

# **COPYRIGHT IN THE EU DIGITAL SINGLE MARKET**

**REPORT OF THE CEPS DIGITAL FORUM**

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The CEPS Digital Forum is a multi-stakeholder platform aimed at raising the level of debate about the policy challenges that arise from the European Commission's Digital Agenda for Europe. It brings together academics, telecommunications operators, broadcasters, equipment manufacturers, content providers, application producers, internet players, national regulators and European institutions to enable a constructive dialogue on how to achieve a successful transition to an information society for all stakeholders.

**CENTRE FOR EUROPEAN POLICY STUDIES  
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The Task Force on Copyright in the EU Digital Single Market was organised by the CEPS Digital Forum and met three times between November 2012 and January 2013. Participants included representatives of authors, collecting societies, film and sound record producers, book and newspaper publishers, broadcasters, European telecoms operators, manufacturers of consumer electronics, Internet companies, consultancies, law firms, distinguished scholars, the European Commission and the European Parliament. Invited contributors from academia, the EU institutions, consumer organisations, civil society, and businesses each presented on selected issues during the meetings of the Task Force.

This Final Report of the CEPS Digital Forum brings together insights from the presentations and discussions at the CEPS Task Force meetings and the rapporteur's own research and analysis. The Report does not represent the views and/or positions of all the Task Force participants or the institutions they represent. It contains conclusions and policy recommendations drawn by the rapporteur after the discussions during the Task Force meetings, and reflects the rapporteur's views only. The participants of the Task Force are listed in Annex II.

The Final Report benefited from the contributions of the invited guests and speakers who are also listed in Annex II. The Task Force was entirely funded by CEPS and via the contributions of the participants to cover organisation and production costs.

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## PREFACE

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The scope and the enforcement of copyright in the digital environment have been among the most complex and controversial issues for lawmakers all over the world for the last decade. Due to the ubiquitous use of digital technology, modern regulation of copyright inherently touches upon various areas of law and social and economic policy, including communications privacy as well as Internet governance.

As recently shown by the European Parliament's rejection of the Anti-Counterfeiting Trade Agreement (ACTA), the issue of online copyright enforcement is politically so sensitive that it can easily lead to strong clashes between the EU institutions, potentially frustrating years of policy-making and international negotiations. At the same time, legislative improvements in the area of online enforcement risk becoming useless if the conditions of licensing of copyright are not smooth and transparent for both rights-holders and users of creative content in an increasingly borderless digital environment. This objective has proven to be hard to achieve in the EU, where copyright law is still regulated as a territorial right at national levels, and ownership regimes and licensing practices vary considerably from one country to another in spite of the various directives that have harmonised national laws in the last 20 years. A more efficient and transparent framework for the licensing of digital uses of copyrighted content would certainly place creators, content producers and commercial exploiters in a much better position to develop new business models.

The purpose of the CEPS Task Force on Copyright in the EU Digital Single Market was to develop a dialogue among stakeholders, EU institutions, consumer advocates, civic society organisations and academics on the future of copyright in the EU Digital Single Market and in a fully globalised economy. In the aftermath of the ACTA rejection, CEPS's Digital Forum conceived and developed a multi-stakeholder dialogue on today's major challenges for copyright law in the online content sector. In particular, the Task Force participants and guest speakers were invited to examine and openly discuss three main topics:

1. Licensing rules and practices in the online music and film sectors (chapter 2),
2. The definition and implementation of copyright exceptions in the digital environment (chapter 3) and
3. The present and future of online copyright enforcement in the EU (chapter 4).

The composition of the Task Force reflects the attempt by CEPS to form a balanced and authoritative group of participants, which was joined by distinguished scholars with different backgrounds and opinions. Taking advantage of the various threads developed in the Task Force debate, the report goes beyond a mere recapitulation of opposing arguments and positions, drawing conclusions and making policy recommendations that ultimately reflect the personal views of the rapporteur.

Giuseppe Mazziotti  
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# EXECUTIVE SUMMARY\*

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## Highlights

The CEPS Task Force on ‘Copyright in the EU Digital Single Market’ dealt with the most relevant issues that EU decision-makers have recently taken into consideration in order to boost the creation and development of EU-wide or multi-territorial markets for copyright works: i) the collective and individual licensing of national copyright titles, ii) the definition and implementation of copyright exceptions in the digital environment and iii) the types of online enforcement measures that member states have to make available to rights-holders as a result of the transposition of EU copyright directives.

Despite inevitable clashes between opposing groups of stakeholders trying to protect competing interests and significant disagreements among the scholars and guest speakers involved in the discussion, the Task Force identified topical issues in each of the examined fields and developed discussion threads that the rapporteur has followed closely in drawing his own conclusions and making his policy recommendations.

As far as **licensing** is concerned, in the absence of unified (i.e. EU-wide) copyright entitlements, multi-territorial licenses are the only instrument enabling cross-border exploitation. The Task Force took the online music and film sectors as examples, since these sectors clearly show, although in different ways, that the territorial nature of copyright is not the

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only element that triggers a strongly predominant national dimension of markets for digital content in Europe. Cultural diversity and linguistic specificities as well as factors such as still unequal penetration of Internet broadband services and varying per capita income from one member state to another strongly encourage 'country-by-country' exploitation and still make such exploitation more profitable for rights-holders, in spite of the borderless nature of the digital environment.

In the film sector, for instance, where the centralisation of all rights in the hands of film producers would place them in a position to easily issue individual multi-territorial licenses, it is mostly because of the aforementioned non-copyright factors that cross-border exploitation is still underdeveloped and country-by-country exploitation deemed to be more profitable. This report shows that simplification of licensing in the film sector is possible even though, in order to preserve *contractual freedom* of both content owners and commercial exploiters, EU legislative measures cannot deprive copyright holders of the opportunity to target a specific public and to make licensing fees for online exploitation proportionate to the particular audience reached by content transmissions.

Conversely, in the music sector, fragmentation and territoriality of management stem mostly from the existence of a plurality of rights-holders (i.e. authors and publishers, record producers and music performers), distinct assignments of online rights (which include both mechanical and public performance rights) and from a strictly national collective management of the global music repertoires by collecting societies on the grounds of so-called 'mutual representation' agreements. As the Task Force acknowledged, at least until the adoption of non-legislative measures by the European Commission since 2005, the activities of collecting societies did not contemplate multi-territorial licensing and gave rise to a well-established territorial partition of the music rights management businesses.

In this regard, the Task Force unanimously agreed that the creation of a common playing field for collective societies at EU level is needed and that the licensing of copyright should be modernised and become more efficient, accurate and transparent for both copyright holders and users. For all these reasons, the Task Force welcomed the European Commission's Proposal on Collective Rights Management of July 2012 (which is currently under examination by the European Parliament and Council) and expressed a largely positive opinion on the purpose of aggregating music repertoires through the creation of one-stop shops for multiple repertoires

and on the goal to reduce the number of licenses that online music providers have to negotiate and conclude.

Not surprisingly, the legal treatment of **copyright exceptions** at EU level was the most controversial subject in the whole work of the Task Force. All copyright holder representatives firmly reject the idea of any kind of legislative reform at EU level that could lead to a more open, technologically neutral and effectively harmonised legal framework for copyright exceptions. In particular, creative industries firmly oppose the idea of a 'flexibility clause' under EU law that would place courts in a position to estimate fairness of a given use when such use is not contemplated in the existing closed list of copyright exceptions. Book and newspaper publishers, in particular, claimed that more room for copyright exceptions would inevitably stifle innovation and would endanger the sustainability of new business models and online deliveries relying on the widespread use of digital rights management (DRM) systems and so-called 'rights expression languages' (i.e. technologies that are able to map usage rights and express them in machine-readable formats). Following the various threads developed in the Task Force debates, the report mentions advantages and disadvantages of both the actual system of exceptions and a more flexible legal framework. In the section on policy conclusions, despite the strong disagreement of copyright holders, this report recommends a careful reflection about how the existing categories of exceptions have been implemented by courts so far and, on the grounds of such reflection, consideration for the adoption of a technologically more flexible and legally more harmonised framework.

Equally controversial was the discussion on the **private copying exception** under EU law and on the implementation of copyright levies in those EU member states where this (optional) exception exists. Representatives of copyright holders claimed that unauthorised copying has eventually proliferated in the digital environment and that levies should continue to compensate the added value that creative content brings to the use of copying devices and media by consumers. In particular, individual rights-holders (i.e. authors and performers) stressed the quantitative relevance of the financial revenue coming from levies and the fact that this remuneration right cannot be validly relinquished under national law and constitutes a source of guaranteed income for individual rights-holders with little bargaining power. Manufacturers of consumer electronics and consumers, obviously, expressed the opposite view arguing that, at a time when licensing and automated rights management opportunities for rights-holders have increased significantly, levies are no

longer justified and should be eventually phased out. In spite of strong disagreement about these radical and opposite scenarios, most of the Task Force participants agreed on the necessity to improve the functionality and transparency of national levy systems and to reduce their effects of heavy market distortion through EU harmonisation measures. The report briefly reviews such measures and endorses most of the recommendations made in the context of a mediation process that the European Commission recently brought to an end. In addition, in its policy conclusions, the report suggests that future decisions should be ultimately based on the grounds of the welfare effects of copyright levies estimated through independent studies that draw on solid economics-based evidence.

Finally, the Task Force dealt with the complex issue of **online copyright enforcement measures** in the EU after the rejection of the Anti-Counterfeiting Trade Agreement (ACTA) in 2012 and in light of a completely new political and media-related dimension of the debate on this subject. The discussion and the analysis of the recent case law of the Court of Justice of the European Union (CJEU) helped point out several areas of tension between copyright enforcement measures and the protection of fundamental rights, such as freedom of expression and communication and Internet user privacy. The Task Force clearly emphasised the weaknesses of excessively broad provisions on enforcement that might easily be found in conflict with human rights law. In this respect the members of the Task Force widely agreed on the suitability of *uniform* enforcement standards like ‘notice-and-takedown’ proceedings and injunctions against online intermediaries. The report considers and draws on recent judgments of the CJEU to conclude that measures such as website blockings or online content removals triggered by rights-holder notifications, in their respective fields of application, should ultimately comply with a principle of proportionality to the gravity of infringements. Last but not least, the report draws on the Task Force discussion to point out the necessity to create a uniform interface at EU level between the protection of user privacy and the implementation of copyright enforcement measures in the context of civil proceedings.

## Policy Conclusions and Recommendations

**H**ow can the EU make copyright fit for purpose in the Internet age? What are the most suitable and realistic policy options in order to achieve the objective of a Digital Single Market in the creative content sectors? This report tries to give a comprehensive response to these questions, dealing with three main areas of copyright law that are crucial for the development of digital markets: licensing, exceptions and online enforcement. The three are inevitably intertwined and their inter-relationships raise problems that cannot be tackled effectively without an overall examination of the whole copyright framework.

### 1. Licensing

This report shows that the territorial nature of copyright is not the only element that triggers a strongly predominant national dimension of markets for digital content in Europe. The picture that policy-makers have to consider while pursuing that visionary goal is definitely a wider and very complex puzzle. Several factors prevent Europe from establishing the Digital Single Market for creative content that the European Commission envisions. Individual creators, content licensors and commercial exploiters are strongly encouraged to take a 'country-by-country' approach in their respective businesses because of Europe's cultural diversity, linguistic specificities and digital divides. These conditions are caused by an unequal penetration of Internet broadband services and varying *per capita* income from one member state to another. The task of EU policy-makers is thus far from easy. However, a re-consideration of several aspects of copyright licensing, as recommended below, might facilitate market integration in the online environment.

#### *Recommendations*

- When thinking of how best to foster the development of a Digital Single Market for creative works, EU harmonisation measures should be viewed as a *second-best* means. Unification through an EU regulation granting uniform copyright titles throughout the EU would certainly be a more adequate choice to reach that ambitious objective. A regulation based on Article 118 TFEU is the only legislative tool capable of overcoming the obstacle of territoriality and of giving rights-holders and commercial users the opportunity to take

advantage of the single market as a whole. However, considering the cultural and linguistic barriers that characterise the EU, unlike the homogeneity of the US market, this policy option should not hinder local or small-scale exploitation or make them legally questionable or economically not viable. A unified copyright system could be based on unitary titles that would automatically replace national titles or on optional EU-wide titles that might co-exist with distinct national titles (which would continue to enable purely local exploitation). Obviously, this would be a long-term solution that should be studied and pondered carefully since it would entail a radical or significant change of the existing national copyright sub-systems.

- Fostering the growth of cross-border online exploitation of creative content is much easier and legally plausible in sectors in which rights ownership is centralised and one single entity can freely decide the territorial reach of licenses for online uses (e.g. films, software, videogames). In the online music sector, fragmentation of rights ownership, i.e. the split of rights between authors and publishers, together with the territorial character of copyright and the existence of multiple layers of rights to clear for the use of recordings, i.e. authors', performers' and record producers' rights, has largely hindered solutions based on multi-territorial licensing. To remove disparities at local level and enable the development of uniform ownership regimes for the same type of content, EU law should harmonise distinct copyright contract laws at national levels. Narrower legislative measures touching just on management-related rules, i.e. without making any changes in the structure of rights ownership, are clearly insufficient to achieve the purpose of an effectively EU-wide or multi-territorial exercise of rights.
- As stated in the report, stakeholders and EU decision-makers unanimously emphasised the essential role that interoperable identification systems and repertoire databases will play for copyright works. Initiatives such as the Global Repertoire Database (GRD), the Linked Content Coalition (LCC) and Accessible Registries of Rights Information and Orphan Works (ARROW) will greatly simplify, modernise and improve the conditions of licensing in the digital market. Innovation of this kind is likely to benefit all players and promote the creation of a level playing field for all content licensors and licensees. The use of rights management information technologies is also the most realistic approach to ensure long-term sustainability and availability of professional content. For markets in

intangibles like digital works to function properly, full disclosure of all necessary information about copyright and the identity of rights-holders and licensors is indispensable. To this end, the European Commission, which is currently monitoring the development of the above-mentioned initiatives, would have to ensure that rights data and metadata are effectively made available by their respective holders to commercial and non-commercial users and, more generally, to the public. Such data and metadata should ideally be released under licences that guarantee open access and facilitate full interoperability through the adoption of non-proprietary and standardised formats.

- The category of rights covering online exploitation, i.e. 'online rights', should be clearly defined at EU level with a subsequent relinquishment of the application of old-fashioned categories, i.e. mechanical and public performance rights, in digital settings. The simultaneous application of these rights for both download and streaming exploitation in sectors like the online music market increases transaction costs dramatically since mechanical and public performance titles can easily belong to distinct rights-holders. EU law already provides for a right of making content available to the public, which the Information Society Directive specifically conceived in order to cover web-based interactive exploitation. However, this right was not conceived or implemented as an independent right of online transmission, i.e. a right that would have absorbed, legally speaking, the acts of reproduction that are technically necessary to enable online communications. A clear and independent definition of the scope of online rights would simplify licensing and would guarantee that each license granted by a copyright holder enables a concrete and autonomous type of use.
- The proposal for a Directive on Collective Management of the European Commission, as it stands, would certainly have a positive impact on the functioning and modernisation of collecting societies. From a purely service-related perspective, the likely adoption of this Directive will considerably improve the overall business of such entities and will force them to gain the technical ability to respond promptly to requests of customised licenses coming from providers of new digital content offerings. However, *there are several aspects of the proposal that the European Parliament and the Council, currently engaged in examining the text and defining their first reading positions, might consider amending.* The following remarks and

recommendations concern both the section of the proposal embodying governance, membership and transparency rules and the section on multi-territorial licensing in the online music sector.

- ✓ *Definition of 'collecting society'*. The proposal provides a definition of 'collecting society' that presupposes the assignment or licensing of rights by a *plurality* of rights-holders and a form of ownership or control by its members. This means that the rules of the proposal on membership, organisation, relations with users, duties of transparency and reporting will *not* apply to *mono-repertoire* licensing vehicles that large music publishers recently set up in cooperation with the biggest collecting societies in Europe. In its impact assessment of the proposal, the Commission considered such corporate sub-entities as licensing agents of single rights-holders and not as collecting societies. If such licensing bodies were not subject to the governance, organisation and transparency obligations laid down in the future Directive, collecting societies might have an incentive to entrust rights (and repertoires) to these corporate sub-structures in order to circumvent the application of the obligations for any of their licensing activities. This is clearly a risk that should be avoided. To this end, then, the definition of 'collecting society' could be amended in order to extend the application of the proposal obligations to mono-repertoire licensing bodies.
- ✓ *Representation power on the grounds of the economic values of rights*. The proposal aims at obliging collecting societies to take the economic value of the rights they administer into account as an objective criterion for the exercise of voting rights in their general meetings. This rule is a direct challenge to the preservation of the principle of solidarity among rights-holders, i.e. a key principle for most European collecting societies, and strongly affects the representation power of authors, especially the owners of small or niche repertoires. Moreover, the fact that, under the proposal, resolutions on the allocation of revenues coming from statutory remuneration rights (like revenue from private copying levies) will also be taken on grounds that the commercial value of rights might easily frustrate the ultimate purpose of statutory remuneration, i.e. subsidising individual creators (rather than subsequent rights-holders like music publishers). The future Directive should

preferably leave national collecting societies with the freedom to choose whether and how the economic value of rights should be taken into account to determine voting rights, especially for those resolutions that concern statutory rights revenue.

- ✓ *Exclusivity of the assignment of rights.* The expansion of the rights-holder freedom to withdraw any categories of rights – including offline rights – challenges the principle of exclusivity of mandates. The proposal allows copyright holders to split the management of their rights and to assign different categories of rights to distinct societies or licensing bodies. This solution facilitates fragmentation of rights management and makes the activities of collecting societies more difficult and burdensome, endangering the efficiencies stemming from their position in their countries of establishment. To enable the development of one-stop shops for online uses of multiple repertoires, the possibility of withdrawal should be confined to online rights.
- ✓ *European Licensing Passport.* The Passport requirements, which collecting societies wishing to grant multi-territorial licenses should meet, are of a purely technical nature, e.g. capability of efficient and transparent data processing, usage monitoring, e-invoicing, etc. EU law-makers might consider adding certain *law-related requirements* that would help achieve public policy objectives. To ensure legal certainty, for instance, the Passport could require societies to offer *complete* packages of rights for online uses (e.g. this requirement would not be met by licensing bodies offering just mechanical rights). To ensure consistency of the digital copyright system, the Passport could also require collecting societies to compile and make updated data available to interested parties with regard to all works in their repertoires that progressively fall in the public domain and become freely accessible and usable, especially in the context of online repositories such as Europeana. An additional requirement for collecting societies wishing to obtain the Passport might be the release of data and metadata concerning their own repertoires under open access licences and through non-proprietary formats that would facilitate the further development of rights management information and tools such as the Global Repertoire Database (GRD).

- ✓ *Authority granting the Passport.* How should compliance with the Passport requirements be verified? What type of authority or institution should perform these supervisory tasks? The proposal is too vague about such a crucial aspect of the new system of multi-territorial licensing for online music rights. It refers to ‘competent authorities’ of member states without clarifying whether or not member states should be obliged to establish a system of supervisory authorities and of authorisations enabling collecting societies to operate, as has already happened in certain member states like Germany. It would be wise to amend the proposal on this aspect and to centralise this function: the scrutiny of a European institution would ensure a uniform enforcement of the Passport requirements.
- ✓ *Clarification on collecting societies’ freedom to provide services on a cross-border basis.* The proposal does not create an interface with the 2006 Services Directive in order to clarify whether collecting societies should be free to provide their services on a cross-border basis. In particular, it is unclear whether or not the authorisations granted by supervisory institutions for collecting societies to operate in certain member states would have extra-territorial effects. For the whole system of multi-territorial licensing to work, without creating a regulatory vacuum for the cross-border activities of a non-negligible number of societies, EU law-makers might consider amending the proposal to provide explicitly that the 2006 Services Directive applies to collecting societies. Obviously, centralising the process of Passport granting at EU level, as recommended above, would also solve the problem of how to make national authorisation systems compatible with the cross-border reach of online music licenses.
- ✓ *‘Tag-on’ regime and the creation of one-stop shops for multiple repertoires.* The ‘tag-on’ regime will make it possible for less developed collecting societies (not holding a Passport) to ask an authorised society to include their repertoires in the multi-territorial licenses that the requested society will offer and grant for its own repertoire. This important corrective measure aims at facilitating the aggregation of musical repertoires. The proposal makes it clear that all aggregated repertoires will have to be managed on a *non-discriminatory* basis and on the grounds

of *non-exclusive* representation agreements for multi-territorial licensing of online rights. This means that the requested Passport society under the tag-on regime will have to behave as a manager of a 'neutral' rights hub through which commercial users of digital music will be able to gain access to all gathered repertoires under the same contractual conditions. This system clearly paves the way for the creation of a reasonably small number of one-stop shops for multiple repertoires, which, in terms of structure, look like the regional hubs that collecting societies have already established in southern Europe and in the Nordic countries for the online licensing of their own repertoires. It is unclear, however, what the future of mono-repertoire online licensing will be and whether the co-existence of traditional collecting societies and of the licensing agents of large music publishers might trigger competition between repertoires in this business. This is certainly an issue that the European Commission should monitor carefully, following market developments after the (possible) adoption and entry into force of the Directive.

- The report focuses on the main factors that end up restricting or slowing down the availability of legitimate online film offerings on both national and multi-territorial basis. Certain factors relate to copyright, whereas other obstacles derive from cultural and linguistic diversity and by commercial decisions.

As far as **copyright** is concerned:

- ✓ *Creation of a 'digital single area' for online film exploitation.* Film producers, in the same way as holders of exclusive rights in sport events, would already be in a position to treat the EU as a Digital Single Market, being free to determine the territorial reach of their online licenses. The fact that content owners make these types of audio-visual content available on a strict 'country-by-country' basis is due to legitimate business decisions and (especially in the case of sports events) to a lack of consumer demand. Film producers have traditionally aimed at maximising the profitability of their content exploitation, targeting at different audiences, tastes and specificities through optimisation of content offerings, e.g. through different language versions. The borderless online environment certainly paves the way for more integrated (or, ideally, pan-European)

content offerings of audio-visual content, although cultural and linguistic diversities persist and matter in spite of technological developments.

In the absence of a unified legal framework for copyright, to facilitate multi-territorial licensing EU policy-makers might consider proposing *the extension of the principle of 'country of origin' to the realm of online film deliveries*, in a sector-specific way. This principle is embodied in existing EU Directives dealing with digital TV services and satellite transmissions, and in the online environment would need to be shaped as a 'country of emission' (or 'country of upload') principle. The purpose of this policy option is that of making transmissions of copyright works subject to just one single law (instead of making them subject to the laws of all countries where content is received and enjoyed, as a consequence of territoriality of copyright). However, law-makers should take the economics of such a policy change into careful consideration, leaving content owners and commercial users with the *contractual freedom* to calculate license fees on the grounds of the audiences reached by the online services and to determine their territorial reach, e.g. through geo-localisation tools.

- ✓ *Separate licensing of rights in the film soundtrack.* The only legal aspect that currently raises territorial barriers to multi-territorial licensing of online films is the separate licensing of public performances of film soundtracks by local collecting societies. Several copyright laws in EU member states treat music performances of soundtracks delivered to user computers through download or streaming film offerings in the same way as performances taking place in cinema theatres. So far this rule has obliged providers of online film services (including start-ups with limited resources at their disposal) to obtain a license from collecting societies on a 'country-by-country' basis. Unfortunately the Proposal on collective management does *not* touch upon this specific aspect. EU policy- and law-makers might consider solving this problem in order to simplify and modernise the licensing of online film exploitation. This result could be achieved through a harmonisation measure aimed at either confining the scope of this right to offline exploitation or tying its exercise to that of the related film (or remunerating soundtrack composers through statutory license schemes).

Obviously, intervening in this field without having harmonised authorship rules with regard to films might raise disparities with regard to the position and legal protection of soundtrack composers in the various member states.

As far as *other types of obstacles* are concerned:

- *Demand for EU-wide licenses.* The real problem for the Digital Single Market in the field of audio-visual content, and film content in particular, is that there seems to be no demand for EU-wide licenses. In spite of their current availability, e.g. in the field of football event rights, no commercial exploiter is willing to pay for pan-European licenses, not only in the broadcasting businesses but also in the online environment. There are barriers for the creation of single markets that are both cultural (or linguistic) and commercial. In particular, due to the very heterogeneous nature of EU national markets, the economic sustainability and profitability of online content offerings largely depends on knowledge of potential advertisers and customers and marketing initiatives and investments made at local level. EU law- and policy-makers should take economic and cultural realities into account. Still, they should also pay attention to the slow and progressive erosion of full enforcement of licensing agreements that tend to restore divisions between national markets. The case law of the CJEU has shown that the application of EU competition law (the *Premier League* case) and of the exhaustion principle (the *UsedSoft* case) in digital settings might trigger largely unexpected consequences for commercially significant content sectors, i.e. sport events and software, which might also extend to videogames.
- *Contractual arrangements concerning the film majors' productions.* Cinematographic production is a complex process that entails an articulated fund-raising activity in both the studio system developed by the Hollywood film majors and in the European film sector. Funds and resources, however, are of a different nature. To fund their productions, US-based film majors fully rely on market forces, and assign copyright to a distributor or

license it by territory, by linguistic version and, more rarely, on a multi-territorial basis. The purpose of these pre-production arrangements, which also include the creation of 'windowed' releases (e.g. exploitation through DVDs, pay TVs, free-to-air TV after release in cinemas), is that of placing a film in the best competitive position in order to cover the costs and gain profits. Obstacles to a wider online availability of majors' film productions stem from release windows and, in some cases, from the exclusive assignment of rights by territory, which include both broadcasting and online exploitation rights, to companies that do not exploit (or underuse) them on the Internet.

As acknowledged in the Task Force debate and in this report, windows are currently shrinking in order to meet consumer expectations and different release systems (e.g., premium on-demand services) might emerge soon as a result of the progressive involvement of prominent online film service providers (e.g. Netflix) in the context of pre-production arrangements. Fast-changing market conditions in countries where online rights have been included in broad packages of territorially exclusive broadcasting rights might easily persuade film majors to stop this practice and to start licensing their content more broadly and to the best (or most promising) online exploiters. In any event, to ensure a wider availability of the mainstream film content on the Internet, and to reduce the appeal of online piracy, the European Commission should keep an eye on excessively broad licensing practices that, in certain member states, end up restricting the development of new online markets. If necessary, the Commission could use its competition-related powers.

- *Contractual restrictions in the European film sector.* European film productions benefit widely from subsidies granted at national level by governments and other public bodies. Limitations or barriers to online exploitation stem normally from old-fashioned administrative regulations that apply to funding agreements or co-production agreements with public sector institutions, e.g. publicly

owned broadcasters, which normally acquire rights that they are either unwilling or commercially unable to use for online exploitation. EU policy-makers could usefully intervene in this area by proposing amendments to the current framework on state aid to the cinema sector aimed at making subsidies conditional on the effective online release of subsidised movies shortly after their release in cinemas and TV.

## **2. Copyright exceptions and private copying levies**

The advent and the very fast development of the digital environment seem to have considerably strengthened the need for democratic and open societies to balance copyright protection with the preservation of freedom of expression and communication, broadly speaking. The Task Force debate focused mostly on whether courts would need to have a nuanced, modern and more flexible regime of exceptions or limitations at their disposal to be able to assess fairness and legitimacy of new (and unpredictable) unauthorised uses of protected materials. The actual EU system of copyright exceptions is extremely narrow and looks at exceptions from a pure Internal Market perspective, failing (paradoxically) to harmonise sufficiently the various categories of unauthorised uses permitted by law. The system stemming from the Information Society Directive (a piece of legislation prepared and discussed in the late 1990s) seems unsustainable in the long run, especially if one considers that it has become very hard (or almost impossible) for the courts, due to an outdated set of provisions, to understand and regulate technology-enabled uses that escape the traditional contours of copyright.

Drawing on the Task Force debate, this report pointed out that there are entire classes of economically relevant digital uses (including any sort of automated processing of protected works for purposes of data mining, computational analysis on texts and automated extraction of data) whose legal treatment is very unclear under the existing legal framework. Uses like the ones occurring in the context of mass digitisation projects (from search and indexing to data mining and text analysis) are undertaken by machines to the benefit of machines and for reasons that are not (directly) associated with enjoyment and consumption of works by humans. These are all activities that are beneficial to both commercial and non-commercial users who treat copyright materials not as ‘works’ but as ‘data’, in order to

extract, collect and re-use a vast array of useful information for different purposes.

The Task Force evaluated advantages and disadvantages of the possible introduction of a more flexible and up-to-date legislative framework concerning copyright exceptions. Moreover, discussants and participants focused on the boundaries and the implications for the Digital Single Market of the private copying exception and of different levy systems at national level that cause heavy distortions on the markets for levied devices and media.

### *Recommendations*

- The current system of EU copyright exceptions and limitations is technologically outdated and, to a large extent, does not harmonise national laws with regard to important (and constitutionally relevant) categories of traditionally permitted uses that are increasingly undertaken on a cross-border basis. National courts, when examining unauthorised uses that are not included in today's closed list of exceptions, would certainly take advantage of the introduction of a 'flexibility clause' that could be modelled on the requirements of the three-step test. In the same way as in the US fair-use doctrine, however, courts should be free to estimate fairness using the requirements as non-cumulative criteria. The co-existence of classes of specific exceptions with a new 'flexibility clause' would give rise to a mixed system where courts could permit uses that are similar (but not identical) to the ones expressly enumerated by the law.
- Before considering a possible legislative reform aimed at enabling a higher degree of flexibility in this area of copyright, a comparison between the outcome of fair-use cases in the US and the settlement of identical or similar cases by European courts would be very useful. In this regard, EU decision-makers might commission an independent study or do a review of the relevant case law and the literature in order to clarify whether or not the existing provisions of the 2001 Information Society Directive place courts in a position to ensure a progressive understanding and adaptation of exceptions and limitations to technological changes. If the comparison eventually showed that the existing provisions are flexible enough to allow European courts to achieve results comparable to those reached via the fair-use doctrine in the US, a legislative reform at EU level might

be limited to a re-formulation of the wording of these provisions aimed at ensuring technological neutrality.

- EU policy-makers might also consider proposing the creation of additional exceptions in order to ensure a nuanced and balanced legal treatment at EU level of technology-enabled uses (e.g. text- and data-mining) for which exceptions and licensing schemes could be complementary. In such cases, exceptions might apply to non-profit uses, whereas licensing schemes might be developed for uses that are directly or indirectly commercial. Confining the scope of a certain copyright exception to the realm of non-profit (i.e. neither directly nor indirectly commercial) uses is a criterion that EU law has already embraced under the Information Society Directive (cf. Art. 5) and, more recently, under the Orphan Works Directive (cf. Art. 6). Following the same criterion with regard to future exceptions permitting certain technology-enabled uses seems a suitable policy option.
- If additional exceptions were created in order to allow technological uses where copyright materials are treated not as works but as data (or information) to be processed automatically by computers or machines, the system of copyright exceptions in the amended version of the Information Society Directive would need to be coordinated with that of Directive 96/9/EC on the *legal protection of databases*, in relation to the extraction of data from non-original databases (i.e. mere aggregation of data) currently protected by an exclusive *sui generis* right (cf. Art. 7).
- The proposed reform of EU copyright exceptions would be based on the assumption that certain exceptions (i.e. especially the ones enabling transformative or productive uses of copyright materials or encouraging innovation) should be made mandatory for member states since they aim at preserving values such as freedom of expression and information, online media freedom, teaching and research purposes. In the same way as exceptions laid down in the special legal framework of the EU Software Directive, such exceptions should also be made non-overrideable through contract under national laws.
- As regards private copying, it is (and it will be) very hard and unlikely to make this exception mandatory for all EU member states, especially at a time when some of them have been re-considering the suitability and/or the concrete way of implementing this exception,

e.g. whether fair compensation to copyright holders should be provided through levies or state funds. Nonetheless, in those member states where the exception applies, the codification and the application of the following measures and criteria seem to be necessary or highly desirable:

- A *uniform concept of harm* caused by unauthorised private copying to rights-holders should be adopted at EU level in order to enable an economics-based calculation of levies. The recommended criteria to estimate the harm to be compensated financially could be that of ‘lost profit’ and the economic value that consumers attach to private copies, i.e. the consumer’s willingness to pay for the making of subsequent copies for personal use diminishes progressively and significantly. This approach would allow a more precise definition of the scope of application of levies, avoiding their proliferation and creating a *de minimis* threshold that clearly indicates that certain private copies cannot be remunerated.
- If the harm were calculated through economics-based criteria, and such criteria were made uniform at EU level as recommended above, it should not matter logically whether copyright holders are remunerated through levies or through state funds. Still, if national levy systems were harmonised and improved, as advocated here, it would be unwise to leave member states with the freedom to opt for a system of state subsidies.
- Copies falling within the scope of application of private copying and levy systems cannot be validly licensed by rights-holders and become an alternative to levies before their phasing-out. Otherwise consumers would end up paying twice for the same copies.
- There should be a link between the application of the levy intended to finance fair compensation and the *deemed use* of levied equipment and media for purposes of private copying. As held by the CJEU (Court of Justice of the European Union) in *Padawan v. SGAE*, this means that private copying levies cannot be applied with respect to equipment and media not made available to private users and clearly reserved for uses other than private copying, e.g. professional uses.

- Legitimate private copying can only come from a legal source, i.e. a lawfully acquired copy of the work; otherwise the exception would not pass the three-step test (in particular the second step, which restricts uses in conflict with the normal exploitation of the protected work). Even though the requirement of 'lawfulness of the source' seems to clearly emerge from the existing legal framework, its future codification would clarify that law-makers and national authorities are not entitled to take unlawful private copies (e.g. downloads from peer-to-peer networks) into consideration for determining the amounts of levies.
- As stated in the report, not surprisingly studies commissioned by interest groups or stakeholders reach opposite conclusions with regard to the welfare effects and ultimate desirability of levies for rights-holders, manufacturers of consumer electronics and consumers. Such uncertainty seems to call for a fully independent and economics-based study on the welfare effects of levies and on their real influence on retail prices. The European Commission has the resources and the expertise to undertake this kind of study before taking any decisions on whether and how to intervene in this complicated field.
- Various recommendations made in the context of the mediation process on levies launched by the European Commission in April 2012 and concluded in January 2013 also emerged from Task Force debate. The list below contains the mediator's proposals or ideas whose implementation seems to be desirable:
  - ✓ Levies should be applied (only) in the country of destination of levied products in case of cross-border transactions, as already clarified in the case law of the CJEU. This principle is based on the assumption that the levy is a form of recompense for the harm that the consumer's private copy causes to copyright holders. Charging the levy in the country of residence of the consumer is therefore consistent with the idea of providing fair remuneration where the harm occurs.
  - ✓ Shifting the liability to pay the levy from the manufacturer (or importer) level to the retailer level would solve the problem of products that are levied twice (in both the countries of manufacture/importation and of destination) and of the subsequent reimbursements. Not only would this shift

strengthen and clarify the principle of country of destination, but it would also avoid the risk of charging undue levies in case of cross-border sales of consumer electronics from a member state adopting levies to a levy-free member state.

- ✓ Targeting the retailer's level would presuppose a drastic simplification of the applied tariffs, which should be reduced to a very limited number so as to give retailers the opportunity to reasonably handle this new task, together with that of providing customers with a receipt where the levy is visible for the consumer.
- ✓ As a result of the liability shift, the persons who are liable under the current system (i.e. manufacturers and importers) should inform levy collectors (i.e. collecting societies) about their transactions concerning levied products in order to place collectors in a position to deal with and monitor a much bigger number of newly liable parties (i.e. retailers).
- Certain recommendations of the mediator appointed by the European Commission do not seem to be adequate to achieve the objective of improving the current scenario significantly. In addition, the mediator showed an incomprehensible reluctance to propose effectively pan-European solutions.
  - ✓ The mediator recommended that products (or classes of products) to be levied should continue to be identified at national level. According to the mediator, an individualised approach would seem to be justified by the fact that choosing which products are subject to levies would allow member states to quantify the concept of 'harm' in a way that reflects the different purchasing power of consumers residing in different member states. That policy goal could still be achieved, however, by letting only tariffs be set at national level.
  - ✓ The mediator was also of the opinion that a mechanism of identification of the levied products at EU level would be too burdensome. Such risk could be easily avoided by giving an EU institution or agency the task of making such EU-wide determinations and ensuring a periodic and technology-wise update of the list of levied products.
- In conclusion, consideration should have been given to the fact that, as far as EU law stands, the choice about whether and how a levy system must be implemented in a given EU country depends solely

on the discretion of national law-makers. Member states appeared as uninvited guests in the mediation process. This was surprising if one considers that, before the start of this process, several EU governments had already expressed their intent to radically reform their levy systems or not to introduce levies despite the introduction of a new private copying exception. It has to be seen how the private copying dossier will develop now and whether the Commission will continue to seek an apparently impossible agreement among stakeholders on very critical issues for the Internal Market that would require independent policy decisions based on economic evidence and a sufficiently wide democratic consensus by EU law-makers. At a time when the debate on EU digital copyright policy has become so turbulent, the issue of copyright levies would certainly require more than a mediation attempt and a clear EU-wide solution.

### **3. Online copyright enforcement**

Due to its potentially ubiquitous application, copyright has become much easier to infringe by the average Internet user and its modern regulation inevitably touches upon digital communication policy and Internet governance, from both economic and social perspectives. The political debate about the Anti-Counterfeiting Trade Agreement (ACTA) clearly evidenced that balancing copyright enforcement measures with the protection of fundamental rights and civil liberties and of Internet architecture will be the main challenge for law-makers in the near future. Such a challenge is even bigger in a context, like the EU, that is politically and legally fragmented and where national courts still grant different types of online enforcement measures and evaluate the potential conflict between copyright and human rights according to distinct criteria and priorities.

#### *Recommendations*

- EU law should place national courts in a position to balance the protection of digital copyright and of other fundamental rights in order to ensure proportionality of enforcement. The existing legislation requires EU member states to make several measures available to copyright holders: ‘notice-and-takedown’ proceedings, injunctions against online intermediaries, disclosure of information on the origins and distribution networks of infringing goods and services, etc. However, these measures have proven to be ineffective

in several member states where EU Directives on electronic commerce, copyright and enforcement of intellectual property rights have not been implemented in a coordinated and uniform way. As a result, national courts have also followed and guaranteed diverse online enforcement standards. A review of existing legislation and, possibly, the start of infringement procedures against those states whose laws still do not comply with the EU *acquis* fully, seem necessary for the creation of a common playing field in this area. Ideally, to ensure a higher degree of effectiveness of copyright enforcement, national courts would need to have different types of tools at their disposal. As the recent case law of the CJEU suggests, a combined implementation of *proportionate* enforcement measures would enable judges to balance copyright protection with the protection of freedom of expression and communication and of Internet user privacy.

- The recent case law of the CJEU made it clear that today's EU legislation should be implemented so as to ensure that online copyright enforcement measures are proportionate to the gravity of infringement. To ensure balance between copyright and the protection of other fundamental rights and goals associated with the specificity of the Internet's architecture, a correct interpretation of the liability exemptions created by the Electronic Commerce Directive for the storage and transmission of infringing content is essential. In particular, the CJEU has recently shown that, as things stand, the only insurmountable barrier for copyright holders wishing to enforce copyright is the principle that restricts member states and national courts from imposing on internet service providers (ISPs) and online hosting providers general obligations to monitor online content transmissions. This means that injunctions requested by copyright holders that, for the purpose of preventing future online infringements, would require the installation of permanent filtering systems or technologies by ISPs and, for instance, social network operators, would *not* be legitimate. This means also that other types of injunctions that do not conflict with the aforementioned principle can be targeted at online intermediaries – irrespectively of their liability – in so far as injunctions constitute the only (or most effective) measure to bring high-volume copyright infringement (e.g. through 'structurally infringing' sites) to an end. Considering their potential side effects on the communication of lawful or free information, injunctions such as website blocking orders should be

viewed as ultimate measures to be used cautiously whenever standard ‘notice-and-takedown’ proceedings are ineffective or inadequate.

- As acknowledged also by the European Commission, it has become evident that Directive 2004/48 on the enforcement of intellectual property rights (IPRED) was not designed to cope with the challenges posed by the Internet to copyright enforcement. IPRED has had a limited application in trials concerning online infringements and it seems advisable to adapt its enforcement measures to the online environment. However, after the rejection of ACTA, the political challenges that a re-opening of this Directive would raise are a serious obstacle, at least in the near future. From a legal point of view, two amendments in particular would be useful in order to make copyright enforcement proceedings more effective and to target the money supply of infringers on a commercial scale:
  - a. In order to confer effectiveness on one of the most important provisions of IPRED (namely the right to information on the origins and distribution networks of infringing goods or services in response to a justified and proportionate request, see Article 8) EU law should create a uniform interface between copyright enforcement proceedings and the protection of user privacy in electronic communications. This interface should ensure that copyright and user privacy are fairly balanced *also* in the context of civil proceedings. The *Promusicae v. Telefonica* judgment of the CJEU was (and still is) a strong encouragement to EU law-makers to legislate in this field. The aforementioned right to information will remain an empty promise in all jurisdictions where the law does not allow courts to restrict user privacy rights when the processing of personal data is necessary for the judicial protection of digital copyright.
  - b. What is also missing in the IPRED framework is a provision giving copyright holders the possibility of blocking payments addressed to individuals and/or entities carrying out online infringing activities on a commercial scale. The underlying idea is that, by preventing high-volume infringers like owners of structurally infringing sites from collecting payments through cooperation of intermediaries such as payment system operators, incentives to infringe copyright would be greatly reduced. Such a new remedy could be incorporated in a newer

version of IPRED. The remedy could either follow the model of the ‘notice-and-takedown’ mechanism adopted for ISP liability under the Electronic Commerce Directive or that of injunctions targeted at online intermediaries under the Information Society Directive (see. Art. 8(3)). Under a notice-and-takedown scheme, rights-holders might be required to send a notice to a payment system operator, who would inform their clients and would evaluate rights-holder notices. Funds deriving from illegal activities could be put in escrow accounts, whereas the accounts of infringing clients might be closed if such measure was found appropriate and/or justified. Obviously, a right to a fair trial should be granted to the parties that this additional enforcement mechanism might affect dramatically. From this angle, the alternative of enabling blocking measures concerning payment systems through injunctions might be preferable, since it would immediately entail a judicial review of rights-holders’ claims and would provide a stronger right of defence.

- In its recent case law, the CJEU held that online enforcement measures should not be unnecessarily complicated and costly for ISPs and hosting service providers (like a social network deviser) to implement. However, EU policy-makers, while monitoring online market developments, should consider that an excessively broad protection of freedom to conduct online business would severely impair the implementation of copyright enforcement measures. (For instance, online content removals undertaken as a result of ‘notice-and-takedown’ proceedings where the volume of notices is high might seem excessive for some ISPs and might therefore be more easily contested.)
- For injunctions against online intermediaries and ‘notice-and-takedown’ procedures to be fair, these remedies should always be accompanied by the possibility – for the ISP, the hosting service provider or whoever has posted allegedly illegal content that has been removed – of reacting and defending themselves in order to prove that the removed content is lawful. From a more general perspective, there undoubtedly exists a problem of a lack of clarity under EU law about how a fair trial should be guaranteed by member states in the context of ‘notice-and-takedown’ proceedings. This problem arises from the Electronic Commerce Directive (see Article 14), which does not specify how (i.e. by means of what type of notice) hosting service providers should be made aware (and acquire

knowledge) of the storage of illegal content on their servers in order to expeditiously remove or disable access to that content. The European Commission might consider taking steps to uniformly require member states to clarify that infringement notices can be sent by means of simple and informal notices (and not through judicial orders, as required in certain member states). However, a right to a fair trial before a judicial authority should be guaranteed to parties that might be affected by abusive or mistaken notices and content removals in the context of ‘notice-and-takedown’ proceedings.

- Last but not least, before undertaking a reform of the current legislative framework in order to improve copyright enforcement and facilitate the development and growth of EU-wide digital single markets, law- and policy-makers would need to consider an issue that is more political and sociological than legal. This issue consists of how to explain and justify to an increasingly vocal part of public opinion the various forms of content control and restrictions that copyright entails in order to motivate and reward professional content creation and foster new online business models. Online copyright enforcement should certainly be improved and made uniform at EU level and copyright-related restrictions should comply with a principle of proportionality aimed at preserving Internet freedom. However, from now onwards, law- and policy-makers should consider that infringing content is always ‘one click away’ for Internet users, and enforcement measures cannot (and should not) become ubiquitous. This means that the future of digital copyright law will have to rely not only on much more developed and accessible lawful online content offerings but also on a wider consensus of society that, in the long run, might require a more general re-consideration of this body of law.

# 1. A 'DIGITAL AGENDA FOR EUROPE' AND TODAY'S TRACKS OF ACTION ON COPYRIGHT

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The creation of the EU Digital Single Market is a policy objective rooted in the 'Digital Agenda for Europe', an initiative that the European Commission launched and defined in May 2010.<sup>1</sup> The Digital Agenda aims at delivering sustainable economic and social benefits from a digital single market based on fast and ultra-fast internet and interoperable applications, thus implementing one of the seven flagship initiatives included in the EUROPE 2020 Strategy (COM/2010/2020). The Agenda comprises seven pillars and 101 actions. In particular, Pillar I of the Agenda contains 21 actions with the goal of creating a digital single market by removing all barriers that might hamper the free flow of online services and entertainment across member state borders, thus fostering a European market for online content, establishing a single area for online payments and protecting EU consumers in cyberspace.

On 18 December 2012, the European Commission published a 'to-do' list, disclosing new digital priorities for 2013-14. Priority number 5 aims at updating the EU's copyright framework, which is considered a key issue to achieve the goal of a Digital Single Market.<sup>2</sup> The Commission is currently working on this action plan by developing two parallel tracks of action. The first track concerns the efforts undertaken to review and modernise EU

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<sup>1</sup> See the "Digital Agenda for Europe" website (<http://ec.europa.eu/digital-agenda/digital-agenda-europe>). See also Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "A Digital Agenda for Europe", COM(2010) 245 final, 19 May 2010 (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52010DC0245:EN:NOT>).

<sup>2</sup> See Communication from the Commission on *Content in the Digital Single Market*, COM(2012)789 final, 18 December 2012 [hereinafter *Content in the Digital Single Market*] ([http://ec.europa.eu/internal\\_market/copyright/docs/copyright-info/121218\\_communication-online-content\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/copyright-info/121218_communication-online-content_en.pdf)).

copyright legislation, whose most tangible results to date have been the 2012 Orphan Works Directive<sup>3</sup> and the proposal on collective rights management.<sup>4</sup> The second track is the creation of a multi-stakeholder platform ('Licences for Europe') that should help develop industry-led solutions to a number of issues for which rapid progress seems necessary and possible without legislative changes. Interestingly, Michel Barnier, European Commissioner for the Internal Market, announced the launch of this initiative in the course of delivering the keynote speech at the inaugural event of the CEPS Task Force on Copyright in the EU Digital Single Market on 7 November 2012.<sup>5</sup>

As regards the first track, since 2011 the Commission has been reflecting on how to create a Single Market for intellectual property rights in order to boost creativity and innovation.<sup>6</sup> Unification of legislation through a regulation is certainly the best option for single markets to materialise and to develop fully in the various sectors. Unification seems also an irreversible trend at EU level after the entry into force of the Lisbon Treaty, which facilitates the creation of unitary intellectual property rights.<sup>7</sup> For several reasons, however, the EU has a long way to go before it can establish a unified legal framework in the field of copyright. The fact that copyright is the only field in the domain of intellectual property where a

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<sup>3</sup> See Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, OJ L 299/5, 27 October 2012, [hereinafter *Orphan Works Directive*].

<sup>4</sup> Proposal for a Directive of the European Parliament and of the Council on *Collective Management of Copyright and Related Rights and Multi-territorial Licensing of Rights in Musical Works for Online Uses in the Internal Market*, COM(2012) 372 final, 11 July 2012 [hereinafter *Proposal on Collective Management*] ([http://ec.europa.eu/internal\\_market/copyright/docs/management/com-2012-3722\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/management/com-2012-3722_en.pdf)).

<sup>5</sup> See M. Barnier (2012), "Making European Copyright Fit for Purpose in the Age of Internet", Speech 12/785, Centre for European Policy Studies, Brussels, 7 November ([http://europa.eu/rapid/press-release\\_SPEECH-12-785\\_en.htm?locale=EN](http://europa.eu/rapid/press-release_SPEECH-12-785_en.htm?locale=EN)).

<sup>6</sup> Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, European Commission, "A Single Market for Intellectual Property Rights - Boosting creativity and innovation to provide economic growth, high quality jobs, and first class products and services in Europe", COM(2011) 287 final Brussels, 24 May 2011 [hereinafter *A Single Market for Intellectual Property Rights*] ([http://ec.europa.eu/internal\\_market/copyright/docs/ipr\\_strategy/COM\\_2011\\_287\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/ipr_strategy/COM_2011_287_en.pdf)).

<sup>7</sup> See Article 118 TFEU.

unification process has not yet started (and is unlikely to start in the near future) is not coincidental.

EU policy-makers are still reflecting whether copyright should be modernised through harmonisation (i.e. a comprehensive codification of the present body of EU copyright Directives) or unification measures (i.e. the creation of a unified legal framework granting uniform pan-European entitlements that could either supersede or co-exist with national titles). According to the Commission, a higher degree of harmonisation of national rules might be pursued through the adoption of a 'European Copyright Code'.<sup>8</sup> Such a codification effort would help to consolidate the existing EU copyright entitlements and would finally give EU law-makers the possibility of updating and harmonising the field of copyright exceptions and of adapting the existing enforcement rules to the digital environment with the aim to ensure a fair balance with other fundamental rights.

As far as the second track of action is concerned, 'Licences for Europe' was launched in January 2013 and has developed four work packages, namely cross-border access and portability of services, user-generated content and licenses for small-scale users of protected material, audio-visual work and film heritage institutions and text- and data-mining.<sup>9</sup> The stakeholder dialogue is being developed through closed-door meetings where enterprises from the creative industries, licensing bodies, commercial and non-commercial users of protected content and Internet end-user representatives are exploring and testing innovative licensing solutions enabled by new technologies. The purpose of the whole exercise is to identify short-term, pragmatic solutions, where possible, but also to explore the limits of licensing in the selected areas. Even though the outcome of this initiative is still uncertain, a dialogue among stakeholders and the formulation of concrete proposals might place the European Commission in a better position to assess which goals can be realistically pursued through industry-led solutions and, conversely, which policy objectives will require public policy action.

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<sup>8</sup> See European Commission (2011a), *A Single Market for Intellectual Property Rights*, p. 11.

<sup>9</sup> See the 'Licences for Europe' website ([http://ec.europa.eu/internal\\_market/copyright/licensing-europe/index\\_en.htm](http://ec.europa.eu/internal_market/copyright/licensing-europe/index_en.htm)).

## 2. LICENSING IN THE ONLINE MUSIC AND FILM SECTORS

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### 2.1 Introduction

In spite of the national and territorial dimension of copyright entitlements in the European Union, in recent years the European Commission has been seeking to foster the development, growth and functioning of EU-wide markets for digital content. The Internal Market Directorate General of the Commission is convinced that there is wide room for multi-territorial (and possibly EU-wide) licensing of rights that might reflect the natural cross-border reality of the Internet and of digital settings more in general. However, multi-territorial licenses still appear as an unrealistic option in the vast majority of scenarios. Markets for digital content are still heavily fragmented and highly differentiated for reasons that are not necessarily linked to the territorially limited scope of copyright. Europe is culturally very diverse, with different languages and different tastes and preferences that the creative industries have to take into careful consideration in shaping their offerings. A further complication is the unequal penetration of broadband access services in the various EU member states, although recent figures suggest that it no longer gives rise to a significant digital divide.<sup>10</sup>

The participants in the CEPS Task Force widely acknowledged that the licensing of copyright needs to be fostered and improved in order to facilitate the emergence and diffusion of legitimate content services. If more

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<sup>10</sup> In 2012, an average of 70% of European households had access to a broadband Internet connection. A divide in broadband penetration existed between Western European member states (73%) and those in Central and Eastern Europe (65%) as well as when comparing densely populated areas (at least 500 inhabitants/km<sup>2</sup>) where 75% of households were connected to a broadband, urbanised areas (between 100 and 499 inhabitants/km<sup>2</sup>) where the penetration rate reached 72%, and sparsely populated areas (less than 100 inhabitants/km<sup>2</sup>), where the average rate was 64% (EUROSTAT, *Households with broadband access [isoc\_pibi\_hba]*).

digital content were made available legitimately – this is one of the most frequently heard messages – large-scale copyright infringements would be easily reduced to a more tolerable level. Not surprisingly, stakeholders answered the question of how these policy objectives could be achieved in very different ways. On the one hand, copyright holders strongly advocated the enactment and effective enforcement of measures aimed at restricting unauthorised access to copyrighted content through a more effective cooperation of online intermediaries. On the other hand, the ‘technology and communications’ front formed by internet service providers (ISPs), internet companies, content platforms operators and commercial users of digital creative content stressed the necessity to simplify today’s licensing schemes and to reduce transaction costs as much as possible. From an impartial point of view, it seems evident that these two views are not necessarily mutually exclusive.

### ***2.1.1 Individual and collective rights management***

From a legal point of view, multi-territorial licenses are much easier to obtain where an individual rights-holder or a rights aggregator manages a well-defined repertoire of works. Individual management is predominant in the audio-visual sector and in the markets for software and videogames. In these markets the copyright holder is in a position to autonomously decide how broad, territorially speaking, a certain license should be.

Conversely, obtaining a multi-territorial license is different and more complex, where licenses for primary forms of content exploitation are issued by collective rights management organisations (i.e. collecting societies) and there are multiple rights to clear, as in the music sector. Music rights management is particularly complex since the mechanical and public performance rights granted to authors by law, and simultaneously applicable whenever a digital use of a creative work is made, might turn out to be owned and/or managed by different entities on a strictly territorial basis. In addition, it must always be considered that any legitimate use of music recordings also presupposes the clearance of the so-called ‘neighbouring rights’ of record producers and of music performers, which are normally acquired and managed by producers themselves, either individually or, in certain cases, collectively.

### 2.1.2 *Reform plan concerning collective management in the online music sector*

From 2005 onwards, the European Commission has taken action to facilitate the acquisition of all online music rights by online music distributors on an EU-wide basis.<sup>11</sup> This policy objective has proven to be very hard (or impossible) to achieve since national collecting societies of authors and music publishers in EU countries have traditionally operated on a strictly national basis and are de facto or legal monopolies.<sup>12</sup> They have concluded agreements of mutual representation for the management of their respective music repertoires in their sole country of business. At the same time, collecting societies developed different rules and contractual practices for the transfer and management of the mechanical and public performance rights, thus leading to the creation of parallel ownership regimes for each of these rights and a lack of transparency in the licensing of rights.

The most important distinction in this regard is probably the one concerning the assignment of mechanical rights in the UK and continental European repertoires. There is a philosophical and cultural difference underlying the notion of *copyright* and *author's* rights in both territories. In the UK, music publishers have historically been the sole proprietors of mechanical rights through their own collective rights management organisation, after having acquired them from the authors. In continental Europe, instead, authors and music publishers usually co-own the same rights under the shield of their respective collecting societies, which have

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<sup>11</sup> See European Commission (2005a), "Community Initiative on the Cross-border Collective Management of Copyright", Commission Staff Working Document, 7 July ([http://ec.europa.eu/internal\\_market/copyright/docs/management/study-collectivemgmt\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/management/study-collectivemgmt_en.pdf)).

<sup>12</sup> More precisely, collecting societies are deemed natural monopolies characterised by economies of scale. The efficiencies arising from such monopolies are given by the fact that the fixed costs of creating a society and of administering a musical repertoire are very high (irrespective of the number of works managed) whereas the costs of administering an additional work are reasonably small. This means that the larger societies and repertoires, by acting in a cost-efficient manner, tend to attract all copyright holders over time. See Drexl, Nérisson, Trumpke & Hilty (2004), "Comments on the Proposal for a Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market", Max Planck Institute for Intellectual Property and Competition Law Research Paper No. 13/04, Max Planck Institute, Berlin.

traditionally sought to protect authors from the bargaining power of the publishers and ultimately become authors' unions.

The European Commission sought to break up this well-established system in order to enable a smooth management of online music rights on a pan-European basis.<sup>13</sup> The main idea was that of dismantling national barriers that restricted rights-holders from issuing EU-wide licences for digital uses of their musical compositions and that forced commercial users of such compositions to seek authorisations in every EU country through the local collecting societies. At the same time, according to this reform plan, individual rights-holders should have been allowed to opt for a collective rights manager of their choice, irrespective of the country of domicile of the rights-holders or of the copyright manager.

To pursue these ends, in 2005 the Commission opted firstly for a non-binding Recommendation, which was addressed to EU member states and collecting societies. This recommendation urged them to re-consider the existing structure of online rights management.<sup>14</sup> At a later stage, the Commission decided to directly tackle the mutual representation agreements that European collecting societies concluded with each other under the aegis of the International Confederation of Societies of Authors and Composers (CISAC). This happened through an antitrust decision (known as the CISAC decision) of 2008 that found the clauses of territorial exclusivity and the membership requirement of economic residence embodied in these agreements illegal since they were deemed to constitute cartels restricting competition in the EU market for services of copyright management.<sup>15</sup> The Commission decision, which concerned solely the exploitation of copyright via the internet, satellite and cable retransmission, did not call into question the very existence of reciprocal representation agreements. It did, however, prohibit clauses that restricted authors' ability to freely join the collecting society of their choice and clauses having the

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<sup>13</sup> Ibid. These commentators argue that, in light of the efficiencies they produce, natural monopolies like collecting societies should be accepted as an efficient market solution. Hence, the law should not try to impose competition on them, since this attempt would endanger the efficiencies stemming from the monopoly.

<sup>14</sup> See European Commission (2005b), Recommendation on *Collective Cross-Border Management of Copyright and Related Rights for Legitimate Online Music Services*, OJ L276/54, 21 October [hereinafter *Recommendation of 18 October 2005*].

<sup>15</sup> See Commission Decision Relating to a Proceeding Under Article 81 of the EC Treaty and Article 53 of the EEA Agreement, C(2008) 3435 final, 16 July 2008.

effect of providing all collecting societies, in their territory of establishment, with absolute territorial protection against other collecting societies as far as the grant of licences to commercial users was concerned. The Commission also found that a concerted practice existed between the collecting societies in so far as each society limited, in the reciprocal representation agreements, the right to grant licences relating to its repertoire in the territory of another collecting society party to the agreement. As a result, the CISAC decision ordered the 24 collecting societies of the European Economic Area to withdraw the above-mentioned clauses from their mutual representation agreements and to bring cartels on territorial segmentation of collective licensing for online, satellite and cable transmissions to an end.<sup>16</sup>

Interestingly, the very recent judgment of the General Court of the European Union in the action brought by most of the collecting societies and by CISAC, while upholding the legal interpretation of the Commission with regard to the membership and exclusivity clauses, annulled the Commission's decision in respect of the finding of the concerted practice.<sup>17</sup> In that respect, the General Court considered that the Commission had not provided sufficient evidence with regard to the existence of a cartel regarding the territorial scope of the mandates that collecting societies grant each other. In addition, the reasoning of the Commission did not render implausible the explanation that the parallel conduct of collecting

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<sup>16</sup> Ibid., pp. 73–75, Arts 1 and 4 (membership clauses) and 3 (territorial exclusivity). The addressees of the decision were: AEPI (Greece), AKKA/LAA (Latvia), AKM (Austria), ARTISJUS (Hungary), BUMA (Netherlands), EAU (Estonia), GEMA (Germany), IMRO (Ireland), KODA (Denmark), LATGA-A (Lithuania), OSA (Czech Republic), PRS (UK), SABAM (Belgium), SACEM (France), SAZAS (Slovenia), SGAE (Spain), SIAE (Italy), SOZA (Slovakia), SPA (Portugal), STEF (Iceland), STIM (Sweden), TEOSTO (Finland), TONO (Norway) and ZAIKS (Poland).

<sup>17</sup> T-392/08 *AEPI v. Commission*, T-398/08 *Stowarzyszenie Autorów ZAiKS v. Commission*, T-401/08 *Saveltajain Tekijanoikeustoimisto Teostory v. Commission*, T-410/08 *GEMA v. Commission*, T-411/08 *Artisjus v. Commission*, T-413/08 *SOZA v. Commission*, T-414/08 *Autortiesibu un komunikšanas konsultaciju agentura/Latvijas Autoru apvieniba v. Commission*, T-415/08 *Irish Music Rights Organisation Ltd v. Commission*, *Eesti Autorite Uhing v. Commission*, T-417/08 *Sociedade Portuguesa de Autores v. Commission*, T-418/08 *OSA v. Commission*, T-419/08 *LATGA-A v. Commission*, T-420/08 *SAZAS v. Commission*, T-421/08 *Performing Right Society v. Commission*, T-422/08 *SACEM v. Commission*, T-425/08 *Koda v. Commission*, T-428/08 *STEF v. Commission*, T-432/08 *AKM v. Commission*, T-433/08 *SIAE v. Commission*, T-434/08 *Tono v. Commission*, T-442/08 *CISAC v. Commission*, T-451/08 *Stim v. Commission*, Joined cases, 12 April 2013.

societies was not the result of concertation, but rather of the need to fight effectively against the unauthorised use of musical works.

The latest initiative of the European Commission in this field has been a proposal for a Directive on Collective Management of Copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market.<sup>18</sup> This legislative proposal seeks to create an appropriate legal framework for the licensing of rights that are administered by collecting societies on behalf of rights-holders by enacting rules ensuring a better governance and greater transparency of all collecting societies. This proposed Directive also seeks to encourage and facilitate the multi-territorial licensing of the rights of authors in their musical works, codifying, with significant corrections, the rules and best practices endorsed through the 2005 Recommendation.

## **2.2 The Commission Proposal on Collective Management**

Stakeholders, independent experts and EU policy-makers discussed the legislative proposal of the Commission and, in particular, new provisions concerning i) the creation of a common level playing field for collecting societies in Europe, ii) the codification of certain licensing-related rights for copyright holders and iii) the model of multi-territorial licensing for online music rights. Even though this proposal embodies rules for all works whose rights are managed on a collective basis, the Task Force participants focused mostly on their impact in the music sector.

Panellists and discussants unanimously agreed on the necessity to create a common level playing field for collecting societies in Europe in order to let such entities compete on a fair and equal basis. The codification of the main principle that authors and other rights-holders should be free to assign their rights to a collecting society of their choice, irrespective of the country of residence or domicile of the rights-holder and of the country of establishment of the collecting society, was also very well received. More controversial, however, were a few rules embodied in the section of the proposal for a Directive concerning the requirements that collecting societies should meet in order to be allowed to grant multi-territorial licenses for digital uses of their respective repertoires.

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<sup>18</sup> See Proposal on Collective Management (European Commission, 2012a).

### *2.2.1 A common level playing field for collecting societies in Europe*

The proposal of July 2012 builds upon the principles and (in part) on the provisions previously embodied in the 2005 Recommendation, through which the European Commission identified a set of practices with a view to enhancing the degree of efficiency and transparency of collecting societies and enabling effective competition among them.<sup>19</sup> Such practices concerned crucial aspects such as equitable royalty collection and distribution without discrimination on the grounds of residence, nationality or category of the rights holder; increased collective rights managers' accountability; fair rights holders' representation in the collective rights managers' internal decision-making; and effective dispute resolution procedures.

It is worth remembering that the recourse to a soft-law instrument for such a sensitive and delicate matter raised a strong conflict with the European Parliament, which openly criticised the adoption of the Recommendation without its prior consultation and formal involvement. The Parliament claimed that the Commission was seeking a radical change of the structure of copyright licensing without intending to pursue any legislative harmonisation of the disparate regulatory frameworks concerning the governance and functioning of collective rights management organisations at national level. What was advocated was the necessity of a truly democratic debate about what the nature, type of governance, functions and ultimate objectives of collecting societies should have been in the information society.

Even if the Parliament acknowledged that copyright holders should in principle be free to choose a collecting society for the management of their rights, it expressed concern about the risks of rights concentration in the hands of the biggest collecting societies that the Recommendation entailed, to the detriment of local and niche repertoires. In particular, in a resolution in 2007 following the release of an official report on the 2005 Recommendation, the Parliament argued that a fair and transparent competitive system among national collecting societies could have been created through a flexible framework Directive, which could have regulated copyright collective management for cross-border online music services.<sup>20</sup> Through this proposal to the Commission, the Parliament made

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<sup>19</sup> See Recommendation of 18 October 2005 (European Commission, 2005b, p. 54).

<sup>20</sup> European Parliament Resolution of 13 March 2007 on the Commission Recommendation of 18 October 2005 on Collective Cross-Border Management of Copyright and Related

it clear that urging national collecting societies to compete with one another without having harmonised their highly heterogeneous legal status, institutional mission and services would not have been fair. This would have inevitably endangered the economic sustainability of those societies that, according to their national laws, not only try to maximise licensing revenues (acting as pure copyright holders' agents), but also pursue cultural goals and a certain degree of solidarity among their members.<sup>21</sup>

Through the proposed Directive of July 2012, the European Commission eventually acknowledged that a common playing field for collective management should have been created through a proper legislative measure. This measure aims at harmonising national rules concerning membership and organisation of collecting societies, management of rights revenue, management of rights on behalf of collecting societies, relations with users and transparency and reporting obligations.<sup>22</sup>

The Task Force participants widely agreed that, if European collecting societies and other licensing bodies are expected to compete with one another on reasonably fair grounds, they should enjoy a uniform legal treatment and be subject to similar administrative duties and burdens (e.g. the pursuit of solidarity or cultural goals), which can greatly influence their profitability.<sup>23</sup>

In the impact assessment that accompanies the text of the proposed Directive, the European Commission (2012b) emphasised that collective rights management needs to evolve in order to become efficient, accurate and transparent for rights-holders and users.<sup>24</sup> In proposing this articulated

Rights for Legitimate Online Music Services, OJ 2007/C 301 E/02, 13 December 2007, pp. 64-67. See also European Parliament Resolution of 25 September 2008 on Collective Cross-Border Management of Copyright and Related Rights for Legitimate Online Music Services, OJ 2010/C 8 E/19, 14 January 2010.

<sup>21</sup> See Hellenic Foundation for European and Foreign Policy (2009), *Collecting Societies and Cultural Diversity in the Music Sector*, report for the European Parliament, pp. 17-18 ([www.uni-muenster.de/Jura.itm/ hoeren/veroeffentlichungen/ hoeren\\_veroeffentlichungen/Collecting\\_Societies\\_and\\_Cultural\\_Diversity\\_in\\_the\\_Music\\_Sector.pdf](http://www.uni-muenster.de/Jura.itm/ hoeren/veroeffentlichungen/ hoeren_veroeffentlichungen/Collecting_Societies_and_Cultural_Diversity_in_the_Music_Sector.pdf)).

<sup>22</sup> See Title II of the Proposal on Collective Management (European Commission, 2012a).

<sup>23</sup> See Guibault & Van Gompel (2006, pp. 138-140).

<sup>24</sup> See European Commission (2012b), Impact Assessment Accompanying the Document Proposal for a Directive of the European Parliament and of the Council on Collective Management of Copyright and Related Rights and Multi-territorial Licensing of Rights in Musical Works for Online Uses in the Internal Market, Commission Staff Working

set of rules for collecting societies, the Commission was clearly concerned that the inefficiency and the lack of accountability of certain societies in the management of rights revenue collected on behalf of copyright holders would have had a negative impact on the exploitation of those rights in the Internal Market.

On the merits of the proposed Directive, several Task Force participants expressed concerns for the decision of the Commission to largely ignore the distinction between original and subsequent rights-holders, in line with the approach of the 2005 Recommendation (European Commission, 2005b). The legislative proposal does not embody a specific principle of non-discrimination concerning categories of rights-holders, as the 2005 Recommendation did. The Commission's proposal merely provides that the representation of different categories of members of collecting societies in their decision-making process should be fair and balanced.<sup>25</sup> However, as claimed in particular by songwriters and composers, fairness and balance are somehow neglected in the provision obliging member states to take the economic value of rights into account as an objective criterion for the exercise of voting rights in the general meetings of collecting societies.<sup>26</sup> In doing so, the legislative proposal does not seem to take into consideration that collecting societies have traditionally acted as entities protecting the parties with weaker bargaining power and have been largely based on associations of individual rights-holders, bound by a principle of solidarity among them. Authors claimed that a representation criterion based mostly on the economic values of repertoires eventually threatens cultural diversity, granting little or no power to the owners of commercially less successful or smaller repertoires.

### ***2.2.2 Freedom of copyright holders to assign their rights to a collecting society of their choice***

The Recommendation of 2005 also urged EU member states to grant copyright holders the right to assign the management of online rights, on a territorial scope of their choice, to a collecting society of their choice,

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Document, SWD(2012) 204 final, 11 July 2012 (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SWD:2012:0204:FIN:EN:PDF>).

<sup>25</sup> See Proposal on Collective Management, Art. 6.3 (European Commission, 2012a).

<sup>26</sup> *Ibid.*, Art. 7.

irrespective of nationality and residence.<sup>27</sup> To this end, member states were invited to screen their national legislation in order to prohibit all territorial restrictions created by reciprocal representation agreements and membership contracts that ultimately restricted each collecting society from managing online rights for the whole territory of the European Union, regardless of the residence of the authors and regardless of the economic location of the commercial users. Moreover, the recommendation made it clear that rights holders should have enjoyed the right to withdraw any of their online rights from their current collecting society and to transfer such rights to another collective rights management entity of their choice.<sup>28</sup>

The set of copyright holders' rights identified in the 2005 Recommendation is now codified and expanded under Article 5 of the Directive proposal, which refers to all categories of rights, not only to the (still legally undefined) category of online rights. The proposed Directive specifies that rights-holders' freedom of choice in their relationship with collecting societies should concern both the management of rights, categories of rights or types of titles and/or repertoires of their choice and the subject matter of the related mandates. Moreover, withdrawal from a collecting society should be allowed after a notice period not exceeding six months.

Generally speaking, Task Force participants agreed on the necessity to codify, clarify and harmonise at EU level the rights and freedom of copyright holders with regard to collective management of their works. However, representatives of collecting societies identified possibly controversial issues with regard to the preservation of the principle of exclusivity in the assignment of rights. Authors pointed out that the possibility of direct licensing without withdrawal of mandates by rights-holders in the (unlikely) event that a collecting society does not grant multi-territorial licenses<sup>29</sup> contradicts the principle of exclusivity. Songwriters and composers also advocated the preservation of this principle arguing that exclusivity guarantees certainty and equal treatment of repertoires, ensuring transparency for rights-holders.

It seems evident that the expansion of the rights-holders' freedom to withdraw any categories of rights, including offline rights, constitutes a

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<sup>27</sup> See Recommendation of 18 October 2005 (European Commission, 2005b, p. 54).

<sup>28</sup> *Ibid.*

<sup>29</sup> See Proposal on Collective Management, Art. 30 (European Commission, 2012a).

challenge to the exclusivity principle, in so far as the Directive would allow copyright holders to split the management of their rights and to assign different categories of rights to distinct societies. This solution clearly contradicts exclusivity of mandates, facilitates fragmentation of rights management and makes the activities of collecting societies more difficult and burdensome, endangering the efficiencies stemming from their natural monopolies.

### ***2.2.3 Requirements for the grant of multi-territorial or pan-European licenses***

As briefly recalled above, collecting societies have traditionally managed the rights in their musical repertoires and in the (global) repertoires of their sister societies just in their own countries of establishment. This means that multi-territorial licenses have traditionally fallen outside the business of collecting societies. Such a licensing structure has inevitably caused fragmentation in the EU, since – at least until the adoption of the 2005 Recommendation – whoever wished to exploit copyrighted music on a pan-European basis was forced to ask for and negotiate one license for every country of operation, gaining access to multiple repertoires on a national basis.

The Recommendation of 2005 was based on the assumption that collecting societies did not need to compete with each other on the grounds of their management services. As a result, societies were not given sufficient incentive to modernise their business and to take advantage of digital technologies in order to gain the ability to process large amounts of data and to provide more flexible and more nuanced solutions for the licensing of new digital services and for the calculation of the respective tariffs.

Seven years after the adoption of the recommendation, after having had the opportunity to observe a considerable transformation in the market for services of online music rights management, the Commission sought to establish the requirements that collecting societies should respect in order to be able to issue multi-territorial or pan-European licences.<sup>30</sup> This set of conditions has been, rather effectively, mentioned as a ‘European Licensing Passport’.

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<sup>30</sup> See Proposal on Collective Management, Arts 21-33 (European Commission, 2012a).

The Passport aims at certifying:

- Whether or not a given society has the capability of processing efficiently and transparently the data needed for the exploitation of such licenses, e.g. identification of music repertoire, by using a time-sensitive, authoritative database containing the necessary data;<sup>31</sup>
- Whether or not a society ensures transparency with regard to the online music repertoire, and/or represents and offers rights-holders and other societies the possibility to correct the relevant data and to confirm their accuracy;<sup>32</sup> and
- Whether or not a given society has the ability to monitor the actual usage of the works covered by the licenses, being capable of processing usage reports and invoicing,<sup>33</sup> paying rights-holders and other collecting societies without delay and providing them with information on works used and financial data related to their rights, such as amounts collected and deductions made.<sup>34</sup>

This new system is based on the principle that collecting societies that do not hold a passport *cannot* promote and directly licence their own repertoires on a multi-territorial basis. Considering this severe restriction, the proposed Directive embodies safeguards seeking to ensure that the repertoire of all societies can have access to multi-territorial licensing.

The legislative proposal provides that a collecting society may request another society granting multi-repertoire licences to have its repertoire represented on a non-discriminatory and non-exclusive basis for the purpose of multi-territorial licensing.<sup>35</sup> Under this regime – known as a ‘tag-on’ regime – the requested society may not refuse if it is already representing (or if it offers to represent) the repertoire of one or more collecting societies for the same purpose.<sup>36</sup> It is also provided that, following a transitional period, copyright holders may grant licences (either directly or through another intermediary) for their own online rights if their collecting society does not grant multi-territorial licences and if it does

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<sup>31</sup> Ibid., Art. 22.

<sup>32</sup> Ibid., Art. 24.

<sup>33</sup> Ibid., Art. 25.

<sup>34</sup> Ibid., Art. 26.

<sup>35</sup> Ibid., Art. 28.

<sup>36</sup> Ibid., Art. 29.

not enter into one of the agreements mentioned above.<sup>37</sup> The legislative proposal also specifies that a society is allowed to outsource services related to the multi-territorial licences it grants, without prejudice to its liability towards rights-holders, online service providers or other collecting societies.<sup>38</sup>

EU policy-makers and representatives of authors and of music publishers agreed on the fact that this part of the proposed Directive, as a whole, seeks to improve the functioning of collecting societies, giving them the right incentives to invest in the development of technical infrastructure and to make an effort to become more business-oriented by customising their licensing schemes. In this regard, the proposal places emphasis on the need to ensure flexibility and to facilitate the granting of customised licences by providing that collecting societies are allowed to grant licences to innovative online services, (i.e. those that have been available to the public for less than 3 years, without being required to use them as a precedent for the purposes of determining the terms of other licences.<sup>39</sup>

The Passport system and the related 'tag-on' regime undoubtedly constitute the most relevant additions to the picture of rules regarding multi-territorial licensing that the 2005 Recommendation encouraged. In particular, the introduction of the tag-on regime should clearly be seen as a correction of new licensing rules for online music rights that did not work as effectively and impartially for all rights-holders as the Commission would have expected after the adoption of its 2005 Recommendation. What was (and still is) at stake under this new regime is the equal treatment of music repertoires and the protection and valorisation of the repertoires of small- and medium-sized societies. Through this addition, the Commission evidently sought to re-balance a set of new rules and licensing practices that evidently favoured the largest collecting societies in Europe and the major music publishers, placing them in a position to set up their joint ventures and licensing vehicles with a view to providing pan-EU licences (at least for the mechanical rights in the Anglo-American repertoires).

Music authors claimed that, under the new regime, the inclusion of the repertoires of small and medium-sized societies in the scope of the multi-territorial licenses issued by bigger, wealthier and technologically

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<sup>37</sup> Ibid., Art. 30.

<sup>38</sup> Ibid., Art. 27.

<sup>39</sup> Ibid., Art. 32.

better equipped societies should be guaranteed. Authors' representatives claimed that multi-territorial licenses granted to users by requested society *A* should effectively include the repertoire of mandating society *B*. At the same time, the repertoire of society *B* should be licensed under the same conditions applied to the repertoire of society *A*. Authors claimed that, for the tag-on regime to be fair, society *A* should also obtain the consent from society *B* before excluding any repertoires from the scope of its licenses with users. This aspect is very relevant according to authors since non-compliance with the passport requirements restricts a collecting society from licensing its own repertoire on a multi-territorial basis and obliges such a society to accept the licensing conditions set out by the mandated society. Representatives of collecting societies also stressed that it would be unreasonable to end up depriving small and medium-sized collecting societies (taking advantage of the tag-on regime for pan-European uses) of the possibility of regional licensing when their infrastructure and administrative capabilities allow them to do so. This permission might be seen as an important incentive for small and medium-sized societies to invest in the development of their infrastructure and services.

The heavy consequences under the new system if a society does not hold a passport inevitably raised the issue of how compliance with the passport requirements should be verified and what type of authority or institution should perform this supervisory task. The proposed Directive makes a rather vague reference to 'competent authorities' of member states without clarifying whether or not the Directive intends to oblige member states to establish a system of supervisory authorities and of authorisations enabling collecting societies to operate, as has already happened in a few member states like Germany. Should these competent authorities be institutions like a member state ministry? Original rights-holders like composers and songwriters emphasised that activities such as the granting of the passport and the checks concerning whether or not a given passport society continues to comply with the passport requirements should ideally be assigned to a European organisation or agency.

It would be wise to amend the proposed Directive on this aspect and to centralise this function, since the scrutiny of a European institution would ensure a uniform enforcement of the passport requirements. Moreover, the centralisation of the process of granting passports and exercising supervisory powers over collecting societies would also avoid the problem of how to make the authorisation systems that exist in a few member states compatible with the cross-border reach of licenses. Commentators rightly observed that, in those countries where the activities

of collecting societies are made subject to authorisation granted by a supervisory institution, the authorisation obtained in the country of establishment by a given society would have no extra-territorial effects. Such situation would create a regulatory vacuum for the activities performed by that society in other EU member states.<sup>40</sup>

### **2.3 The expected impact of the proposed Directive's rules in the music sector**

With the (likely) adoption of the new Directive, collecting societies will no longer be allowed to accomplish their tasks unless they modernise their business quickly and gain the ability to respond promptly to requests of customised licenses coming from providers of new content offerings for consumers. The rules of the proposed Directive concerning the governance, membership and organisation of collecting societies, management of rights revenue, relations with users and transparency and reporting obligations will certainly have a positive impact on the functioning of these entities. Thus, from a purely service-related perspective, there will be considerable improvements.

Still, as evidenced also in the debate among Task Force participants, there are several aspects of the proposal that are not fully convincing and might give rise to uncertainties and practical problems in the near future.

This section identifies unclear aspects of the proposed Directive (section 2.3.1) and seeks to shed light on the model for online music rights management, which the adoption of the Directive would foster (section 2.3.2).

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<sup>40</sup> See Drexl et al. (2004), p. 17. Unlike the European Commission, these authors are of the opinion that Article 16 of the 2006 Services Directive ('Freedom to provide services', see Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on *services in the internal market*, OJ L376/36 - 27 December 2006 [hereinafter *2006 Services Directive*]) does not extend to the activities of collecting societies. Such negative opinion is based on the grounds of the 'intellectual property' exception to the freedom to provide cross-border services laid down under Article 17, No. 11, of the same Directive (which, in the authors' view, should also apply to collecting societies). The authors point out that copyright is a form of intellectual property that is territorial in nature. This means that, in countries like Germany and Poland, which provide for an authorisation system for collecting societies, the authorisations granted by the competent authorities in Germany and Poland will only cover the societies' activity in relation to the rights arising from national (i.e. German or Polish) law.

### 2.3.1 *Unclear aspects of the proposal*

It is not entirely clear why the European Commission decided to insert a section on multi-territorial licensing of online music rights in a general and broad legislative measure trying to harmonise the disparate legislative frameworks under which national collecting societies have operated so far. Harmonising the general rules on collective management might have taken priority over the codification of specific rules (at least the ones taken from the Recommendation of October 2005) that had evidenced problems in their implementation and did not simplify the licensing business of copyright holders and did not produce any benefits for commercial users of digital music.

The proposed Directive also fails to take the traditional composition of collecting societies into account. In particular, the proposal does not consider carefully that, in the vast majority of member states, these societies have been largely based on associations and 'unions' of authors, i.e. the original rights-holders, helping to solve conflicts of interest arising between original rights-holders and music publishers, who become rights-holders on the grounds of assignment of rights. The fact that national law should oblige collecting societies to take the economic value of rights into account as an objective criterion for the exercise of voting rights in their general meetings is a direct challenge to the preservation of the principle of solidarity among rights-holders and strongly affects the representation power of original rights-holders, especially those owning small or niche repertoires.<sup>41</sup> The general meetings take resolutions on the distribution policy for the amounts due to rights-holders, including the revenues coming from statutory remuneration rights, such as those associated with the exception of private copying. The proposed Directive does not consider that in several member states that have implemented the private copying exception, national laws reserve the administration of the revenue coming from levies to collecting societies with a view to protecting the economic interests of authors vis-à-vis those of publishers. The fact that, under the proposal, decisions on the allocation of private copying revenue will also be taken on grounds of the commercial value of rights might easily frustrate the ultimate purpose of statutory remuneration, i.e. subsidising creativity, placing large music publishers in a more advantageous position.

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<sup>41</sup> Ibid., Art. 7.

It is not clear whether or not the rules concerning the governance, membership, organisation, relations with users, duties of transparency and reporting that each member state will have to establish for collecting societies will also apply to the licensing vehicles that large music publishers set up after the adoption of the 2005 Recommendation in cooperation with the biggest collecting societies in Europe. In its impact assessment of the proposed Directive, the European Commission (2012b) considered these corporate sub-entities created by major music publishers and a few collecting societies (e.g. CELAS, DEAL, etc.) as licensing agents of rights-holders and not as collecting societies. The proposal seems to uphold that conclusion, stating that entities owned, in whole or in part, by collecting societies that offer and grant multi-territorial licenses for online rights in musical works should be subject to just a limited number of provisions embodied mostly in Title III of the proposal (Multi-territorial licensing).<sup>42</sup> If that were true, collecting societies wishing to circumvent the application of the rules of the future Directive for any of their licensing activities would merely need to entrust rights (and repertoires) to corporate sub-structures that they might set up with other collecting societies or single rights-holders. This lack of clarity is a direct consequence of a definition of ‘collecting society’ that, on the one hand, presupposes the assignment or licensing of rights by a plurality of rights-holders and a form of ownership or control by its members and, on the other hand, does not require that collective management organisations should act as trustees of copyright holders.<sup>43</sup>

With specific regard to the provisions on multi-territorial licensing of online music rights, it is very difficult to predict how the current situation would evolve with the entry into force of the new Directive and whether there would be any significant changes in the new licensing models of the online music sector.

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<sup>42</sup> Ibid., Art. 31.

<sup>43</sup> Ibid., Art. 3(a): “[...] ‘collecting society’ is any organisation which is authorised by law or by way of assignment, licence or any other contractual arrangement, by more than one rights-holder, to manage copyright or rights related to copyright as its sole or main purpose and which is owned or controlled by its members [...]”.

### 2.3.2 *Model of online rights management: One-stop shops for multiple repertoires*

It is unfortunate that the proposed Directive largely relies on the approach of the 2005 Recommendation without touching upon the factors and the intrinsic limits that affected the implementation of such recommendation. As anticipated above, this non-legislative instrument did not produce any benefits for commercial users of digital music since it increased, instead of lowering, the number of licenses that an online music provider needs in order to launch a pan-European service.

The main idea of letting rights-holders in musical compositions concentrate their online rights in the hands of a single pan-European licensor for multi-territorial licensing did not work (and could not work, from the beginning) because of different contract rules and distinct types of assignments between authors, publishers and collecting societies at national level.

When the 2005 Recommendation was drafted, the Commission did not take into careful consideration that copyright contract laws and the agreements regarding the assignments of rights varied significantly from country to country and led to distinct relationships between authors and music publishers and, as a result, to distinct ownership regimes. In particular, the fact that continental-European collecting societies followed a union model in protecting authors from the bargaining power of music publishers and in ensuring that authors eventually kept (or at least share on an equal basis) the copyright in their works was largely ignored.

Considering that online rights (i.e. mechanical *plus* public performance rights) were difficult (or impossible) to transfer, the major effect of the 2005 Recommendation was that of placing major music publishers in a position to withdraw just the mechanical rights in their Anglo-American repertoires in order to confer such rights to the above-mentioned new customised licensors for purposes of pan-European licensing. This could happen since – just for the Anglo-American repertoires, in light of a different contractual practice – music publishers are the sole proprietors of the mechanical rights and they could let the mandates to national collecting societies concerning these categories of rights and repertoires expire. This means that the largest music publishers were the only ones taking advantage of the 2005 Recommendation in order to distance themselves from certain (supposedly inefficient, non-transparent and old-fashioned) collecting societies in the licensing of

mechanical rights and to create specialised licensing agencies for pan-European administration of these rights in their own music repertoires.

Still, such licensing vehicles have not been able to license full packages of rights for online exploitation since public performance rights – for all music repertoires – are still owned or co-owned by authors and managed by their respective collecting societies. In Germany, for instance, this situation has led to a Court of Appeal judgment where the licensing of mechanical rights in the EMI musical repertoire by CELAS (a joint venture created by EMI, PRS and GEMA) was deemed to be illegal under German law since it gave rise to an incomplete or insufficient authorisation that did not enable any economically autonomous digital use of the EMI music repertoire.<sup>44</sup>

In response to the centralisation of the licensing of mechanical rights in the Anglo-American repertoires of major music publishers (which are no longer administered by local societies for online exploitation), small- and medium-sized societies established regional hubs (e.g. SACEM, SGAE and SIAE through the ‘Armonia’ initiative in southern Europe; the Scandinavian and Baltic societies did the same through the Nordisk Copyright Bureau) in order to license joint musical repertoires on a pan-European basis.<sup>45</sup>

By focusing merely on the multi-territorial scope of licensing and on the technical and management-related requirements that each ‘Passport’ society should meet, the proposed Directive does not touch upon nor does it try to solve any of the above-mentioned legal problems. Nor does it clarify what licensing models should collecting societies and/or the licensing agents of copyright holders preferably embrace in order to provide a smooth and efficient licensing of music rights for online exploitation.

The fact that online rights cannot be easily withdrawn and/or transferred smoothly from one pan-European licensor to another is strictly linked to distinct and complex ownership regimes that could be made more uniform (for future works) only through harmonisation of copyright contract laws and a simplified definition of ‘online rights’. Online rights

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<sup>44</sup> See Oberlandesgericht (Court of Appeal), *CELAS GmbH v. MyVideo Broadband S.R.L.*, 20 April 2010, *Zeitschrift für Urheber- und Medienrecht (ZUM)* 709 (2010); see also Bundesgerichtshof (Federal Court of Justice) Pending case Az. I ZR 116/10.

<sup>45</sup> See Mazziotti (2011), pp. 774-775.

constitute a non-codified category that is actually a combination of mechanical and public performance rights. The exclusive rights of reproduction and public performance traditionally refer to completely different modes of commercial exploitation in the offline world and, as a result, can easily prove to be owned by (or assigned to) different entities and/or rights-holders, with potential blocking effects on licensing agreements. A codification and unification of online rights, to make their transfer and management smoother and faster, would certainly require a different understanding of the existing right of making content available to the public or a reform of the list of exclusive rights under the 2001 EU Copyright Directive. None of these objectives can be achieved with a narrow legislative intervention such as that of the proposed Directive on Multi-Territorial Licensing.

A significant change or improvement of the actual situation of uncertainty and fragmentation of online music rights could stem from the implementation of the Passport requirements and of the complementary tag-on regime. Considering that the technical capacity required under the proposal for the Passport to be granted is remarkably high, it is likely that (at least in the early stage of the implementation of the Directive) just a very few and large collecting societies, who have already invested in the development of sophisticated rights management information technologies, will be able to gain the Passport and be allowed to issue multi-territorial licences. The tag-on regime will make it possible for the less developed societies (not holding a passport) to ask an authorised society to include their repertoires in the multi-territorial licences that the requested society will offer and grant for its own repertoire. Considering that the proposed Directive embodies a principle of non-discrimination between distinct repertoires and rights-holders in case of management of rights on behalf of other collecting societies, the requested Passport society under the tag-on regime will have to behave as a manager of a “neutral” rights hub through which users of digital music will gain access to all gathered repertoires under the same contractual conditions.<sup>46</sup>

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<sup>46</sup> See Proposal on Collective Management, Art. 13, in the chapter on “Management of rights on behalf of other collecting societies”, under Title II. This provision obliges member states to ensure that collecting societies do not discriminate between their members and any rights-holders whose rights they manage under a representation agreement, in particular with regard to applicable tariffs, management fees and the conditions for the collection of rights revenue and distribution of the amounts due to rights-holders.

If this situation concretely materialised, these licensing hubs would look like, in terms of shape and function, the regional hubs that have been established in various areas of Europe. The licensing hubs stemming from the enforcement of tag-on obligations would also make the services of the specialised licensing vehicles created by major music publishers less attractive and less convenient for commercial users. As we have seen, these vehicles would still need to pre-acquire the necessary public performance rights from local collecting societies in order to offer full packages of rights, thereby raising both transaction and monetary costs. In this respect, the main question is whether and how the largest European collecting societies, which have already established corporate sub-structures for the licensing of online uses of the repertoires of major music publishers, will react to the (likely) entry into force of the new Directive. These societies (i.e. PRS, GEMA, SGAE, etc) might actually turn out to be the Passport societies receiving requests of rights management under the tag-on regime, having to license small and niche repertoires that, commercially speaking, would not be of any interest to them.

If the creation of a few licensing hubs managing full packages of online rights was the outcome of the proposed Directive, the tag-on regime would have achieved its main purposes: i) facilitating aggregation of repertoires, ii) protecting the repertoires of small- and medium-sized societies for the sake of cultural diversity and iii) making the acquisition of online rights for multiple repertoires on a multi-territorial basis for commercial users easier and smoother.

If the above-mentioned forecast was correct, collecting societies would be expected to compete with the each other on the grounds of their management services and technical capacity, and not on the grounds of their distinct repertoires. It is worth recalling that the adoption of the 2005 Recommendation seemed to trigger an unprecedented (at least in Europe) competition between distinct music repertoires, which followed the (incomplete) withdrawal of online rights from local collecting societies by major music publishers and the creation of mono-repertoire licensing vehicles for these rights such as CELAS, PAECOL, PEDL, PEL, DEAL, etc.<sup>47</sup> The Commission proposal, instead, seems to reject (or at least not to

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<sup>47</sup> See Mazziotti (2011, pp. 800-801. For further information see for CELAS (<http://www.celas.eu/CelasTabs/About.aspx>), for PAECOL (<https://www.gema.de/en/gema/organization/paecol-gmbh.html>) and for PEDL (<http://www.warnerchappell.com/pedl/pedl.jsp>).

encourage) this new form of competition by facilitating repertoire aggregation through the tag-on regime and by embracing the principles of non-discrimination of repertoires (when a collecting society happens to manage the repertoires of other collecting societies)<sup>48</sup> and non-exclusivity of the representation agreements for multi-territorial licensing of online rights.<sup>49</sup>

The rules and principles embodied in the proposed Directive suggest that the future system of online music rights management in the EU could be based on a few rights management hubs created by the Passport societies. These hubs would be in a position to license full packages of rights (i.e. the mechanical and public performance rights of both authors and music publishers) to commercial users wishing to exploit different music repertoires on a pan-European or multi-territorial basis. Under this system all collecting societies would be free to entrust their online rights to any passport societies on a non-exclusive basis, so that the same repertoires might end up being available in the portfolio of rights of more than one pan-European hub. The new licensing system would also enable collecting societies to widely rely on their mutual representation agreements (especially after the annulment of the 2008 CISAC decision, in its section on concerted practices) in order to be entitled to authorise online exploitation of their respective repertoires and of extra-European repertoires upon request of users, irrespective of the user's economic residence. These hubs would ultimately function as centralised one-stop shops for multiple repertoires. This means that providers of pan-European online music services would need to seek, negotiate and obtain a number of licences that will be much lower than the number of licences required today.

In conclusion, the system that has been described would play the same function that other types of one-stop shops have played (or should have played) for the acquisition of rights for online exploitation. An example in this respect is IFPI's "Simulcasting Agreement", which enables users established in the territory of the EEA to approach any collective management society of record producers (established in the EEA territory) to negotiate and obtain a multi-territorial and multi-repertoire licence for acts of simulcasting (i.e. the simultaneous Internet transmission of sound recordings included in broadcasts of radio and/or TV signals). Another

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<sup>48</sup> See European Commission (2012a), Proposal on Collective Management, Arts 13 and 28.

<sup>49</sup> *Ibid.*, Art. 28.

example of the same kind was given by the structure of the Santiago (online public performance) and Barcelona (digital reproduction) standard agreements, that collecting societies concluded under the shield of their international umbrella associations (CISAC and BIEM, respectively) in order to enable commercial users to obtain a license for online exploitation (e.g. webcasting, streaming and online music on demand) of the worldwide music repertoire from their national collecting society.<sup>50</sup> The only difference that would exist between these precedents and the multi-repertoire licensing hubs that might stem from the implementation of the Passport and tag-on regime is the non-identity of repertoires that each pan-European rights hub might have in its portfolio, depending on the scope of the representation agreements that each society will have concluded.

## 2.4 Multi-territorial licensing in the film sector

The Task Force participants also discussed the issue of multi-territorial (or EU-wide) licensing of audio-visual works in a framework, namely the film sector, where content exploitation - instead - seems to be firmly entrenched within national borders. Participants heard diverging views about why, in spite of the theoretically easier licensing for movies - whose rights are concentrated in the hands of film producers - online movies are not legitimately made available to consumers in several EU jurisdictions in the same way, and in the same proportion, as online music is. It was widely acknowledged that a better and wider availability of legitimate audio-visual content online would help reduce digital piracy to a more tolerable level. Still, stakeholders explained the more limited development of online film services in different ways.

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<sup>50</sup> The European Commission found both the above-mentioned schemes (i.e. IFPI's Simulcasting and the Santiago and Barcelona agreements), in their original versions, in violation of EU competition law (i.e. Art. 101 TFEU) because of the incorporation of a clause of economic residence (or customer allocation) in the model agreements that eventually obliged users to resort to the collecting society of their country of residence. Whereas the Santiago and Barcelona agreements were not renewed after the issuance of a statement of objection by the European Commission, IFPI's Simulcasting Agreement was amended, with the removal of the economic residence clause, and is still a well-functioning scheme.

### 2.4.1 *Online content exploitation in the film sector*

The debate among stakeholders and policy-makers focused on the supposedly inverse relationship that exists between availability of lawful offerings of online movies and large-scale copyright infringements. Available data show that online services offering film content are much less developed than online music services.<sup>51</sup> In this regard, major film producers acknowledged that online markets are still a small fraction of the whole picture for them in Europe. However, copyright and the acquisition of online rights do not seem to be the only factors hindering access to films by content providers and, eventually, by consumers. The discussion revealed the existence of access barriers such as deliberate non-availability of content due to 'windows', through which films are progressively made available commercially, and policy and regulatory barriers at national level.

Both film producers and providers of online film services emphasised that traditional windows (i.e. exploitation through DVDs, pay TV, free-to-air TV) in the release of movies are currently shrinking: for instance, the six-month window between cinema and DVD releases have recently become a four-month window. Digital retail is not so well developed yet, but video on-demand is growing rapidly in the EU and such growth is based on increasingly higher consumer expectations in terms of quick availability of content online after release in cinemas, whose physical appeal does not seem to decline because of the uniqueness of the theatrical experience of a movie. Windows regarding the home entertainment sector are moving online: the first DVD window has moved online as rental or pay per view, in the same way as the pay TV ones, which have become video-on-demand services made available through subscription models. Also free-to-air TV transmissions of movies are partially moving online, where they are funded through advertising revenues.

From the perspective of major film producers, windows have been inherently related to the process of funding movie productions and making them profitable in order to continue to produce content. Film producers claim that a large part of their job is to clear rights and undertake the

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<sup>51</sup> In 2011, global revenues coming from digital sales accounted for 32% of the music industry's total sales and for just 1% of film industry sales (see IFPI, 2012). Even though the MAVISE database on TV and on-demand audio-visual services and companies whose offerings are available in Europe (<http://mavise.obs.coe.int>) lists 541 service providers specialised in VoD for films, an online service playing the same role as Netflix for the US is still absent (see note [6164](#)).

principal risk for movie production. A producer has to raise funds (i.e. own funds, private equity, hedge funds, tax incentives, product placement, pre-sale of rights often on territorial bases); organise locations, insurance and effects; hire authors, actors and many others; and obtain necessary clearances, rights and licenses. The producer may assign copyright to a distributor or license it to a number of companies (e.g. by territory, language, category of rights). The main purpose of these contractual arrangements, which include the creation of windowed releases, is that of positioning a film in the best competitive position in order to cover costs, to secure return on investment and make profits in order to create new works. Major film producers license content on a national basis and on a linguistic basis on multi-territorial grounds, but rarely do they release content on a pan-EU basis. These producers claim that contractual freedom allows them to exploit their works in a complicated and fast-changing environment and to ultimately decide whether and how their content should be licensed and made available in a certain region or country of Europe.

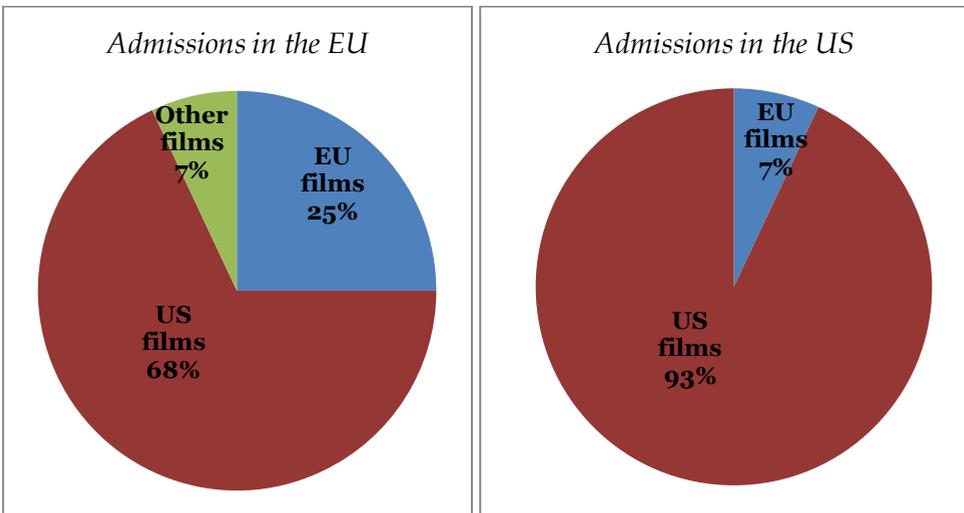
Obviously, the fact that there is no major European film producer raises problems in terms of equal availability of film content produced by national medium- and small-sized producers of movies, whose creations are often subsidised by member states, under their cultural policy programmes and by the European Commission through the so-called 'MEDIA Programme'.<sup>52</sup> The different financial resources at the disposal of film producers and their completely different bargaining power vis-à-vis intermediaries (i.e. local distributors, cinemas, licensees, etc.) are not the only reason for such unequal distribution and availability of content. Cultural diversity and linguistic specificities also play an important role and explain, to a large extent, why European movie productions are much less available than US majors' movies. European film productions are targeted very often at a specific national audience. Obviously, this makes it difficult for these films to be widely appreciated on an international basis. See Figure 1.

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<sup>52</sup> MEDIA (Decision no. 1718/2006/EC of the European Parliament and of the Council of 15 November 2006 concerning the Implementation of a Programme of Support for the European Audio-visual Sector, OJ L327/12 – 24 November 2006) is the EU's support programme for the European audio-visual industry aiming at: i) enhancing the European audio-visual sector, ii) increasing the circulation of European audio-visual works and iii) improving the competitiveness of the sector by facilitating access to funding and fostering the adoption of digital technologies. MEDIA has a budget of €755 million over the period 2007-13. For further information, see [http://europa.eu/culture/media/index\\_en.htm](http://europa.eu/culture/media/index_en.htm).

Film producers stressed that there is a very different dynamic behind the film industry in the US than in Europe and this is the consequence of a voluntary market distortion that EU member states and the European Commission have accepted as a matter of national cultural policy. In Europe, when a film is funded with public money, film production is not expected to lead to significant financial gains for the producers since the objective of cultural promotion of local productions largely prevails over that of making profits.

Figure 1. Cinema admissions by region of production, year 2009



Note: US films include also works produced in Europe with investment from the US.

Source: Author's elaboration on the European Commission's Green Paper on *Online Distribution of Audiovisual Works in the European Union* (2011b).

The main problem arising with regard to publicly subsidised film productions, in terms of availability and dissemination, is created mostly by administrative rules at national level and/or contractual provisions applicable to these productions that end up distorting market-based dynamics.<sup>53</sup> Very often these administrative or contractual restrictions do not easily enable new and window-neutral licensing practices to emerge

<sup>53</sup> The Communication of the European Commission on state aid to the cinema sector established an appropriate framework allowing member states to grant financial support to the production and distribution of films while maintaining a level playing field in the Internal Market. See European Commission (2001).

and develop. For instance, as emphasised by a start-up provider of online film services, in Sweden there was a rule until recently under which publicly subsidised movies could be made available just for cinema distribution, in a way that neither the film-maker nor the film producer was placed in a position to decide what form of distribution or commercial exploitation that movie should have had.<sup>54</sup> If EU policy-makers decide that publicly subsidised movies, which form part of the national cultural heritage of European nations, should be available online, these models of old-fashioned restrictions should be quickly removed from all public film systems so that these movies can become freely available on the market. This means that public sector institutions such as public broadcasters or media companies owned (or directly controlled) by member states should not be allowed to acquire rights that they would be unwilling or commercially unable to license for online exploitation of movies.

Excessively broad contractual arrangements seem to create problems also for the online availability of the most commercially successful and appealing film content in EU jurisdictions where US-based film majors have traditionally sold full packages of rights, including online rights, to TV and/or cable broadcasters on an exclusive basis. An evident problem of availability arises whenever such exclusive licensees do not make significant online exploitation of their film content or do not sub-licence their (territorially exclusive) rights to online content providers wishing to develop new film offerings in a given jurisdiction. EU policy-makers seemed to be aware of all the above-mentioned restrictions, which prevent content owners from adjusting their release policies to fast-changing market conditions and raise obstacles for current and future content providers to make film content widely available online. The factors that led to this highly fragmented picture and the development of effective solutions for the creation of more advanced digital markets for film content will be briefly examined in the next sections.

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<sup>54</sup> The previous system has been replaced by the 2013 Film Agreement concluded by the Swedish State and the Swedish film industry (including, among others, the associations of Swedish film and TV producers, film distributors, the Regional Film Funds Network) and the Swedish TV broadcasters. The text agreement is available in English on the website of the Ministry of Culture ([www.regeringen.se/content/1/c6/20/16/74/111b3287.pdf](http://www.regeringen.se/content/1/c6/20/16/74/111b3287.pdf)).

### 2.4.2 *Is there any room and demand for pan-European licenses in the audio-visual sector?*

At first sight, licensing practices in the film sector might appear incredibly disruptive and distortive of the logic of the EU internal market. Still, as acknowledged by the Task Force participants, licensing audio-visual works on a cross-border (and possibly EU-wide) basis is complex and such complexity does not stem only from copyright-related issues.

Obviously, the territoriality of copyright, and of the exclusive rights the law grants to copyright holders, matters. In this regard, today's situation would have been completely different if the European Community had not initially excluded intellectual property rights from the areas of law that should have been either harmonised or unified in order to create a well-functioning Common Market. In this respect, a few commentators spoke about a political mistake that stemmed from a misinterpretation of the 1957 Treaty of Rome, whose exclusion of property rights from the areas of Europeanisation of laws should not have concerned just real property, without extending to the domain of intellectual property.<sup>55</sup> If intellectual property rights, as it was said, had been made EU-wide from the beginning, where appropriate, now the European Union would not be characterised by the existence of many business models taking advantage of territorial fragmentation and firmly based on country-by-country content exploitation, with so many vested interests, costs and so many positions that policy-makers have to take into consideration.

Still, the above-mentioned situation does not seem to be irreversible if one considers that the markets for creative content (especially in the music and film sectors) are increasingly based on access services rather than on sales of goods.<sup>56</sup> The fact that the area of services constitutes 74% of the European GDP and developed enormously in the last decades, with a significant acceleration in the last years triggered by the implementation of the 2006 Services Directive, should always be borne in mind. Internal market legislation has been a tool to foster economic growth in Europe,

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<sup>55</sup> The Treaty of Rome (25 March 1957), Art. 222, reads: "This Treaty shall in no way prejudice the rules in member states governing the system of property ownership" ([http://ec.europa.eu/economy\\_finance/emu\\_history/documents/treaties/rometreaty2.pdf](http://ec.europa.eu/economy_finance/emu_history/documents/treaties/rometreaty2.pdf)).

<sup>56</sup> "[In 2011] consumers spent €1.2 billion on audio-visual content through digital/online platforms and services, representing an increase of 20.1% compared to 2010. Whereas, spending on physical video (DVD/BD) amounted to €8.3 billion, down 7.7% compared to 2010" (see Stezel et al., 2012, p. 30).

helping to remove an enormous amount of distortions and restrictions and subsequently enabling the emergence of unprecedented types of business models that neither economists nor policy-makers were able to predict (e.g. in 1995 nobody would have been able to predict the emergence and success of low-cost airline businesses as a result of liberalisation of this market at EU level). An economist who contributed to the discussion emphasised that the emergence of new business models can be predicted on condition that market structures start becoming obvious and the conduct of entrepreneurs is easier to foresee. Unfortunately, as the Task Force participants acknowledged, pan-European markets for online film content exploitation seem to be far from reaching such a threshold.

One of the main questions that arose with regard to film and audio-visual content concerned the demand for pan-European licenses by commercial users, especially if one considers how high the costs of such multi-territorial licenses would be. Is anybody asking film producers or owners of sport rights for pan-European licenses at the moment? Is anybody willing to pay for them? Film producers and owners of rights in sport events acknowledged that they would certainly start granting multi-territorial or pan-European licenses for online films and for online transmissions of sport events if these licenses made commercial sense.

Content owners emphasised that, considering the centralisation of rights that characterises these types of audio-visual content, copyright is not an obstacle for the unification of markets. Under the current legal framework in Europe film and sport events rights-holders have the ability to grant national, multi-national and pan-EU basis licenses. For instance, a leading association of owners of rights in football matches stressed that, even though a pan-EU offer for such rights exists, there has never been any demand for it. The reason for the lack of demand is linked not only to commercial or economic factors (i.e. nobody seems to have enough money to pay for such licenses) but also to cultural diversity and fragmentation. Because of cultural fragmentation, if a content provider wants to take advantage of the Digital Single Market and to supply content on a multi-territorial basis, it needs to acquire a deep knowledge of each individual market, to invest in advertising, to recruit the best marketing people and to sell content to local audiences effectively. To make an example: the fact that US-based online movie provider Netflix launched its services in Europe starting by linguistically homogenous countries such as the UK and Ireland is not coincidental. Entering new markets in Europe takes time, also for global and successful players. As content owners summarised, no

commercial user is expected to launch content services in Europe by acquiring rights for 27 countries simultaneously.

Task force participants widely agreed that EU policy-makers wishing to foster the development of the EU Digital Single Market should not end up dictating commercial strategies and decisions that only commercial users of digital content can fully estimate and undertake.<sup>57</sup> The choice about when and where to make audio-visual content available to the public should always be left to commercial exploiters, who are ultimately responsible for the development of new and economically viable business models.<sup>58</sup>

Nonetheless, stakeholders and policy-makers acknowledged that legislative changes under EU law and the increasingly important case law of the Court of Justice of the European Union (CJEU) on the exercise of intellectual property rights in the Internal Market might have a relevant impact on licensing schemes in the audio-visual sector. In particular, the Task Force participants fully recognised the importance of the principle embodied in a judgment (*Premier League*) through which the CJEU held that, even though selling content rights on a strictly country-by-country basis is legitimate, such a contract-based territorial segmentation cannot enjoy absolute territorial protection in the EU.<sup>59</sup> As stressed by EU policy-makers, the *Premier League* judgment might be interpreted as eventually

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<sup>57</sup> See Communication from the Commission (2010a), “A Digital Agenda for Europe”, op. cit., p. 8, where it points out that easier, more uniform and technologically neutral solutions for cross-border and EU-wide licensing in the audio-visual sector should preserve the contractual freedom of rights-holders (“Right holders would not be obliged to license for all European territories, but would remain free to restrict their licenses to certain territories and to contractually set the level of licence fees.”).

<sup>58</sup> The power of choice granted by national copyright entitlements in the audio-visual sector and its compatibility with EU law was recognised by the European Court of Justice in C-62/79 *SA Compagnie générale pour la diffusion de la télévision, Coditel, and others v CinéVog Films and others*, 18 March 1980, at 881, where the Court stated: “[...] that the provisions of the Treaty relating to the freedom to provide services do not preclude an assignee of the performing right in a cinematographic film in a member state from relying upon his right to prohibit the exhibition of that film in that State, without his authority, by means of cable diffusion if the film so exhibited is picked up and transmitted after being broadcast in another member state by a third party with the consent of the original owner of the right” thus allowing the exercise of copyright on a national basis with regard to contents that can circulate as intangibles.

<sup>59</sup> C-403/08 *Football Association Premier League and Others and Karen Murphy v Media Protection Services Ltd* (C-429/08), Joined cases, 4 October 2011, [hereinafter *Premier League*].

having the effect of weakening the full enforceability of licensing agreements which create territorial restrictions for the licensee of audio-visual content wishing to provide access to that content on a cross-border basis (i.e. outside the territory covered by the license). The case brought before the CJEU for a preliminary ruling concerned an agreement under which a Greek broadcaster, who acquired rights in the transmission of football matches, had undertaken the promise to prevent the public from receiving the broadcasts outside the area (i.e. Greece) for which the broadcaster held the license. In this business sector, this is a model agreement that all broadcasters conclude with the sport content owner in order to protect the territorial exclusivity of all broadcasters. In *Premier League* the case concerned only satellite TV transmissions and did not touch upon the actual granting of exclusive licenses for the broadcasting of sporting events and the strictly territorial basis upon which these licenses are granted. Rather, the case concerned acts of retail and purchase of cards and decoding devices which allowed certain restaurants and bars located in the UK to receive satellite channel broadcasts from another member state, the subscription of which was less expensive than that of the UK broadcaster transmitting the Premier League football matches on an exclusive basis. The judgment clearly made a distinction between individual use and profit-making uses of satellite broadcasts, arguing that the owners of public houses made these broadcasts available to a new public, attracting more customers and for purposes of financial gain.<sup>60</sup> The CJEU reached the conclusion that the above-mentioned agreement was illegal under Art. 101 TFEU insofar as it restricted the supply of decoding devices and of TV broadcasting services enabling access to the protected content for non-commercial purposes on a cross-border basis.

### ***2.4.3 How could a digital single area for audio-visual content be eventually created? Policy options***

EU policy-makers are fully aware of the difference that exists between Europe and the US in terms of types of online content traffic. In Europe (unauthorised) access to online content through peer-to-peer networks is still widely predominant, whereas in the US legitimate services, providing online content like Netflix, generate much more traffic than in the EU.<sup>61</sup>

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<sup>60</sup> See *Premier League*, paras. 197-207.

<sup>61</sup> According to the *Global Internet Phenomena Report* (see Sandvine 2012, *Global Internet Phenomena Report* (2H 2012)

Europe has a larger population and a bigger GDP than the US but online content markets much less developed, which means that content creators and producers earn much lower revenues. There is a great potential that the EU should take advantage of by simplifying and streamlining licensing, in order to have more dynamic markets for Europe's creative content. Policy-makers and stakeholders unanimously agreed that Europe needs to find ways to encourage innovation and creation if it wants to allow more digital innovative services to emerge and take off in the EU. The aim should not only be that of maximising the potential of this market but also increasing the export. Europe's linguistic and cultural diversity is a challenge but also presents opportunities that neither rights-holders nor devisers of digital services should miss.

To achieve the above-mentioned objectives in the close future and to significantly reduce the gap that exists with the US, the European Commission is actually looking for tools and solutions aimed at facilitating the creation of a digital single area where films can be marketed, licensed, and lawfully accessed by consumers in new, efficient, convenient, and user-friendly ways. Since 2009 the Commission papers have shown an increasing awareness of the need to intervene with legislative measures in order to foster and facilitate pan-European or multi-territorial online exploitation, also in the field of on-demand film deliveries.<sup>62</sup> As acknowledged by the Commission, in the long-term a policy solution to be considered in order to achieve such result would be that of creating EU-

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([www.sandvine.com/downloads/documents/Phenomena\\_2H\\_2012/Sandvine\\_Global\\_Internet\\_Phenomena\\_Report\\_2H\\_2012.pdf](http://www.sandvine.com/downloads/documents/Phenomena_2H_2012/Sandvine_Global_Internet_Phenomena_Report_2H_2012.pdf)), which focuses on internet traffic generated by the top ten applications (including basic http traffic) per band usage, audio-visual real-time entertainment in the US market accounted for 47.5% of peak-period aggregate traffic (fixed access) in the second half of 2012, Netflix being the leader with a traffic share of 28.8%. In the same period, BitTorrent was exhibiting a downward trend, being responsible for an average of only 10.3% of aggregate traffic. By contrast, audio-visual entertainment in the EU accounted for 28.5% of peak-period traffic, mainly due to the performance of YouTube (20.1%). In particular, file-sharing played a more prominent role in Europe, generating 18.8% of peak-period traffic.

<sup>62</sup> See DG INFSO and DG MARKT, *Creative Content in a European Digital Single Market: Challenges for the Future* (22 October 2009), p. 12 and p. 17 (discussing the possible legislative extension of the principle of the country of origin of the transmission principle to the realm of online film deliveries) ([http://ec.europa.eu/avpolicy/docs/other\\_actions/col\\_2009/reflection\\_paper.pdf](http://ec.europa.eu/avpolicy/docs/other_actions/col_2009/reflection_paper.pdf)) [hereinafter *Creative Content*].

wide (i.e. unified) copyright titles.<sup>63</sup> Unification of EU copyright law would have instant EU-wide effect, giving rise to a single market for copyright and related rights through. European copyright titles would remove the inherent territoriality of national copyright rules, especially if the system were construed as prevailing over national titles.<sup>64</sup> In the short-term, instead, what seems a more realistic option is a sector-specific intervention that might apply only in the realm of online film deliveries. A policy option that the European Commission is considering carefully is the extension of the so-called ‘country of origin’ principle, incorporated into the Audio-visual Media Services Directive for the identification of the law applicable to online transmissions by broadcasters, to *all* web-based content transmissions.<sup>65</sup>

According to the Commission, which is in charge of monitoring the implementation of the Audio-visual Media Services Directive, the said legislative choice regarding the application of a single law was somehow justified by the fact that broadcasting is generally much more regulated at national level than acts of web-based on-demand deliveries. The country of origin principle is also incorporated under the 1993 Satellite and Cable Directive for the creation of a single audio-visual area and the definition of the notion of communication to the public by satellite at a Community

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<sup>63</sup> See DG INFSO and DG MARKT (2009), *Creative Content*, *op. cit.*, p. 18 (discussing the consequences of copyright unification through a EU regulation and mentioning also a softer approach, according to which EU-wide entitlements might co-exist with national copyright titles).

<sup>64</sup> The possible creation of an optional unitary copyright title on the grounds of Article 118 TFEU, after having examined its potential impact on the single market, rights-holders and consumers, was also mentioned in *A Single Market for Intellectual Property Rights*.

<sup>65</sup> See Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the *Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Provision of Audiovisual Media Services* (Audio-visual Media Services Directive) (codified version), OJ L95/1, (15 April 2010) [hereinafter *Directive 2010/13*], replacing (with no substantive changes) Directive 2007/65, Art. 2, (See Directive 2007/65 of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the *coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities*, OJ L322/27, 18 December 2007 [hereinafter *Directive 2007/65*]). This solution was already considered in the Green Paper on the *Online Distribution of Audiovisual Works in the European Union: Opportunities and Challenges Towards a Digital Single Market*, COM(2011) 427 final (13 July 2011), [hereinafter *Green Paper on the Online Distribution of Audiovisual Works*], pp. 11-14

(<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0427:FIN:EN:PDF>).

level.<sup>66</sup> Both Directives apply, respectively, this principle of private international law to broadcast transmission signals and to online transmissions of audio-visual content (mainly digital TV services).

In both the above-mentioned cases, the logic was that of avoiding the cumulative application of several national laws to a single EU-wide act of commercial exploitation of copyrighted works, by adopting a criterion that identifies a single applicable law.<sup>67</sup> While adopting a single law approach both these Directives took steps to prevent opportunistic location of the television service's business establishment or of the point of departure of the transmission in a country with particularly lax copyright norms. First, the single law approach applied only to business establishments or transmission points located within the European Union. Second, the Directives embodied measures ensuring a sufficient level of substantive harmonisation of member state laws in their respective fields of application. This means that, despite the application of a single national law with EU-wide effects on satellite and online TV services, identical or similar conditions for market players in all EU member states preclude a race to the bottom.

An extension of the country of origin principle to online interactive (i.e. on-demand) content transmissions should certainly be pondered carefully, taking the differences between online transmissions – on the one

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<sup>66</sup> Council Directive 93/83/EEC of 27 September 1993 on the *Coordination of Certain Rules Concerning Copyright and Rights Related to Copyright Applicable to Satellite Broadcasting and Cable Retransmission*, OJ L248/15 (6 October 1993), [hereinafter *Directive 93/83*].

<sup>67</sup> Even though the logic is the same, these two Directives implement the principle of the law of the country of origin of the transmission in different ways. *Directive 93/83* adopts a country of emission rule, under which satellite broadcasters must clear copyrights just once, in the EU member state from which the programme-carrying signal is uplinked to the satellite under the control and responsibility of the broadcaster (rather than in the various member states where the broadcast is received because of the satellite footprint). By contrast, *Directive 2010/13* (which codified the 2007 'modernisation' amendment to the 1989 Television without Frontiers Directive) extends a 'country of establishment' rule from traditional television services to both interactive and non-interactive online television services. Due to the country of establishment principle, providers of audio-visual media services must comply only with the laws (including copyright law) of the EU member state where the service provider is established, rather than with those of the member states where the service can be received: see *Directive 2010/13*, Art. 2, 3 (setting the criteria according to which a media service provider should be deemed to be established in a given member state: e.g. location of the provider's head office or location of a significant part of its workforce).

hand - and satellite transmissions and digital TV services - on the other hand - into account. What should also be pondered is the scope of application of such regime and its potential impact on the various creative content sectors. If, for the aforementioned reasons, EU law elaborated the country of origin principle in a sector-specific manner and then extended it to online film services (and to the delivery of services that are ancillary to broadcast activities, e.g. catch-up TV) operated within the European Union, then a licence acquired in the territory of the country of the communication's origin would automatically cover the whole EU territory.<sup>68</sup> The pan-European reach of a licence in the country of origin would derive automatically from the law of such country since, legally speaking, that country would be the only place of use of copyrighted works in the online environment.<sup>69</sup>

It goes without saying that, if EU law-makers opted for this policy option, for online copyright licensing (expanding also one of the key principles of the Directive 2010/13), they would need to determine how to concretely adapt the country of origin principle to the realm of online content deliveries.<sup>70</sup> The criterion identifying the single applicable law could be either the country of upload of the copyrighted content to the server connected to the Internet or the country of establishment of the service provider. These variations on the country of origin principle would entail the emergence of distinct scenarios, whose thorough analysis was not developed in the Task Force debate. For instance, EU law would need to

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<sup>68</sup> See European Commission (2011b), *Green Paper on the Online Distribution of Audiovisual Works*, pp. 12-13 (discussing the extension of the 'country of origin' principle to the licensing of audio-visual works and, in particular, to on-demand TV programmes online).

<sup>69</sup> It goes beyond the scope and the purposes of this work to discuss the implications of the described reform for the determination of the law applicable to copyright infringements affecting works made available online under the above mentioned "single law" principle. This aspect is currently disciplined under Regulation (EC) no 864/2007 of the European Parliament and of the Council of 11 July 2007 on the *Law Applicable to Non-contractual Obligations* (Rome II), OJ L199/40 (31 July 2007), Art. 8. Regulation 864/2007, Article 8, provides that the law applicable to a non-contractual obligation arising from the infringement of an intellectual property right should be the law of the country for which protection is claimed (*lex loci protectionis*). Ideally, to avoid the application of distinct laws to the management of online music rights and the infringement of the same rights, EU law-makers could create an exception to the *lex loci protectionis* rule by embracing the principle of the country of origin of the transmission even for the determination of the law applicable to online copyright infringements.

<sup>70</sup> See *Directive 2010/13*, at recital 33.

establish a secondary criterion identifying the single law of a EU member state if the service provider establishment or the transmission points were not located within the European Union (e.g. opting for the law of the member state with which the online music service or the non-E.U. provider are most closely connected, in light of, say, the presence of offices or workforce of the same provider).

The implementation of a country of upload (or emission) principle would also alter significantly the bargaining conditions of content licensing. In the determination of licence prices, in particular, parties would necessarily need to take account of the actual and potential audiences of online content transmissions on a pan-European or multi-territorial basis. Moreover, content licensors and online service providers would have to retain a sufficient degree of contractual freedom in order to be autonomous and flexible enough in designing, launching and promoting new and economically profitable content offerings and in determining their territorial reach in the context of culturally and linguistically diverse countries. If such freedom was not adequately guaranteed and licences should be pan-European on a mandatory-basis, their prices might become so high that on one (or just a very limited number of large online content providers like international Internet platforms or global media conglomerates) would be able to pay for the acquisition of online rights.

In this prospective framework, copyright holders and their licensees would effectively start treating the European Union as a unified Digital Single Market, although retaining the freedom to geo-localise their content transmissions and to make them accessible to diversified audiences throughout the EU.<sup>71</sup> The circumstance that member state copyright rules have already been harmonised to a sufficient extent would widely mitigate the above-mentioned risk of a “race to the bottom” in the protection of copyright holders, as a consequence of the application of one single national law. Needless to say, this policy option would require a legislative reform of EU law, especially after the conclusion reached by the CJEU in *Football Dataco v. Sportradar*.<sup>72</sup> In that case the court had to determine the

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<sup>71</sup> A model to follow is *Directive 93/83*, which is based on contractual freedom in order to enable content licensors to continue limiting the satellite and cable exploitation of their rights, “[...] especially as far as certain technical means of transmission or certain language versions are concerned [...]” (Recital 16).

<sup>72</sup> Cf. C-173/11 *Football Dataco Ltd and Others v Sportradar GmbH et Sportradar AG*, 18 October 2012, paras. 39-43.

criteria of localisation of acts of online transmissions of copyrighted content from one member state to another and to assess whether the subsequent re-use of the protected content (i.e. a database) took place just in the country of upload or, also, in the country of use or reception of the content transmission. The Court held the act of re-use can be deemed to be located in the territory where user's computer receives the content for purposes of storage and display on screen.<sup>73</sup>

As recalled above, the case law of the CJEU is opening up new scenarios and policy solutions that look even more radical than a sector-specific implementation of the country of origin principle. The first option is the implementation of the exhaustion principle (and of the so-called 'first sale doctrine') with regard to intangible copies of copyrighted content that consumers download from the Internet. In the *UsedSoft* case, the CJEU recently held that the exclusive right of distribution of the owner of a computer program should be deemed to be exhausted in relation to the sale of a copy of the protected program that customers have downloaded from the copyright holder's website and that they have legitimately acquired under a license granted for an unlimited period of time in exchange for a fee.<sup>74</sup> The CJEU held that, when this type of sale occurs, the copyright owner is no longer entitled to block the resale of such copies by third parties who acquire the software licenses from the original users and sell them (while transferring also the related right to download updated copies of the computer program) to their own customers. The CJEU clarified that, for the distribution right to be exhausted, the first acquirer should delete or make the original copy of the program downloaded onto her computer unusable at the time of resale.<sup>75</sup> If this conclusion, which was reached with

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<sup>73</sup> Ibid., para. 43.

<sup>74</sup> C-128/11 *UsedSoft GmbH v Oracle International Corp.*, 3 July 2012, [hereinafter *UsedSoft GmbH v Oracle*].

<sup>75</sup> See *UsedSoft GmbH v Oracle*, paras. 78-79. As acknowledged by the CJEU, ascertaining whether such a copy has been made unusable may prove to be difficult. Still – as the court emphasised – copyright owners distributing computer programs through physical media (e.g. CD-Rom or DVD) have to face the same problem, since it is only with great difficulty that they can make it sure that the original acquirer has not made copies of the program that she continues to use after having sold her material medium. To solve that problem, the CJEU concluded, the software owner is allowed to use technological protection measures (like product keys) in the distribution of both physical and digital (i.e. intangible) formats. Technologies like the one for which Amazon was recently granted a patent in the US might solve the problem in the close future. See <http://patft.uspto.gov> ("Secondary market for digital objects"). Amazon has developed a system of 'data stores' where the user who no

specific regard to provisions of the EU Software Directive,<sup>76</sup> were extended to all kinds of copyrighted digital works (e.g. movies, videogames, e-books, music files, etc), intangible copies of creative works could be freely re-sold on a cross-broader basis, and subsequently disseminated on a EU-wide basis, provided that their first buyers have made such copies unusable when re-selling them. To this end, the provisions of the 2001 Information Society Directive that define the exclusive rights of distribution and of making content available to the public would need to be revised in order to make the exhaustion principle applicable also to permanent sales of intangible copies of copyrighted works. As things now stand, the sale of intangible copies through the Internet entails the exercise of the sole right of making content available (i.e. a type of right that is not contemplated under the Software Directive), whereas exhaustion applies only to the right of distribution of physical copies.<sup>77</sup>

The second policy option that the recent case law of the CJEU suggests is based on the assumption that EU law (under Article 101 TFEU) prohibits agreements whose purpose or effect is preventing, restricting or distorting competition in the EU Internal Market. In particular, the case law of the CJEU has held that agreements that tend to restore the divisions between national markets are liable to frustrate the Treaty's objective of achieving integration of those markets through the establishment of a single market.<sup>78</sup> As recently evidenced in the *Premier League* judgment, licensing agreement between the owner of exclusive rights in sporting events protected under national law and a TV broadcaster may eventually be deemed to infringe competition law insofar as the agreement restricts the broadcaster from technically enabling access to the licensed content outside his or her country of establishment and operation. Even though this case did not concern and did not directly affect the exclusivity granted by

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longer desires to retain the right to access the now-used digital content is given the possibility of transferring it to another user's personalised data store, while deleting the used content from the originating data store.

<sup>76</sup> See Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs, OJ L 111/16 (May 5, 2009), [hereinafter *Software Directive*], (codifying the content of Council Directive 91/250 EEC of 14 May 1991).

<sup>77</sup> See Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the *Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society*, OJ L167/10 (June 22, 2001), [hereinafter *Information Society Directive*], Art. 4.2.

<sup>78</sup> See *Premier League*, p. 139.

owners of sporting events to TV broadcasters on a strictly territorial basis, the judgment emphasised that the enforcement of EU competition law and the pursuit of its underlying objective of EU-wide market integration might end up denying legal protection to technology-enabled (and contractually agreed) restrictions aimed at ensuring territorial exclusivity in the access to protected audio-visual content. This conclusion might be of great significance in the development of online exploitation of audio-visual content if the above-mentioned principle were re-stated (or deemed to apply) with regard to technologies (e.g. encryption devices) that are used on the Internet in order to protect territorial exclusivity of access to content and to ensure an effective geo-localisation of online content offerings.

## **2.5 Standardisation of rights management information systems and repertoire databases**

EU policy-makers and stakeholders unanimously emphasised the essential role that central identification systems and repertoire databases will play for copyright with regard to music, film and other types of creative content. Markets for intangible goods such as copyright works can only function if all necessary information about the relevant rights as well as who owns and/or controls them is openly available and in standardised and interoperable formats. Tools such as the Global Repertoire Database (GRD) and initiatives such as the Linked Content Coalition (LCC) and the “Accessible Registries of Rights Information and Orphan Works towards Europeana” (ARROW) might greatly simplify, modernise and improve the conditions of licensing in digital markets. The operative elements of licensing would take great advantage of standardised and fully interoperable formats if all digital rights management information could be sorted out in a way that all content licensors and licensees have easy access to such data. The availability of such data would certainly promote the creation of a level playing field for all players.

The GRD is a central, authoritative and multi-territorial source of copyright-related information concerning the global repertoire of musical works. Metadata includes information about musical works themselves, the creators of the works and their ownership, control or administration.<sup>79</sup> The collected data need to be overlaid with authoritative information about

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<sup>79</sup> See [www.globalrepertoiredatabase.com/index.php/faq](http://www.globalrepertoiredatabase.com/index.php/faq).

what organisation (whether a music publisher, a collective rights management society or other institution) is in a position to grant the requisite licences for the exploitation of the musical works by rights share, by right type, by use type, by territory and by exploitation date.<sup>80</sup> This ambitious project aims at providing a comprehensive database of the global ownership and control of musical works, openly available to songwriters, publishers, collecting societies, and end-users. The GRD seeks to enable cost savings (mainly by eliminating duplication in activities of data management and processing), to lead to a better management of online digital content (by lowering administrative barriers for companies wishing to distribute music online and to increase music availability), and to ensure a quicker and more efficient compensation to rights-holders. The GRD will be able to perform its desired function only if all constituencies have proper access to the data collected in the database. Three years after the launch and support of the initiative by the European Commission, the GRD is progressing to a designed blueprint ready to be built. However, the project is moving slowly and discussions are problematic since it is still unclear under which conditions metadata will be made available by rights-holders and collecting societies.

Another remarkable standardisation initiative has been developed by the Linked Content Coalition (LCC), which has more than 40 partners across various sectors.<sup>81</sup> The LCC is mostly a right-holder initiative, even though it involves tech companies (e.g. Microsoft, Digimarc, Microgen) and broadcasters (e.g. RTL Group) as partners that are also commercial users of content. This initiative is not supposed to create a database itself (as the GRD does for music rights information) but aims at defining how rights should be described and how metadata should be standardised so that different databases can inter-operate and create a networked information environment. The LCC project, which is followed closely by the European Commission, does not promote any specific business models; nor does it

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<sup>80</sup> The GRD Working Group, which manages the project, was formed in late 2009 and includes the following companies and organisation: European Composer and Songwriter Alliance, International Confederation of Music Publishers, International Confederation of Societies of Authors and Composers, Sony/ATV Music Publishing/EMI Music Publishing, Universal Music Publishing, Warner/Chappell Music, Australasian Performing Right Association, Gesellschaft Für Musikalische Aufführungs- und Mechanische Vervielfältigungsrechte, PRS for Music, Société des Auteurs, Compositeurs et Editeurs de musique, Sveriges Tonsättares Internationella Musikbyrå, Apple, Google, Omnifone.

<sup>81</sup> See <http://linkedcontentcoalition.org>.

endorse any collective or individual licensing schemes. Rather, it aims at creating a standardised and freely accessible technical framework that seeks to facilitate the content supply chain and to ensure that content can be licensed more easily in the digital environment. The LCC's key deliverable is the 'Rights Reference Model' (RRM), presented in March 2013, which is designed to support automated access to content rights and rights data across the Internet.<sup>82</sup> The RRM covers all types of media, usage (by both humans and machines) content (e.g. text, image, sound or audio-visual) and any business model, including free use. This model is expected to have two main uses. One is that of a 'hub', enabling information held in different formats to be converted into a common language.<sup>83</sup> The second use of the RRM is as the basis to develop new multimedia rights systems, including new messages and languages where needed.<sup>84</sup> An aspect that is also particularly important for the LCC is micropayments, especially in

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<sup>82</sup> There have been several initiatives aimed at improving automation of rights management on the Internet coming from different sectors. See for instance the 'PLUS' coalition in the field of photography and graphic images (<http://useplus.com>). See also the 'Automated Control Access Protocol' (ACAP) (<http://the-acap.org>), which was a rights expression language designed primarily to express usage policies for publicly available online content in web pages in a non-proprietary and open format and in a machine-readable way. ACAP was a global project initiated by publishers and newspaper agencies worldwide. However, the project did not gain acceptance as it undermined existing, accepted and tested web standards and protocols such as robot.txt and, at the moment, it seems to have lost momentum (even though, since 2011, it has been maintained by the International Press Telecommunications Council).

<sup>83</sup> As emphasised by the European Publishers Council, which is managing the project, there will never be a single rights language to suit everyone. The RRM developed by the LCC is conceived so that any existing language or message (e.g. standards like ODRL, XRML, PLUS or rights messages in ONIX and DDEX or other proprietary formats used by individual companies) can be converted into the RRM without losing any of its meaning.

<sup>84</sup> The LCC proposes to use the 'Rights Reference Model', inter alia, to identify rights 'at the point of entry' to the web, by targeting user-generated content creators (bloggers, authors of mash-ups, etc.) and enabling them to declare themselves, works and rights in their works. This would create a framework model whereby all content generated on the internet could be registered and assigned rights status. The LCC would also define 'Principles of User Interface', organising the way users access and interact with the LCC. In both cases, what publishers are trying to do is to integrate (or 'map') machine-readable rights expressions (like the ones that have been widespread in DRM proprietary systems for more than a decade) and to encourage other sectors to make standards and clearer definitions themselves. Online intermediaries object that this approach would raise the difficult issue of rights-holders defining, in standards, what uses are permitted or not under copyright (i.e. the categories and scope of the various licence permissions).

sectors (for instance the publishing sector) where sometimes the transaction cost raised by how to make a payment is higher than the payment for the content itself. The LCC is now likely to move towards a standards consortium.

ARROW is another standard-based rights management infrastructure, supported by the Commission and mentioned in official documents and legislation.<sup>85</sup> ARROW enables exchanges of information within a network of databases and registries, thus facilitating right information management of text-based works in any digitisation projects. ARROW enables to identify authors, publishers, and other rights-holders of a work or their representatives, as well as right status, including whether the work is orphan, copyrighted or in public domain, or if it is still commercially available or out of commerce. In addition, the system provides information on how to get the licence in order to digitise and exploit the desired work. Given all these characteristics, ARROW has become an indispensable tool for EU-wide projects like 'Europeana' aimed at ensuring the widest access to knowledge and at preserving cultural heritage, especially in the text- and image-based sectors.<sup>86</sup> This tool will also facilitate the new task that the Orphan Works Directive assigns to the Office for the Harmonisation in the Internal Market, namely, the creation of a single publicly accessible online database of orphan works and the collection of relevant data (e.g. records of diligent searches) coming from public libraries, educational establishments and museums, archives, film or audio heritage institutions and public service broadcasters established in the member states.<sup>87</sup>

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<sup>85</sup> See <http://arrow-net.eu>. See for instance *A Single Market for Intellectual Property Rights*.

<sup>86</sup> See <http://europeana.eu>.

<sup>87</sup> See Orphan Works Directive, Art. 3(6).

# 3. DOES EUROPE NEED TO REFORM COPYRIGHT EXCEPTIONS? WHAT IS THE FUTURE OF LEVIES?

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## 3.1 Introduction

The members of the Task Force participated in interesting and politically timely discussions with regard to the appropriateness of the actual system of copyright exceptions under EU law. In particular, the debate among EU policy-makers, stakeholders, civic society organisations, consumer advocates and academics focused on a possible adaptation and reform of the horizontal legal framework created by the Information Society Directive of 22 May 2001.<sup>88</sup>

The term ‘exceptions’ is used here interchangeably with expressions such as ‘restrictions’ and ‘limitations’. This term refers to certain categories of uses that the law exempts from the copyright scope, with a view to achieving a number of public policy objectives (e.g. allowing criticism, research, teaching, news reporting, parody, and so on).<sup>89</sup> Copyright exceptions may encompass different types of statutory provisions, including full copyright exemptions, statutory licenses, compulsory licenses, and cases of so-called mandatory collective administration of copyright.<sup>90</sup> What makes these provisions similar to each other is that, in all

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<sup>88</sup> See the Information Society Directive, Art. 4.2.

<sup>89</sup> See Guibault (2002), *Copyright Limitations and Contracts, An analysis of the contractual overridability of limitations on copyright*, The Hague: Kluwer Law International, p. 16.

<sup>90</sup> *Ibid.*, p. 20. As the author explains, the most common form of limitation recognised in favour of users consists of a full exemption from the scope of the rights-holder’s exclusive right, where the right to authorise or prohibit is withdrawn without monetary compensation for the rights owners for the use of their work. Under a statutory licence, instead, copyrighted works can be used without authorisation from the rights-holder but against payment of fair remuneration. Unlike voluntary licenses, the amount of remuneration to be paid to rights-holders under a statutory licence is either fixed by the legislator or by some regulatory authority. In this classification, the third category (compulsory licensing) is

of these cases, users are entitled to access, copy, quote, extract, manipulate and tinker directly with copyrighted material without the authorisation of the copyright owner.

The most relevant and debated issue was about whether or not a set of provisions based on a list of non-mandatory exceptions and limitations with a narrow character, like the one provided under Art. 5 of the Information Society Directive, still accommodates the needs of a mature and fast changing digital environment. In today's digital environment new technology-enabled creativity and transformative uses pose unprecedented questions about the most appropriate scope of digital copyright and the best way to legally define its borders. In response to a supposedly inadequate role of a closed number of exceptions to the rights granted by harmonised copyright laws, academics and stakeholders openly discussed the advantages and disadvantages that the introduction under EU law of a flexible norm like the US fair use doctrine would create in the context of European legal systems

The debate touched also on whether or not the current system provides for a sufficient degree of harmonisation of national copyright laws with a view to fostering the development of cross-border (and possibly EU-wide) uses and online exploitation of protected digital content. Touching upon the issue of harmonisation of exceptions in the Internal Market, the debate inevitably focused on the diverse implementation of levies on recording equipment and blank media in the various member states where copyright law provides a private copying exception. Speakers and discussants placed special emphasis on the mediation process on levies that the European Commission launched in April 2012 and put to an end in January 2013. The report provides an overview and a critique of the policy recommendations that the mediator, Antonio Vitorino, published at the end of this process.

This chapter will review all the aforementioned issues after having provided a short overview of the current system of copyright exceptions in the EU. It is worth mentioning by now that the chapter will not examine in

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distinguished from the previous one (statutory licensing) on the assumption that the former requires a rights owner to grant an individual licence at a price and under conditions determined either with the user or by authorities where an agreement cannot be reached. The fourth category, finally, addresses a much less constraining form of limitation, under which copyright law requires that certain rights must be exercised through authors' collecting societies.

detail the recently adopted EU Directive on Orphan Works, which was eventually shaped as a measure introducing a new copyright exception. This Directive certainly constitutes an important step towards the objective of enabling online access to wide collections of creative works by institutions acting in the public interest (i.e. public libraries, archives, film heritage institutions, public broadcasters). However, the Directive has a specific field of application, dealing just with works whose authors and rights-holders cannot be identified and solely enables non-commercial use of such works, like those allowed by a publicly funded digitisation project like Europeana.<sup>91</sup> For these reasons, and due to time constraints, the Task Force members decided not to take this piece of legislation and this relevant subject into consideration.

### **3.2 The system of copyright exceptions embodied into the 2001 Information Society Directive**

The existing legal framework on copyright exceptions and limitations is defined in the 2001 Information Society Directive. After having briefly examined the current legal framework, this section draws on the Task Force debate in order to evaluate advantages and disadvantages of the possible introduction of a more flexible legal framework for the understanding and enforcement of copyright exceptions by private parties and courts.

#### **3.2.1 *Is the current system of copyright exceptions at EU level still appropriate?***

The Information Society Directive did not manage to effectively harmonise copyright exceptions beyond a certain extent since there was no political consensus among EU law-makers about the acts and uses that should have been exempted from copyright's scope, especially in the digital environment. As a result of such political failure, there is now an imbalance in this field that lies in the fact that, at a time when the scope of the exclusive rights of copyright holders was harmonised and expanded (as a result of the adaptation of copyright's scope to digitised information), the 2001 Directive did not make its exhaustive list of exceptions and limitations

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<sup>91</sup> During the preparatory works, cultural public institutions (e.g. the British Library) successfully lobbied for the enactment of a sector-specific copyright exception claiming that 30% of their collections were orphan works and that such directive should have concerned uses of orphan works by public bodies.

mandatory for member states. Nor did the Directive succeed in creating a legally binding or useful distinction between mandatory and non-mandatory exceptions in light of their nature, function and of their relevance in enabling unauthorised cross-border uses. Such a distinction would have certainly helped creating a more harmonised, effective and consistent safety nets for particularly important exceptions that now, instead, can be legitimately restricted through contractual means and practically imposed through sophisticated DRM technologies.

The exceptions provided in the lengthy list under Article 5 of the Information Society Directive are provided *à la carte*, which means that member states are free to take and implement only those ones they find most appropriate in their national copyright systems because of their own interests and of economic and cultural priorities. Interestingly, the only exception that the Directive made it mandatory in 2001 is a technological exemption concerning acts of temporary copying occurring for the sole purposes of enabling content transmission in a network between two parties by an intermediary and enabling a lawful use. These acts are excluded from the scope of the exclusive right of reproduction, on condition that they have no independent economic significance (Art. 5.1 Information Society Directive).<sup>92</sup>

The greatest achievements in the Information Society Directive in terms of harmonisation of exceptions and limitations were, respectively:

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<sup>92</sup> The CJEU has interpreted this technological exemption in 3 cases (*C-5/08 - Infopaq International A/S v Danske Dagblades Forening*, 16 July 2009, [hereafter *Infopaq I*]; *C-302/10 - Infopaq International A/S v Danske Dagblades Forening*, 17 January 2012, [hereinafter *Infopaq II*]; *Premier League*). The Court found that the following factual requirements should be met for the exemption to apply: i) the reproduction should be transient, i.e. “its duration [should be] limited to what is necessary for the proper completion of the technological process in question” (*Infopaq I*, para. 64); ii) the reproduction should be an integral and essential part of the technological process (see *Infopaq II*, para. 30); iii) the sole purpose of the reproduction is to enable a transmission in a network between third parties by an intermediary or a lawful use (i.e. authorised by the rights-holder or not restricted by law: see Information Society Directive, Recital 33; see also *Premier League*, para. 171, and *Infopaq II*, paras. 43-44); and iv) the reproduction should not have an independent economic significance (i.e. it should not be able to generate an economic advantage additional to the one generated by the intended use and it should not modify contents (see *Premier League*, para. 176, and *Infopaq II*, para. 54). Unfortunately, none of these cases concerned Internet-related technologies and the cited judgments did not truly clarify the application of the technological exemption of temporary acts of reproduction, leaving room for several uncertainties and making difficult to draw general conclusions.

- i. The creation of an exhaustive number of types (or classes) of exceptions that all member states are bound to comply with (insofar as they decide to opt for a certain type or class); and
- ii. The introduction into EU law of the so-called three-step test (Art. 5.5) that EU law-makers borrowed from international conventions on copyright, where the test has the function of instructing Contracting Parties on the legitimacy (in terms of scope and of potential impact on the market for the copyrighted work) of national exceptions.<sup>93</sup>

From a political point of view, the current system reflects scepticism about the concrete possibility of fully harmonising copyright exceptions. A few participants emphasised that full harmonisation in this area is a very unlikely objective since cultural diversity makes it impossible for member states to agree on a unitary set of mandatory exceptions and limitations. Advocates of the current system also added that, as it stands, the exhaustive number of specific exceptions embodied in the Information Society Directive preserves legal certainty while leaving national law-makers and courts with a significant room for manoeuvre. However, independent experts pointed out that, if the system had applied the principle of subsidiarity more carefully, considering also that full harmonisation could not be achieved in any event, member states should have been left with the freedom to create additional exceptions at national level, in both online and offline settings.

As we have seen, more harmonisation throughout the EU would certainly ensure higher legal certainty and a smoother cross-border dissemination of works and services taking advantage of copyright exceptions and limitations. Still, as argued by representatives of the computer and communication industry, this solution would not easily accommodate new technology-enabled uses that – for the sake of

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<sup>93</sup> The three-step test was originally provided under Art. 9(2) of the Berne Convention on the protection of literary and artistic property, which dates back to the Stockholm revision of this convention in 1967. According to Art. 9(2), it shall be a matter for national legislation to permit the reproduction of copyrighted works in certain special cases (first step), on condition that such reproduction does not conflict with a normal exploitation of the work (second step) and does not unreasonably prejudice the legitimate interests of the author (third step). After its introduction into the Berne Convention, subsequent international provisions regarding copyright law, that is, Art. 13 of the 1994 TRIPS Agreement and Art. 10(2) of the 1996 WIPO Copyright Treaty resumed this test. These provisions expressly extended the applicability of the three-step test to all rights granted to copyright holders, i.e. the rights of communication to the public, distribution and rental.

innovation and freedom of expression and communication on the Internet – should not fall within copyright’s scope. This front (supported by some academics and by consumer advocates) advocated a much more flexible approach to copyright exceptions, especially at a time when new uses of copyrighted information by both humans and computers appear and develop on a daily basis and deviate considerably from the categories of use identified in the late 1990s. It was argued that uncertainty about lawfulness of new uses is somehow inevitable in a society in which technologies develop at a very fast pace and in unpredictable ways. What seems hard to contradict is that, in this context, EU legislation, which is static in nature, will never be able to keep up with the pace of technological innovation, due to the closed-list approach and to the fact that the preparatory work and the process of law-making, transposition into national law and entry into force of new legislation at EU level is particularly complex and can take many years. The computer and communications industry, whose largest companies are mostly headquartered outside the EU, clearly indicated US law and a clause ensuring flexibility, like the US ‘fair use’ doctrine, as a model to follow. In particular, it was proposed that such a new clause could be introduced into the EU copyright system in addition to the existing set of exceptions and limitations.

### *3.2.2 A more flexible framework for copyright exceptions?*

A reform of copyright exceptions based on the introduction of a norm ensuring higher flexibility was advocated not only by Internet companies and consumers, but also by a front of academics and independent experts. A few scholars have proposed a model law in the context of a project entitled “European Copyright Code”, where a clause following the wording and the rationale of the three-step-test would co-exist with a closed set of exceptions.<sup>94</sup> As stressed by the drafters of the Code, this approach would reflect a combination of common law and civil law principles, giving rise to a system where the law enumerates various categories of exceptions and, at the same time, creates a safety valve for flexibility. The above-mentioned ‘flexibility clause’ would enable courts to

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<sup>94</sup> See Chapter 5 of the European Copyright Code (<http://copyrightcode.eu>). The Code is the result of the Wittem Project, which was established in 2002 as a collaborative effort among scholars across the EU.

permit uses that are similar to the ones expressly enumerated in the Code and that would pass the three-step test.<sup>95</sup>

It should be borne in mind that, as a consequence of the introduction of the three-step test into EU law, the test has now a binding force not only for EU member states, when codifying their own national exceptions, but also (and most importantly) for national courts in the concrete application of the same exceptions.<sup>96</sup> For EU member states, then, the three-step test at the moment not only constitutes a series of criteria for interpretation addressed to the national parliaments (criteria that all member states were already compelled to comply with as a result of their adherence to the Berne Convention and the WTO). The test is also a standard of evaluation and of judicial application of the exceptions provided under national law, in conformity with the catalogue of (optional) exceptions spelt out under Article 5 of the Information Society Directive.

Whereas national courts currently apply the three-step test when enforcing every single exception, in the prospected system courts would use the test each time a new unauthorised use is not contemplated in the closed circle of exceptions. Under these new circumstances, European courts would behave, to a great extent, like US courts when applying the doctrine of fair use.<sup>97</sup>

Another front of academics argued that EU law-makers should be cautious in transplanting the idea of a flexible set of standards into EU law since Europe has a completely different (and widely heterogeneous) system of judicial enforcement of copyright rules. Before taking this option into consideration, EU policy- and law-makers should bear in mind that today's fair use doctrine is the result of hundreds of years of case law in which US courts analysed several aspects of unauthorised copying and of other types of unauthorised use. In assessing the legitimacy of non-authorised uses

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<sup>95</sup> See European Copyright Code, § 5(5).

<sup>96</sup> See Mazziotti (2008), *EU Digital Copyright Law and the End-User*, Berlin: Springer, pp. 84-86.

<sup>97</sup> The doctrine of fair use was initially developed by courts and subsequently codified in §107 of the US Copyright Act of 1976. The doctrine gives rise to a system of exceptions that is to a certain extent antithetic to that of continental Europe and to the idea of limiting the subject matter of copyright through specific and punctual provisions, like the exceptions of *droit d'auteur* systems. Fair use operates *ex post*, and courts apply this doctrine on a case-by-case basis, anytime a court reviews an alleged copyright infringement. Fair use makes it possible for a court to find a concrete unauthorised use of a copyrighted work compatible with the evaluation criteria spelled out under §107 of the US Copyright Act.

under the fair use doctrine, US courts should consider elements such as the aim and the character of the use, the nature of the work and the quantity or portion of the work used as well as the effect of the use on the potential market value of the work. It seems evident that fair use and its criteria are clearly designed to achieve the same objective pursued by European exceptions and by the three-step test (i.e. preventing unauthorised uses from competing with any forms of commercial exploitation that are exclusively granted by the law to the copyright holder). Still, what varies significantly is *how* the objective has been achieved so far and will have to be pursued in the future.

The development of an extensive case law in the US on the grounds of theories such as the distinction between transformative and non-transformative uses and the recognition of 'market failure' have allowed courts to understand how the fair use doctrine can be implemented and constantly adapted over time. It was stressed that the interpretation of fair use has been in rapid evolution recently, and the fast development of completely new forms of exploitation of copyrighted works in the digital world (e.g. digitisation of millions of books owned by a university library without the consent of the copyright holders) has made the application of fair use much less predictable than ever.

A few academics expressed scepticism about the effectiveness of a system where the actual EU exceptions would co-exist with an implementation of the three-step test that followed the fair-use model, in terms of flexibility. What might be more useful, it was argued, is a comparison between the outcome of fair-use cases in the US and the settlement of identical or similar cases by European courts having to rely on the categories of unauthorised uses created under the Information Society Directive. In this regard, the Task Force discussion (as well as the relevant literature) pointed out that the categories of exceptions and limitations identified in the 2001 Directive can be viewed as broad prototypes that eventually place courts (and ultimately the Court of Justice of the European Union) in a position to ensure a progressive understanding and adaptation of exceptions and limitations to technological changes.<sup>98</sup> If the above-mentioned comparison eventually showed that flexibilities embodied into the provisions of the Information Society Directive effectively enabled European courts to achieve results comparable to those

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<sup>98</sup> See B. Hugenholtz and M. Senftleben (2011), *Fair Use in Europe: In Search of Flexibilities*, Amsterdam: IViR - Vrije Universiteit.

ensured by fair use in the US, a legislative reform at EU level might prove to be un-necessary.

An interesting aspect of the debate concerned the potential beneficiaries of the introduction of a clause ensuring flexibility for copyright exceptions in Europe: who would stand to benefit from such a new approach? Interestingly, consumer advocates claimed that the introduction of a flexible standard of evaluation for unauthorised uses would certainly make new uses and practices (like parodies and mash-ups, which have gained an unprecedented relevance in the digital culture) much easier to understand and, possibly, to accept from a legal point of view. Still, as a downside, such a flexible approach would also entail lack of predictability that would inevitably be linked to the decisive role of judicial interpretation. Various Task Force participants pointed out that fear to incur higher damages and litigation fees in the context of copyright infringement cases might eventually stifle unauthorised uses that, at least in principle, could be covered under the scope of a 'flexibility clause'. For the same reasons, although from an opposite perspective, large enterprises such as Internet companies, telecommunications operators or media conglomerates might end up taking advantage of the uncertainties and unpredictability that a more flexible legal framework would trigger. In a system where the boundaries of exceptions would be based on the outcome of complex and time-consuming proceedings, individual authors and/or content owners having no or little financial means at their disposal might feel reluctant to undertake potentially very expensive lawsuits against companies hiring the best lawyers and relying upon an almost unlimited litigation capacity. In response to these arguments, technology and communications companies object that, if fair use caused so much legal uncertainty, they would face thousands of lawsuits filed every week targeting fair-use decisions that their in-house lawyers have to take every day.

### **3.3 Exceptions and limitations targeted at new technology-enabled uses**

One of the most relevant aspects that were taken into consideration is the complex relationship between exceptions and new technologies. Should exceptions be deemed to shrink and to be progressively phased out in light of the increased opportunities of copyright holders to control digital works and to license their use? Should exceptions, to the contrary, be even more

guaranteed, legally speaking, in an environment where an excessively wide scope of digital copyright would actually stifle suitable unauthorised uses by persons and, also, by computers or machines?

The debate focused on the interface between copyright exceptions and innovative business models and on the role of exceptions. After that, a particularly relevant discussion concerned the legal treatment of acts of automated data processing performed by computers and machines, which cannot be easily understood using the traditional categories of exceptions and limitations provided under EU law. Finally, the discussion briefly touched on legalisation of unauthorised activities occurring on peer-to-peer networks through a possible exception covering non-commercial file sharing of copyright works. This solution would also require a flat-rate payment by users based on a system of mandatory or extended collective management what would clear the rights of communication to the public.

### ***3.3.1 Copyright exceptions and innovative business models***

When examining the issue of whether or not the EU should go for further harmonisation of copyright rules, content owners such as book and newspaper publishers raised the attention of participants on the supposedly inverse relationship between innovation and copyright exceptions. Digital publishing is the new challenge for publishers and requires significant investments on innovative business models. The e-book market is still in its infancy and, according to publishers, needs to be encouraged through a solid and stable copyright framework. Even though copyright holders acknowledged the suitability of exceptions and limitations in certain specific cases, they strongly believe that licensing and technological advances such as ARROW (see §2.5 *supra*) must play a central role in today's digital society since it is a flexible, practical, and fast means, which does not imply heavy transactions costs. Furthermore, according to content owners, licensing provides proper incentives to invest in new and innovative business models, thus meeting new needs of users.

In the current scenario, despite a slow growth of digital content markets, professional content creators have had increasing problems in getting remunerated. Newspaper publishers, in particular, claimed that innovation is not economically sustainable for them without an effective enforcement of intellectual property rights. Book and newspaper publishers stressed that an inappropriate treatment of copyright exceptions might make the situation even worse, enabling more free riding and serving the commercial interests of online news aggregators. Newspaper

publishers admitted that traditional licensing systems do not always fit the needs of providers of new digital content services. However, innovation in licensing and reliance on digital rights management technologies are the most realistic approach in order to protect intellectual property and to ensure a long-term sustainability of book publishing and professional news media and quality journalism.

### ***3.3.2 Copyright exceptions and purposes of scientific research and teaching***

Representatives of open access publishers focused on the standpoint of researchers (and of their communities) on the value of copyright exceptions. By opting for open access, researchers unilaterally place the results of their work at the public's disposal, without any restrictions of use and for free in electronic format. The main objective of this licensing policy is that of guaranteeing the widest possible access to scientific literature on digital archives maintained by academic institutions, research centres, governmental authorities and other institutions in pursuit of similar goals. Authors normally opt for such licensing forms either spontaneously or in compliance with directives or guidelines given by their employers (universities or research institutions). The movement has its manifesto in the Berlin Declaration of 2003 on open access to scientific literature, promoted by the Max Planck Society.<sup>99</sup>

The peculiarity of open access publishing is that this business widely relies on the relinquishment of economic rights by the authors of the works published. Publishers following this business model normally acquire certain exploitation rights from authors who opt for licensing standards such as Creative Commons' and do not seek an immediate financial gain or a monetary reward from their creative work. These authors, who are normally remunerated by their employers in order to produce research output, are motivated mainly by the purpose of contributing to the advancement of scientific knowledge in their fields and by gaining exposure and reputation within their respective academic communities through dissemination of their work on freely accessible on-line repositories. As a result of these arrangements, open access publishers

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<sup>99</sup> See *Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities*, Open Access at the Max Planck Society (<http://oa.mpg.de/lang/en-uk/berlin-prozess/berliner-erklarung/>).

normally release online for free what they sell in hardcopy formats for a fee.

One of the main principles of the open access movement is that copyright in the results of publicly funded research should be retained by authors and their works should be released under licensing terms granting free access and permitting certain forms of re-use of such works for free. Considering the ultimate purpose of this movement, it is easy to understand why, ideally, academic researchers and publishers opting for open access would expect from the law wider freedoms and usage permissions with regard to all copyrighted materials, including the ones released for gainful purposes by traditional publishers.

Supporters of open access licensing believe that copyright should always incorporate exceptions allowing academics to use protected materials for private study, criticism and review. This front of stakeholders advocated similar solutions for text and data mining and for research and teaching purposes, arguing that non-commercial restrictions placed on activities aimed at producing research output are not in the public interest and eventually stifle innovation. Researchers and enterprises espousing the concept of open access also emphasised that modern research projects operate with large international teams, based in multiple countries, and the above-mentioned copyright exceptions should be fully harmonised, at least across Europe.

As things stand, EU law allows member states to provide for exceptions or limitations to the rights of reproduction and of communication to the public if the use of the copyrighted work occurs “for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved.”<sup>100</sup> This type of exception seems flexible enough to permit national law-makers to satisfy the needs of researchers and teachers without unreasonably compromising the interests of copyright holders. Moreover, the adoption of a neutral term in the provisions (*use*) shows that the national exceptions and limitations for educational uses can apply to different types of use and, therefore, not only to quotations. However, national exceptions covering acts of reproduction and communication, carried out in relation to research and teaching activities, are limited in

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<sup>100</sup> See Art. 5(3)(a) of the Information Society Directive.

their scope by the requirements of the purposes of illustration (which establishes a necessary correlation between freedom of use and the subject matter of teaching and research), the non-commercial character of the use and by the three-step test.

Types of exceptions such as the one for research and teaching purposes provided under the Information Society Directive might easily create problems for legitimate cross-border uses in so far as these permissions are not shaped as mandatory for member states under EU law. The fact that exceptions of this kind may not exist in all EU jurisdictions does not facilitate and encourage the development of cross-border initiatives such as open courses made available online for free by educational institutions such as public universities. Teaching initiatives of this type have recently developed at a fast pace and have been offered at an increasingly high level, at a both a European and international scale. Educational institutions and teachers offering online open courses would clearly run the risk of infringing copyright, somewhere in Europe, even if they strictly complied with the requirements set out under EU law, while using and publishing portions of copyrighted materials in the courses offered on their closed web-based networks. In addition, the fact that the scope of the aforementioned exception is restricted to activities having a non-commercial purpose might raise doubts about the legitimacy of these types of uses by private educational institutions, even when courses are offered just to their students: would those initiatives have a commercial character? That is one of the questions that remain unanswered as things stand.

### ***3.3.3 Understanding and regulation of 'automated data processing' of digital works***

The approach undertaken by EU law-makers in 2001 undoubtedly creates problems today in terms of lack of harmonisation of uses permitted by law. The fact that certain uses of copyrighted materials might turn out to be *lawful* in certain EU member states and *unlawful* in other states certainly hinders and jeopardises the development of cross-border activities and of EU-wide services having to rely on a form of copyright exemption. This situation is even more undesirable and unsustainable in the long run for Internet companies and providers of innovative content offerings if one considers that, due to an outdated and unreasonably restrictive set of rules at EU level, it has become impossible to fully understand and regulate technology-enabled uses that escape the traditional contours of copyright.

As pointed out in the relevant literature, there are classes of uses of digital works that include any sort of automated processing of such works for purposes of data mining, computational analysis on texts and automated extraction of information and whose legal treatment is very unclear under the existing legal framework.<sup>101</sup> What characterises these technology-enabled uses is that works are automatically processed for various purposes that have nothing to do with traditional forms of exploitation of copyrighted works that follow copying (i.e. dissemination and uses addressed to an audience). Uses like the ones occurring in the context of mass digitisation projects (from search and indexing to text analysis) are undertaken by machines to the benefit of machines and for reasons that are not (directly) associated to enjoyment and consumption of works by humans. These are all activities that are beneficial to companies or non-profit institutions performing acts of automated data processing, using protected digital works not as ‘works’, but as ‘data’ in order to extract, collect and re-use a vast array of useful information.<sup>102</sup> Automated data processing can pursue objectives such as data analysis, sophisticated text analysis (e.g. the content of a book or the whole production of a specific author), analysis of metadata on patterns of use of digital copies (e.g. to create databases of user profiles) and computational analysis (which includes image analysis and text extraction, linguistic analysis and automatic translation and indexing and search).<sup>103</sup>

To sum up, there are classes of unauthorised uses of copyrighted works in digital formats that are of crucial relevance for the mere functioning of information and communication technologies whose use has become vital on the Internet and, more in general, in the information society. The fact that the current system of exceptions is based on a closed number of provisions, and that such provisions were carved out at a time

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<sup>101</sup> See Borghi and Karapapa (2011), “Non-display uses of copyright works: Google Books and beyond”, *Queen Mary Journal of Intellectual Property*, Vol. 1, No. 1, April, pp. 21-24. In computer sciences ‘data mining’ is defined as the extraction of implicit, previously unknown, and potentially useful information from data. ‘Text mining’ is the process of text analysis in order to extract information that is useful for particular purposes: see I. Witten and E. Frank (2005), *Data Mining: Practical Machine Learning Tools and Techniques*, San Francisco; CA: Elsevier, p. 351.

<sup>102</sup> See M. Borghi and S. Karapapa, ‘Non-display uses of copyright works [...]’, op. cit., pp. 44-47.

<sup>103</sup> On automated text processing and data mining, see Borghi and Karapapa (2013), *Copyright and Mass Digitization: A Cross-Jurisdictional Perspective*, Oxford: Oxford University Press, pp. 43-69.

when the digital environment and the Internet were in their infancy, forces courts and private parties to seek the application of old-fashioned categories to the above-mentioned new types of uses on digital works.

Despite their built-in flexibilities, exceptions like those permitting quotations for purposes such as criticism or review and reproduction and/or communication of published articles in connection with the reporting of current events cannot easily become applicable standards for the assessment of activities (e.g. reproductions of picture thumbnails, display of text snippets, etc) through which protected works are processed automatically, for instance, by search engines and online news aggregators.<sup>104</sup>

It was pointed out that EU member states have implemented these exceptions into their laws according to different strategies of transposition, and only a few of them have eventually preserved the technology-neutral wording embodied in the Directive.<sup>105</sup> This means that in vast EU jurisdictions (e.g. France, Germany, etc) quotations and uses for purposes of news reporting are, in their statutory definitions, strictly limited to criticism and to the purpose of review of the works in which such uses are incorporated. On the contrary, in the Netherlands and in the Nordic countries, the laws transposing these provisions seem to leave wide room for a fair implementation of the same exceptions to acts comparable to quotations made by computers, such as those made by a search engine collecting information from an online database of housing agencies.<sup>106</sup>

The inadequacy (or insufficiency) of the present EU copyright system for the purpose to foster economic growth in the context of a mature digital economy has been emphasised recently by studies and initiatives undertaken at EU and national level. At European level the European Commission has been rather reluctant to admit that the 2001 Information Society Directive should be re-opened in order to improve and modernise the section on copyright exceptions. In its recent Communication on *Content in the Digital Single Market* of December 2012, when touching upon its plan for new legislation, the Commission announced actions in the domains of out-of-print works (through a contractually based solution taking the form of a Memorandum of Understanding), access to works by

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<sup>104</sup> See, respectively, Arts 5(3)(d) and 5(3)(c) of the Information Society Directive.

<sup>105</sup> See B. Hugenholtz and M. Senftleben (2011), *Fair Use in Europe*, op. cit., pp. 14-16.

<sup>106</sup> *Ibid.*, p. 16.

visually impaired persons and technology-based solutions, especially with regard to rights management information.<sup>107</sup> The Commission made no reference in that document to the issue of copyright exceptions, except for the mediation process on private copying levies and the enactment of the Orphan Works Directive (which should be seen as a legislative measure introducing new copyright exceptions).

Very different is the scenario of certain EU member states where policy-makers have already announced or started initiatives aimed at modernising the framework of copyright exceptions. The most significant example in this regard is the UK, where the Intellectual Property Office (IPO) has been following and implementing policy recommendations embodied into the Hargreaves Review of May 2011.<sup>108</sup> In response to a public consultation launched by the UK government, the IPO recently published a lengthy document that explains what the government will do in order to enhance, as proposed by Hargreaves, the UK's regime of copyright exceptions (or "permitted acts", according to the IPO's lexicon).<sup>109</sup> Through this ambitious and comprehensive reform plan the UK government seems to challenge the position of the European Commission, trying to speed up a policy-making process that, clearly, will have no equivalents at EU level before the expiration of the Commission's mandate in 2014. The most evident challenges embodied in the UK reform plan concern the creation of a narrow private copying exception and of an exception covering text and data mining for non-commercial research within certain limits.<sup>110</sup> On both fronts the UK government seems to deviate or, at least, to proceed independently from the European prospect. On the one hand, the exception allowing individuals to copy lawfully acquired content on media and devices they own for strictly personal uses would come with no remuneration for copyright holders, as the Information

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<sup>107</sup> See European Commission (2012c), *Content in the Digital Single Market*.

<sup>108</sup> See Hargreaves (2011), *Digital Opportunity. A Review of Intellectual Property and Growth*, UK Intellectual Property Office, London, May.

<sup>109</sup> See UK Intellectual Property Office (2012), *Modernising Copyright: A modern, robust and flexible framework*, 20 December.

<sup>110</sup> See UK Intellectual Property Office, *Modernising Copyright*, op. cit., at 16. Other areas in which the document announced legislative intervention are educational uses, quotation, parody, research and private study, disabilities, preservation, public administration and reporting.

Society Directive would require.<sup>111</sup> On the other hand, the UK intends to introduce an exception in an area where the European Commission, instead, is just exploring, at least for now, the potential and possible limits of standard licensing models and assessing the feasibility of technology platforms to facilitate text and data mining access.

### ***3.3.4 Legalisation of non-commercial sharing of protected works through a statutory license***

During the debate about the desirability of new exceptions in the EU Digital Single Market, a civic society organisation claimed that non-commercial sharing of cultural works on peer-to-peer networks should be made legal. It was argued that the Information Society Directive could be amended in order to allow a copyright limitation aimed at excluding unauthorised file sharing among individuals, having not-profit-making character, from the scope of the exclusive rights of reproduction and of making digital content available to the public. According to the proponents, this new provision should be accompanied by the creation of new social rights to remuneration and access to funds granted to authors. Under this scheme, all Internet broadband subscribers should be obliged to pay a flat-rate monthly fee collected by ISPs and aimed at remunerating creators of works shared over the Internet and at funding content production.

Proposals aimed at legalising file sharing have been made for a decade now.<sup>112</sup> In the most sophisticated (and legally most plausible) versions, these proposals advocate the creation of an exception to the exclusive right of digital reproduction – through an expansion of the scope of the exception of private copying, which would cover user downloads – and the implementation, at the same time, of extended (or mandatory, alternatively) collective licenses that, through the intermediation of rights-holder collecting societies, would clear copyright in the content that file sharers upload.

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<sup>111</sup> See Art. 5(2)(b).

<sup>112</sup> See, for instance, N. Netanel (2003), “Impose a Non-commercial Use Levy to Allow Free Peer-to-Peer File Sharing”, *Harvard Journal of Law and Technology*, Vol. 17(1), p. 1; and W. Fisher (2004), *Promises to Keep. Technology, Law and the Future of Entertainment*, Stanford, CA: Stanford University Press.

These proposals gained momentum in the US and in Europe at a time when markets for online content (especially Cloud-based services enabling access to digital works in streaming) had not emerged and developed yet. At that time, there seemed to be no or little alternative to unauthorised file sharing for efficient dissemination of creative works online. Markets for digital content were not mature yet since copyright owners (and their rights licensors) had not adapted their business to the new digital environment (not fully, at least) and web-based content platform could not rely on today's broadband Internet access services for a smooth and user-friendly delivery of digital works. Moreover, from a purely legal point of view, the legalisation of unauthorised downloads through the extension of the private copying exception was (and still is) at odds with the three-step test and, in particular, with the requirement that aims at protecting actual and potential markets for copyright works from excessively broad exceptions.

Nowadays there are several factors that make the enactment of such a legislative reform unlikely, at least in Europe. Firstly, the fact that online markets have been eventually developing and that EU policy-makers want such markets to grow and become increasingly cross-border, reaching one day (possibly) the stage of the EU Digital Single Market, should be taken into consideration. Legalising file sharing would be likely to have disruptive effects on nascent or well-functioning online content markets and would frustrate the most recent initiatives that the European Commission has recently undertaken in the field of copyright licensing. Secondly, it should also be considered that large-scale online copyright infringements are likely to decrease significantly with the increasingly wide and cheaper offerings of legitimate online content. At the same time, online 'piracy' could be reduced to a more tolerable extent through a more nuanced and effective implementation of the judicial measures and tools made available under the laws implementing the 2004 Intellectual Property Rights Enforcement Directive (IPRED).<sup>113</sup> Finally, neither rights-holders nor ISPs seemed to endorse the proposed scheme of statutory licences and eventually agreed that the scheme would not be beneficial to anyone. On the one hand, copyright holders clearly expressed their preference for voluntary licensing schemes in the online environment. On the other hand,

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<sup>113</sup> See Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ L195/16 (*Corrigendum*, 2 June 2004), [hereinafter *IPRED*].

ISPs firmly refused to embark on a licensing scheme that would raise the transaction and administrative costs related to their role of intermediaries with their subscribers dramatically.

### 3.4 Copyright exceptions and the pursuit of public policy goals

A short digression on the constitutional dimension of copyright exceptions is indispensable to understand why EU law has failed to take the public policy element that normally upholds these provisions in due consideration. Unsurprisingly, this approach was mostly a consequence of the purely Internal Market-related angle from which copyright rules have been harmonised.

#### 3.4.1 *Constitutional dimension of copyright exceptions*

In both the copyright and the *droit d'auteur* traditions, exceptions to exclusive rights seek to strike a balance between granting incentives and rewards for individual creation, and providing too much protection and thereby stifling intellectual innovation. In the relevant literature, it is argued that copyright exceptions that facilitate 'transformative' or 'productive' uses of copyrighted works should be ranked above all the other exceptions.<sup>114</sup> Keeping transformative uses distinct from non-transformative (i.e. consumptive) uses helps identify the justification or rationale underlying each copyright exception. Exceptions that allow transformative uses must be considered to be more important than those that enable mere reproductive (and hence 'non-transformative') uses because only the former promote the creation of competing works by

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<sup>114</sup> See Senftleben (2004), *Copyright, Limitations and the Three-Step Test. An Analysis of the three-Step Test in International and EC Copyright Law*, The Hague: Kluwer Law International, p. 39; Heide (2003), *Copyright, Contract and the Legal Protection of Technological Measures – Not “the Old Fashioned Way”: Providing a Rationale to the “Copyright Exceptions Interface”* (www.ssrn.com). The distinction between transformative and non-transformative uses is used here in a merely descriptive way. In short, transformative use takes place when the user creates a new work incorporating an earlier one into it. Derivative works, such as caricatures, parodies, and pastiches, as well as uses such as quotations for teaching, criticism and scientific research, exemplify transformative use. In contrast, non-transformative use takes place when the user accesses the work without embedding it into a new creation. Non-transformative use includes activities such as reading, watching, listening to, and copying for purposes of entertainment, private study, information and communication.

leaving follow-on users free to share ideas or parts of pre-existing works.<sup>115</sup> This conclusion is ultimately grounded in the constitutional protection of freedom of expression, which guarantees public access to quotations and enables other transformative uses of copyrighted works, like caricatures, parodies and pastiches.

By permitting certain transformative uses without the authorisation of the copyright owner, certain exceptions built into copyright laws protect and encourage freedom of expression ensuring that new generations of creators have the opportunity to build upon pre-existing stocks of works still protected by copyright. The assumption is that intellectual creation, as a fruit of human intellect, is a *cumulative* process that requires an author to permit follow-on creators to use and enjoy the fruit of his or her labour in the same way as he or she was allowed to access already existing works.<sup>116</sup>

By opening up new scenarios for uses of copyrighted works, the advent and the very fast development of the digital environment have considerably strengthened the need for society to have an effective system of copyright exceptions that can preserve online the constitutional values that have traditionally been protected offline. Unfortunately, EU law- and policy-makers did not pursue this objective when drafting and discussing the provisions of the Information Society Directive in the late 1990s.<sup>117</sup>

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<sup>115</sup> See Heide, *Copyright, Contract and the Legal Protection of Technological Measures*, op. cit., p. 2. Nonetheless, the importance of non-transformative uses should never be underestimated if one considers that the creation of new works of authorship would never be possible without the opportunity of engaging in uses of works (i.e. personal use for the purpose of private study) which serve as an indispensable source of inspiration and information for contemporary authors and end-users wishing to become new creators.

<sup>116</sup> See Senftleben, *Copyright, Limitations and the Three-Step Test*, op. cit., p. 38, who describes this requirement as 'intergenerational equity', a concept based on the idea that intellectual creation is a public good which cannot be depleted and which is constantly renewed by new ideas and forms of expression. On this assumption the author argues that it is highly desirable, in order to promote scientific and cultural progress, for transformative and non-transformative uses of works of the intellect to be able to draw upon more than just the public domain, which is formed by all the pre-existing ideas and works of former authors which are unprotected (either because of the non-eligibility of mere ideas for copyright protection, or due to the expiration of the term of protection of the copyrighted material in question). To a certain extent, this opportunity should also concern works of contemporary authors who still enjoy copyright protection.

<sup>117</sup> At that time, the primary objective of harmonisation was the elimination of the negative effects that the existing differences in protection between member states would have had on the internal market for copyrighted goods. The new digital environment, in particular, was

EU law-makers were mostly worried about the increased economic impact that exceptions might have had in the context of the new digital environment. For that reason, they acknowledged in the Directive's preamble that the scope of certain exceptions could have to be even more limited when it comes to certain new uses of copyright works.<sup>118</sup>

At that time, the European Convention on Human Rights did not bind EU secondary legislation, as it will do after the upcoming formal accession of the EU to the Convention.<sup>119</sup> With the entry into force of the Treaty of Lisbon on 1 December 2009, the new version of Article 6 of the Treaty on European Union formally recognises the constitutional value of protection of human rights, providing that the freedoms and principles set out in the Charter of Fundamental Rights of the European Union should have the same legal value as the EU Treaties.<sup>120</sup> If this had been the EU legislative framework at the time when the Information Society Directive was drafted, the legal treatment of copyright exceptions would probably have been more consistent and would have ensured higher consideration for exceptions protecting and enhancing freedom of expression.

It was briefly recalled above that, as things stand, EU law raises no distinction between major and minor exceptions and restricts member states from enacting new exceptions. In addition, the Information Society Directive provides no interface between copyright protection, contracts and measures of technological protection (e.g. Digital Rights Management systems) having the potential to restrict uses permitted by law, both legally and technically. The only attempt that the Directive made in this regard was that of obliging member states to monitor the conduct of copyright holders and to take appropriate measures in order to ensure that a limited

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understood as making such differences “more pronounced in view of the further development of transborder exploitation of works and cross-border activities [...]”: see Recital 31 of the Information Society Directive. As pointed out in the relevant literature, had the Directive been consistent with this objective, harmonisation measures could only have been taken when there was plain evidence that these discrepancies would affect intra-Community trade: see Cornish and Llewelyn (2005), *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*, London: Sweet & Maxwell, p. 441.

<sup>118</sup> See Recital 44 of the Information Society Directive.

<sup>119</sup> See Art. 6(2) TEU.

<sup>120</sup> See Art. 6(1) TEU.

number of exceptions can be exercised effectively, in spite of the implementation of technologies such as DRMs.<sup>121</sup>

### 3.4.2 *Uncertainties concerning the automated processing of digital works*

To understand why the current legal treatment of copyright exceptions at EU level raises so many uncertainties and problems in today's digital environment one should start by considering that the harmonised right of digital reproduction is so broadly defined as to cover all forms of copying, including temporary copying, and then use of digital works. The sole mandatory exemption at EU level is granted to acts of copying occurring for the purpose of enabling i) mere transmission of copyrighted materials between third parties by an intermediary and ii) a lawful use of protected content.<sup>122</sup> This means that, unless one of the optional types of exceptions listed under Art. 5 of the Information Society Directive proves to be applicable in a certain member state, whatever unauthorised use of copyrighted digital materials falls within the copyright scope, and requires a license in order to be lawful.

During the Task Force debate, participants widely agreed that, to a large extent, blocking and/or excessively restrictive effects in online content communications stemming from the very broad scope of the right of digital reproduction (and from the little room granted to exceptions) were somehow mitigated by the implementation of 'notice-and-takedown'

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<sup>121</sup> Art. 6(4) of the Information Society Directive creates safety nets for copyright exceptions against DRMs. This complex provision establishes obligations for member states to make it sure that certain exceptions can be effectively exercised notwithstanding the legal protection of technological measures. EU member states are required to promote the adoption of voluntary measures by rights-holders and to monitor and diligently evaluate whether and how such measures are implemented. As a subsidiary obligation, member states should intervene with appropriate measures when copyright holders fail to provide effective means enabling beneficiaries to engage in acts permitted by law. The field of application of this mechanism is restricted to a closed number of exceptions having no connection with each other: photocopying, quotations for teaching and scientific purposes, uses for the benefit of people with a disability, acts of copying by libraries, educational establishments or museums, ephemeral recordings made by broadcasters and copies of broadcasts made by non-commercial social institutions. The scope of application of the above-mentioned safety nets is made even narrower by the last provision of Art. 6(4), which makes the mechanism non-applicable to digital works made available on-demand. For a more detailed analysis, see Mazziotti, *EU Digital Copyright Law and the End-User*, op. cit., pp. 94-100.

<sup>122</sup> See Art. 5(1) of the Information Society Directive and note [9292](#).

procedures, as a result of the safe harbour provisions embodied in the 2000 Electronic Commerce Directive.<sup>123</sup> Representatives of online intermediaries and search engine operators acknowledged that the creation of liability exemptions for ISPs, as a mandatory measure of electronic communication policy in the whole EU territory, has had a relevant impact in the Internal Market by facilitating the setting up of online content services and making the conditions under which unauthorised content should be removed after a notice of the copyright holder uniform in all EU jurisdictions.

Whenever the above-mentioned EU-wide liability exemptions or local exceptions prove to be inapplicable, any unauthorised uses of copyright works inevitably falls within copyright's scope. From a legal point of view, this means that any act of such reproductions and/or communications requires a licence from the copyright holder. In practical terms, this means that, in the absence of applicable exceptions, a search engine operator or an online news aggregator would need a license in order to legitimately display picture thumbnails or text snippets in the supply of their services to the public. The German Federal Supreme Court indirectly upheld this conclusion in a well-known case concerning the lawfulness of unauthorised reproduction and making available to the public of copyright protected pictures in thumbnail form by Google's image search engine.<sup>124</sup> After having found that the quotation exception, as shaped under German copyright law, could not cover this kind of use, the Court applied the doctrine of 'implied consent' in order to find Google not liable of copyright infringement. The judgment found that the copyright owner had implicitly authorised the use of her protected pictures in the search engine service by making her works available online without applying technical means blocking the automatic indexing and displaying of online content by search engines.<sup>125</sup> As persuasively pointed out in the literature, this case is a very good example of how national courts constrained by a closed system of exceptions at EU level look for flexibilities outside the copyright field.<sup>126</sup>

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<sup>123</sup> Articles 13 and 14 of the Electronic Commerce Directive provide that ISPs engaging in caching and hosting activities are liable only if, while having gained actual knowledge of transmission of unlawful information over their networks, fail to remove expeditiously or disable access to unlawful information.

<sup>124</sup> Bundesgerichtshof (Federal Court of Justice), case I ZR 69/08, 29 April 2010, pp. 14-15.

<sup>125</sup> *Ibid.*, pp. 15-19.

<sup>126</sup> See Hugenholtz and Senftleben, *Fair Use in Europe*, *op. cit.*, p. 12.

As things stand, in many EU jurisdictions it is very uncertain whether or not acts of automated data processing of digital works performed by machines can take advantage of any copyright exceptions. Uncertainties are even greater with regard to the automated processing of copyright works that machines undertake to the benefit of machines, for uses that are not addressed to (and intelligible) to humans. An excellent example is given, in the context of large-scale book digitisation projects, by so-called ‘non-display’ uses of literary works. It is still uncertain whether the unauthorised scanning and digitisation of literary works which are not displayed to users but are merely used for purposes of data mining<sup>127</sup> and text-mining<sup>128</sup> infringe copyright or not.

Interestingly, data mining for scientific research purposes is one of the themes that have been discussed in the platform for stakeholder dialogue (“Licences for Europe”) that the European Commission launched in January 2013 after its Communication on *Content in the Digital Single Market* of 18 December 2012. The official premise is that data mining requires a copyright licence (i.e. an additional licence on top of the licence to access the copyright works). Unlike the UK Intellectual Property Office in its reform plan for modernisation of copyright, the European Commission is not considering (at least for now) the possible adoption of an exception to copyright that would permit the use of the analytics for non-commercial research. As things stand, the Commission does not intend to go beyond the exploration of standard licensing models that can facilitate access to, and use of, data. This means that data mining falls *prima facie* within the scope of copyright protection. If that held true, copyright would inevitably extend to facts and data embodied in the copyright works (e.g. scientific journal articles) that technologies used by researchers have to copy in large quantities in order to be able to analyse patterns, trends and other useful information. These bulk copies are deemed to be infringing if they are made without the specific authorisation of copyright holders and

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<sup>127</sup> ‘Data-mining’ is normally referred to as the extraction of implicit, previously unknown, and potentially useful information from data. Data-mining is in many ways conceptually similar to ‘reading’ and ‘research’. It is a way for software to perform tasks such as reading, comparing and analysing large quantities of data in order to draw conclusions. It has become a ‘copyright suspect’ since the above-mentioned tasks are achieved through technology.

<sup>128</sup> “Text-mining’ indicates finding structural patterns in texts, extracting information out of these patterns and combining them with data on the use of work like data on works search and access.

academic publishers, who claim to have received a very few requests for such licences. Infringements are likely to occur also if licenses granting access to research materials explicitly exclude text and data mining from their subject matter. Newspaper publishers emphasised that text- and data-mining is already happening for subscribed content for non-commercial-use (without charge to the users) subject to some basic conditions. Furthermore, publishers stressed that access to subscribed content is being facilitated, often by re-packaging content in easily mined formats in order to enable consistent search results without technical barriers that might otherwise occur if researchers sought to mine data directly on the publishers' servers. What is crucial in this area for publishers is that any activity of text- and data-mining is carried out in a way that ensures that the database infrastructure and quality are maintained. Additionally, both book and newspaper publishers pointed out that they are currently working within the 'Licences for Europe' initiative on a model clause for licences in the area of subscribed content in order to streamline this process still further.

In this regard, it is certainly worth exploring, as the European Commission has been doing, whether or not licensing practices can develop and become beneficial to both rights-holders and non-commercial re-users of scientific research materials. However, in consideration of the socially valuable character of these uses, EU law-makers might consider exempting this particular form of copying from copyright's scope through a specific exception or through a 'flexibility clause' that would place national courts in a position to draw flexibly on requirements of fairness like the ones embodied in the three-step test. At the end of the day, there are important precedents under EU copyright law that show that certain types of reproduction of copyrighted content should be exempted in mandatory way in order to effectively achieve socially valuable goals and pursue objectives that are in conflict with absolute copyright protection. The EU Software Directive is the best example in this respect in so far as it obliges member states to restrict the right of reproduction on computer programs by granting lawful acquirers of a copy of the computer program a number of contractually non-waivable rights of use ensuring consumer protection, freedom of research and study, and openness and competition in the downstream markets for interoperable computer programs that third

parties independently create.<sup>129</sup> If EU law-makers wished to amend the Information Society Directive on the legal treatment and on the status of the most important and valuable exceptions, hence, they would have an easy-to-follow example, i.e. the Directive that, in 1991, harmonised national copyright rules in Europe with specific regard to the very first type of information good.

### 3.5 Boundaries of the private copying exception under EU law

The Internal Market distortions created by the implementation of private copying exceptions at national level, and the European Commission's plan to intervene in this area somehow, led the Task Force participants to a discussion about the boundaries of this type of exception under EU law. In particular, the debate focused on the kinds of copying that should trigger the application of levies, on how levies will have to be calculated and how a higher degree of efficiency and transparency can be ensured and on whether or not levies remain a desirable tool to subsidise creativity. Participants also addressed the issue of whether levy systems might be replaced by national funds in the close future. This section will give an overview of the debate after having briefly recalled how the Information Society Directive deals with private copying.

#### 3.5.1 *The current legal treatment of private copying at EU level*

The Information Society Directive defines private copying as copying made by “ [...] a natural person and for ends that are neither directly nor indirectly commercial, on condition that the rights-holders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned [...]”.<sup>130</sup>

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<sup>129</sup> See the Software Directive. The non-waivable rights of use created by the Software Directive are the following: i) the right to make a back-up copy of the program (see Art. 5(2)); ii) the right to observe, study or test the functioning of the programme in order to determine the ideas and principles which underlie any element of the program (see Art. 5(3)); and iii) the right to reproduce the source code of the program and to translate its form when these acts are indispensable to obtain the information necessary to achieve the interoperability of an independently created program with other programs (i.e. the so-called ‘decompilation’ or ‘reverse engineering’ of computer programs; see Art. 6(1)).

<sup>130</sup> See Art. 5(2)(b) of the Information Society Directive.

As a result of this provision, EU member states are entitled to set out an exception to an exclusive right (i.e. the right of reproduction) that would otherwise extend to private use of copyright work. Nonetheless, the Directive gives member states the option of freely estimating the desirability of declassifying the exclusive right to authorise private copying into a statutory license, on condition that this declassification is accompanied by fair compensation in favour of rights-holders, and that the level of such compensation takes account of the presence and operation of technological measures.<sup>131</sup>

The provision at issue has two important implications. On the one hand, it actually enables member states to maintain or introduce so-called levy systems even in digital settings. Member states are thereby given the option of determining the form, the detailed arrangement and the possible level of fair compensation, on condition that they carefully evaluate, among other circumstances, whether private copying causes minimal harm to right holders or not.<sup>132</sup> On the other hand, Article 5(2)(b) provides that, if compensation schemes are *not* maintained or newly introduced, member states must ensure the phasing-out of levies as long as technological measures such as DRM systems effectively control and enforce the private use and copying of protected materials.

A few years after the enactment of the Information Society Directive, it had already become clear that there was no common ground on how member states had implemented the provision of Article 5(2)(b) of the Directive.<sup>133</sup> After holding a consultation with member states and all stakeholders in October 2004, the European Commission's Internal Market Directorate General disclosed the intention of intervening in the complex interplay created by the implementation of DRM technologies and the proliferation of national levies on digital copying equipment and digital media.<sup>134</sup> According to the Roadmap document regarding a possible

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<sup>131</sup> See the Information Society Directive, Recital 35, *in fine*.

<sup>132</sup> *Ibid.*, Recital 35.

<sup>133</sup> See the speech given by Charles McCreevy (European Commissioner for Internal Market and Services), *Address to the European-American Business Council/Business Software Alliance Conference on Digital Rights' Management*, High level Industry Seminar/Global Industry Roundtable on Levies and DRMs, Brussels, 12 October 2005 ([http://ec.europa.eu/internal\\_market/copyright/copyright-info/copyright-info\\_en.htm](http://ec.europa.eu/internal_market/copyright/copyright-info/copyright-info_en.htm)).

<sup>134</sup> See Commission of the European Communities, Copyright levy reform, Commission's Work Programme for 2006 – Roadmap.

copyright levy reform in the EU delivered by the Commission in 2006, the above consultation evidenced that levies were unequally applied in terms of equipment, media and amounts across EU member states, and that there was a lack of transparency in relation to their collection and distribution.

From then onwards the European Commission has undertaken a number of initiatives and consultations with stakeholders seeking to tackle the heavy distortions created in the Internal Market by an unequal and not sufficiently efficient and transparent application of levies. Drawing on the achievements of a draft Memorandum of Understanding developed through the intermediation of the Commission in 2009, a mediation process on copyright levies launched in April 2012 sought to boost a stakeholders agreement on outstanding critical issues (see §3.6 below).

### 3.5.2 *What types of copying should trigger the application of levies?*

Copyright levies are applied in 22 out of 27 member states on blank media and recording devices.<sup>135</sup> Levy systems make it possible for authors and other categories of rights-holders (i.e. publishers, music performers and actors, recording and film producers) to obtain fair remuneration for unauthorised copying of their works while respecting consumer privacy and ensuring legal certainty for personal use. In addition, as stressed by copyright holders, levies are and should remain anchored to a market failure rationale, and should therefore be implemented just when licensing proves to be either impossible or economically unviable. This should also mean, for a matter of logic and consistency within the levy system, that for the types of copying that fall within a statutory licence, and subsequently trigger the application of levies, licensing should not be allowed and cannot become an alternative to levies (otherwise the consumer would end up paying twice). The Information Society Directive indirectly upholds this conclusion by obliging EU member states to take account of the application (or non-application) of DRM systems (and hence of existing licensing schemes) in determining whether or not levies should apply.<sup>136</sup>

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<sup>135</sup> It is worth noting that the UK, Ireland, Luxembourg, Malta and Cyprus are the only member states of the European Union where levy systems have never existed. Annex I provides three tables showing retail prices for i) printers, ii) music/video/game devices and iii) tablet computers in 20 countries against levy and VAT rates.

<sup>136</sup> See Art. 5(2)(b). Music publishers emphasised that if DRMs had been standardised and developed in order to ensure interoperability these systems might have been accepted by

The inclusion of types of copying in the scope of the statutory licensing schemes accompanied by levies should be assessed on the grounds of certain elements (or requirements) that Task Force participants took into consideration. The purpose of the debate was not only that of clarifying what the scope of private copying currently is, but also suggesting how the above-mentioned requirements could be harmonised and made uniformly applicable in those EU countries that decide to keep or introduce a private copying exception.

As we have seen, under the Information Society Directive the requirement of fair compensation is a condition for the application of private copying, unless harm caused by unauthorised copying proves to be minimal. It was persuasively argued in the discussion that a common definition of ‘harm’ and of the equal conditions under which rights-holders should receive fair remuneration for the harm they suffer from copying is currently missing at EU level and this gap should preferably be filled, if the Directive were amended in the future.

The CJEU recently held that the concept of fair compensation, within the meaning of Article 5(2)(b) of the Information Society Directive, is an autonomous concept of EU law which must be interpreted uniformly in all the member states that have introduced a private copying exception, irrespective of the power conferred on the member states to determine, within the limits imposed by EU law in particular by that Directive, the form, detailed arrangements for financing and collection, and the level of that fair compensation.<sup>137</sup> Unfortunately, in that occasion the CJEU did not have the opportunity to extend this clarification to the kind of losses that should be compensated through fair compensation. In *Padawan v. SGAE* the CJEU merely held that fair compensation should be calculated on the grounds of the criterion of the harm caused to authors of protected works by the introduction of the private copying exception.<sup>138</sup>

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consumers, with the consequence that private copying could have been made subject to licensing and levies might have eventually been phased out (as foreseen under Art. 5(2)(b) of the 2001 Information Society Directive). However, this situation has never materialised and, with the proliferation of unauthorised digital copying, all categories of copyright holders believe that levies should be increased in order to adapt them to the increased harm suffered by rights-holders.

<sup>137</sup> C-467/08 *Padawan SL v. Sociedad General Autores y Editores de Espana (SGAE)*, 21 October 2010, [hereinafter *Padawan SL v. SGAE* ], paras. 33-37.

<sup>138</sup> *Padawan SL v. SGAE*, paras. 39-42.

As independent experts stressed in the Task Force debate, a correct interpretation of the Directive suggests that ‘harm’ should be seen as an unreasonable prejudice leading to an intolerable loss of income for rights-holders. This means that what causes harm to rights-holders can be either a missed licensing opportunity and/or a loss in sales. On these grounds, not all types of private copying necessarily cause harm to rights-holders. Only some kinds of copying should trigger the application of levies (or other fair compensation systems). Looking at the benchmark of the three-step test (and in particular at its third requirement) law-makers and national courts should always consider that fair compensation which accompanies the exception of private copying has traditionally been deemed to make reasonable the potentially unreasonable prejudice caused to copyright holders. This means that, to a certain extent, the fact that unauthorised private copying might cause prejudice or harm to rights-holders should be tolerated. At the same time, the evaluation of the economic impact of private copying on the licensing or sale opportunities of the copyright work should take into consideration that the consumer willingness to pay for the making of subsequent copies for personal uses diminishes progressively (and significantly), and a few of such copies cannot be expected to be remunerated. In this regard, consumer advocates added that a *de minimis* rule could be introduced under EU law in order to ensure exclusion from the scope of levy systems of forms of private copying such as back-up copies, format conversion, and private storage.

In the *Padawan* case, the CJEU recently clarified the contours of another requirement of private copying, in the absence of which levies cannot be applied legitimately. This requirement consists of a necessary link between the application of the levy intended to finance fair compensation with respect to digital copying equipment, devices and media and the *deemed use* of such equipment and devices for purposes of private copying. On these grounds, the CJEU found that the indiscriminate application of private copying levies, in particular with respect to equipment, devices and media not made available to private users and clearly reserved for uses other than private copying (i.e. business and professional uses) is incompatible with the Information Society Directive.

Finally, copyright owners, and in particular film producers, emphasised the central role that the requirement of lawfulness of the source should play in determining the scope of levies. According to this criterion, legitimate private copying can only come from a legal source (i.e. a lawfully acquired copy of the work), otherwise the exception would not pass the three-step test (in particular the second step, which restricts uses in

conflict with the normal exploitation of the copyright work). Even though this requirement is not codified under EU law yet, it seems to clearly emerge from the existing legal framework and to restrict law-makers and national authorities from taking unlawful private copies (e.g. downloads from peer-to-peer networks) into consideration for the determination of the amounts of levies.

Interestingly, the fact that copyright works like films are successfully marketed in digitally copy-protected formats (e.g. DVD) makes legitimate private copying in this sector unlikely, since consumers would need to circumvent technical measures in order to be able to copy the work. It was argued that the Information Society Directive justifies the employment of adequate measures restricting the number of copies that consumers are entitled to make. However, the same Directive leaves national law-makers with the freedom to specifically preserve the making of digital copies for personal use from the potential override enabled by anti-copy measures.<sup>139</sup> If national law does not create a provision of this kind, the implementation of measures of technical protection prevails on the enforcement of the (unprotected) exception, with the consequence that no copyright levy can be charged legitimately (otherwise there would be an abusive double payment).<sup>140</sup> The inevitable consequence of this principle is that lawful sources of legitimate private copying in the audio-visual sector tend to be confined to contexts where content is broadcasted through air and, now, over the Internet (i.e. webcasting).

### 3.5.3 *Methods of calculation, administration and transparency of levies*

A variety of fair compensation systems exists in Europe (mainly levies, but also state subsidies and budget allotments) which are very different in terms of methods of application, way of calculation, possible level of fair compensation, and so on.<sup>141</sup> The Task Force participants unanimously

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<sup>139</sup> See Art. 6(4)(4) of the Information Society Directive.

<sup>140</sup> This was the conclusion of the French Supreme Court (*Cour de Cassation*) in *Société Studio Canal et autres c. Perquin et UFC Que Choisir*, judgment of 28 February 2006 (available in French at <http://legalis.net>). At the end of the day, this is also what Recital 39 of the Information Society Directive foresaw: “[...] exceptions and limitations should not inhibit the use of technological measures or their enforcement against circumvention.”

<sup>141</sup> Annex I provides tables with useful examples.

agreed that common principles would be required in order to harmonise these systems.

Original rights-holders (i.e. music and audio-visual authors, music performers and actors) claimed that the current system of private copying remuneration is well established and should be the starting point for further improvements. Authors and performers, in particular, emphasised the importance of levies as a substantial part of their earnings (i.e. 5% of the earnings of authors and 35% for performers<sup>142</sup> in Europe, on average). Earnings coming from levy systems are particularly relevant for individual creators and performers since their respective rights to remuneration cannot be validly relinquished or transferred through contract under national laws and, consequently, constitute a guaranteed source of income for them.<sup>143</sup> According to individual creators in both the music and audio-visual sectors, charging levies on new devices is playing a pivotal role to ensure fair compensation, due to the speed of technological change.

This extension of levies requires negotiations and agreements with device manufacturers who often started lawsuits to avoid or postpone payments. Therefore, a harmonised and improved system would work to the benefit of both manufacturers and copyright holders since it would ensure higher predictability (avoiding litigation and its costs) and a faster implementation of new levies.

All the beneficiaries of levies, including music publishers, advocated that EU harmonisation should address issues such as a faster adaptation of

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<sup>142</sup> See AEPO-ARTIS (2009), *Performers' Rights in European Legislation: Situation and Elements for Improvement - Updated Version* ([www.aepo-artis.org/usr/AEPO-ARTIS%20study%202009/AEPO-ARTIS%20Study%20Update\\_200912.pdf](http://www.aepo-artis.org/usr/AEPO-ARTIS%20study%202009/AEPO-ARTIS%20Study%20Update_200912.pdf)).

<sup>143</sup> In the music sector, the fact that levies stem from the enforcement of a non-waivable right to remuneration raises an unsettled dispute between authors and performers, on the one hand, and publishers and record companies, on the other hand, about the legitimacy of licensing practices targeting digital private copying. Authors and performers claim that the private copying exception should cover all copying activities undertaken by the consumer in his or her private sphere (once he or she has acquired a lawful copy of the work) and levies should be calculated on the grounds of such use. Music publishers and record companies, instead, advocate their freedom to license more than one copy to service providers of digital content wishing to enable their customers to legitimately bring and store the acquired content on more than one device. This disagreement can be easily explained in economic terms since authors and (to a greater extent) performers, after having transferred their rights to content exploiters, do not have an interest in licensing subsequent private copies that do not bring additional royalties to them, whereas they do receive a legally guaranteed income from (supposedly higher) private copying levies.

levies to new devices and media, a clear and common methodology for tariff definition, increased transparency and quicker negotiations with manufacturers. Copyright holders concluded that EU harmonisation of certain aspects of levy systems is necessary to improve their functioning and to adapt them in order to make them fit for the EU Digital Single Market.

The issue of lack of efficiency and transparency of existing levy systems was raised by information technology, telecoms and consumer electronics companies, consumer representatives and also by certain beneficiaries of levies such as music publishers. In different ways, all of them targeted the excessively high administrative costs raised by the (statutory) interposition of authors' collecting societies in the activities of collection, distribution and use of levies (e.g. for the funding of cultural projects and for the social protection of authors).

In particular, companies manufacturing hardware and devices, which are currently liable to finance the fair compensation system (while being able to transfer the actual burden of funding it to private users), raised major complaints against today's administration of levy systems. These companies stressed that, pending distribution, intermediaries (i.e. collecting societies) end up keeping substantial amounts of rights-holders' money. For instance, in 2010 major societies had accumulated €3.6 billion worth of liabilities to rights-holders and were managing €3.7 billion worth of available funds.<sup>144</sup> Moreover, in countries like France, the interposition of an excessive number of intermediaries increases transaction costs dramatically, with the consequence that a large part of the levy revenues may be absorbed by the administration systems themselves, to the detriment of the rights-holders.<sup>145</sup>

For all these reasons, consumer electronics companies welcomed and strongly supported the obligations of transparency and reporting that the European Commission's proposed Directive on Collective Rights Management intends to create for the activities of collecting societies, including the ones regarding levies and the allocation of their revenues. It was argued that more competition between collecting societies, as a result

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<sup>144</sup> See European Commission (2012b), *Impact Assessment accompanying the Proposal on Collective Management*, SWD (2012) 204 final, Brussels, 11.07.2012, p. 19 (see the box named "Poor handling of collected royalties").

<sup>145</sup> See Commission permanente de contrôle de sociétés de perception et répartition des droits, *Huitième rapport annuel*, May 2011, Ch. 3, pp. 73-77.

of their freedoms to offer their services across borders and to represent rights-holders resident or established in other member states, will certainly improve the current picture of rights management also with regard to levies. However, what is still uncertain (and was not touched upon in the discussion) is whether and how collecting societies established and operating outside the (national) territory of collection of levies, and wishing to apply their own national requirements, will be allowed to enter a business that the law often reserves to local societies and regulates heavily.<sup>146</sup>

Also consumer advocates complained that levy systems are not sufficiently transparent. They not only agreed that the methods of application and ways of calculation, collection and distribution of levies are not uniform at all in the various EU member states, and are also very unclear. They also stressed that consumers are usually unaware of these charges and of the underlying statutory license allowing copying for personal uses. To solve this problem, a good idea might be that of making levies visible for consumers, obliging retailers to provide buyers of copyright equipment, devices and media with receipts where the levy amount is clearly displayed and explained (shortly).

A final problem that was discussed, and that the CJEU recently solved in the *Opus* case, concerned the avoidance of double payments in cross-border sales, where both the importing and the exporting countries charge a levy on the same device or medium.<sup>147</sup> The CJEU held that the levy chargeable to the manufacturer or importer of the device or medium should be charged only in the country of residence of the consumer, regardless of whether the commercial seller of copying equipment (in that case it was a distance seller operating online) is established in another member state. The court's reasoning was based on the assumption that the levy should be viewed as a form of recompense for the harm suffered by the author for unauthorised private copying and is ultimately due by the person causing the harm, i.e. the consumer. As a result, the damage that the

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<sup>146</sup> Consumer electronics companies stressed the potential impact on levy systems of the application of the 2006 Services Directive to collecting societies, to be understood as service providers. If the Directive effectively applied to collecting societies, they should merely comply with their own national requirements while offering their services on a cross-border basis (see footnote 40).

<sup>147</sup> C-462/09 *Stichting de ThuisKopie v. Opus Supplies Deutschland GmbH*, 16 June 2011, [hereinafter *Opus*].

levy seeks to repair should be deemed to take place where the consumer resides (and not where the distance seller operates).

### ***3.5.4 Do levies remain a desirable tool to subsidise creativity at national level? Can levies be replaced by national funds?***

Authors and other categories of rights-holders took advantage of the discussion to point out that levies are still a very good tool to subsidise creativity in so far as they provide an important source of income to individual creators and the creative sector more in general. Furthermore, rights-holders remarked that levies have a positive effect on the development and on the economic sustainability of cultural projects and their revenues are useful for the social protection of authors.

Consumer electronics companies, instead, replied that hardware-based levies are no longer desirable since new models of content distribution are developing rapidly and Cloud computing is revolutionising consumers' copying habits. Hardware and device manufacturers advocated the implementation of alternative forms of fair compensation that would guarantee rights-holder revenues in the long run and a well-functioning ecosystem for creativity.

From an economics-based perspective, available data show that levies clearly have non-negligible subsidising effects for creators and the ability of devices and media to copy and store music is an important added value that consumers associate to the price of these products.<sup>148</sup> More uncertain, instead, is the effect of levies on prices of devices and media, which in several cases do not seem to be influenced by the level of compensation of rights-holders.<sup>149</sup> As explained in the relevant literature, the extent to which it is profit maximising for manufacturers of copying devices and media to pass on copyright levies to consumers (rather than absorb the costs) depends on several factors that might change from one market to another (i.e. degree of competition, elasticity of demand and whether or not levies

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<sup>148</sup> For instance, 26% of the UK population listens to music stored on mobile phones, and this percentage increases dramatically with young or very young users (i.e. 40% for people in the age range from 25 to 34 years and 56% in the age range from 16 and 24 years): see Harris Interactive, 'Fast forward, Waves 6 to 8', October 2010, at p. 19. In France, for example, music represents approximately 21% of the content storage in memory cards for multi-functional devices: see P. Lorenzo, J. Padilla, A. Requejo, *The welfare effects of private copying levies*, Compass Lexecon, February 2012 (<http://saa-authors.eu>) p. 11.

<sup>149</sup> See Annex I.

are applied uniformly to all manufacturers).<sup>150</sup> This means that the extent of ‘pass-on’ is difficult to estimate, unless levies are added explicitly on the retail price (as prescribed only in Belgium).<sup>151</sup>

As regards the possible replacement of levies with state funds, the creative sector in general clearly expressed its negative opinion, holding that state funds and other alternative system have proven to be inadequate, having resulted (for instance in Spain) in dramatic losses for the copyright holders. Creators clearly advocated that levies should continue to be paid by the end-users who copy protected works, through the interposition of those who make copying equipment and devices available to them. Audio-visual authors, more specifically, asserted that alternative systems based on general taxation are inadequate to compensate rights-holders, do not normally result in decrease of prices for devices and media, while merely increasing profits for manufacturers and importers of such media.<sup>152</sup> Consumer electronics companies and consumer advocates replied that the idea of fair compensation ensured through state subsidies should not be rejected as such, if the new system relied on an estimation of the real economic harm suffered by rights-holders.

Not surprisingly, studies commissioned by interest groups or stakeholders reach very different conclusions about the welfare effects and desirability of levies. A study commissioned by Nokia found that the policy option of removing copyright levies would lead to gains for everyone.<sup>153</sup> Taking into account current and future dynamics in the market, this study argues that, with the removal of levies, consumers would buy more devices at lower prices and would consume more digital content. Device manufacturers would be better off since they would sell more devices and would have greater incentives to take part in new business models for

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<sup>150</sup> See M. Kretschmer (2011), *Private Copying and Fair Compensation: An empirical study of copyright levies in Europe*, study commissioned by the UK Intellectual Property Office (IPO), p. 17 (<http://ipo.gov.uk/ipresearch-faircomp-full-201110.pdf>).

<sup>151</sup> Ibid.

<sup>152</sup> See *The impact of the elimination of fair compensation for private copying after the entry into force of Royal Decree-Act 20/2011 of 30<sup>th</sup> December* (on file with the author), embodying a retail price chart carried out by EGEDA (i.e. collecting society of audio-visual producers in Spain) that evidences a low impact of the elimination of levies on retail prices of copying devices and media.

<sup>153</sup> See Oxera, *Is there a case for copyright levies? An economic impact analysis*, study commissioned by Nokia, April 2011 (<http://oxera.com>).

distributing content. Rights-holders would also benefit from such a removal since, with the predictable growth of digital content sales and with the development of new business models, they would be able to extract effective compensation from their works. Embracing a different economic model, a study commissioned by a group of copyright holder representatives openly contested the aforementioned findings arguing that the removal of levies would make both copyright holders and device manufacturers worse off.<sup>154</sup> As regards content creators, the removal of levies would reduce their incentives to produce new, high quality content and would deprive them of the revenue generated by the levy systems. Manufacturers might gain financially from an increase in sales of their products in the short term; however, in the long term their products might become commercially less appealing since, without the incentives provided by levies, there would be much less high quality content to copy. In this picture, consumers might gain in the short term because of the decrease of prices of devices but in the long run might be worse off since because of less investment in content and a lower availability of creative works.

Considering the aforementioned uncertainties, a fully independent and economics-based study on the welfare effects of levies and on their influence on retail prices seems necessary. The European Commission has the resources and the expertise to undertake this kind of study before taking any decisions on whether and how to propose new legislation in this complicated field.

### **3.6 The European Commission's mediation process and its final recommendations**

In conclusion of the debate on private copying levies, the Task Force participants discussed the European Commission's mediation process launched in April 2012 with EU policy-makers. After having recalled the main challenges that a fast-changing digital environment poses to levy systems in EU member states, a representative of the Internal Market Directorate General of the Commission stressed that a mediation process on the legal treatment of levies was necessary at a time when the debate among stakeholders on how to adjust and harmonise these systems at EU

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<sup>154</sup> See P. Lorenzo, J. Padilla, A. Requejo, *The welfare effects of private copying levies*, study commissioned to Compass Lexecon by AEPO-ARTIS, EUROCOPYA, GESAC, IFPI, IMPALA and SAA, February 2012 (<http://saa-authors.eu>).

level had become increasingly more difficult. As EU policy-makers put it, the willingness of stakeholders to discuss about levies after having failed to reach an agreement on a Memorandum of Understanding brokered by the Commission in 2009 was gone. From what the discussion revealed, the European Commission still does not know whether and how it will propose legislation in this field.

Even though at the time of the Task Force discussion the mediation report by Antonio Vitorino was not publicly disclosed yet (and it would actually fall outside the scope of this work) it seems worth providing an overview of his achievements and a brief comment on his policy recommendations.

### 3.6.1 *Achievements of the mediation process*

The decision to appoint a mediator with the task of exploring possible solutions to critical issues of European levy systems was announced in a communication of the Commission of 24 May 2011 entitled “A Single Market for Intellectual Property Rights - Boosting Creativity and innovation to provide economic growth, high quality jobs, and first class products and services in Europe”.<sup>155</sup> The main issues that the mediator was asked to examine concerned the harmonisation of methodology used to impose levies, improvements in their administration (especially with regard to the type of equipment that should be subject to levies), the setting of tariff rates and the interoperability of the various national systems in light of the cross-border effects that disparate levy systems have on the Internal Market.<sup>156</sup>

As the mediator openly acknowledged in his report, the interests at stake proved to be conflicting and prevented stakeholders from exploring common ground.<sup>157</sup> The mediation process took place at a time when several cases were still pending before the CJEU and a few EU member states had just decided to implement alternative forms of remuneration for rights-holders. At the same time, CJEU judgments like *Padawan* and *Opus* had already provided important clarifications on outstanding critical

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<sup>155</sup> See *A Single Market for Intellectual Property Rights*.

<sup>156</sup> *Ibid.*, pp. 12-13.

<sup>157</sup> See A. Vitorino, *Recommendations resulting from the mediation on private copying and reprography levies*, Brussels, 31 January 2013 ([http://ec.europa.eu/internal\\_market/copyright/docs/levy\\_reform/130131\\_levies-vitorino-recommendations\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/levy_reform/130131_levies-vitorino-recommendations_en.pdf)).

issues, so that a few problems of interpretation of the existing legislation were already solved. Hence, in his report the mediator sought to merely facilitate and advance future discussions without envisaging or proposing any specific intervention of EU law-makers on levies.

After consultation with the stakeholders, the mediator reached the conclusion that today's developments in the markets for digital content do not justify a radical reform of levy systems yet. His report concluded that alternative compensation systems have been put forward but have not been sufficiently worked out in detail, so that the elimination of hardware-based levies in the immediate future cannot be recommended. What the mediator mentioned as a 'big bang' (i.e. the elimination of levies) does not seem advisable for now, in his view.<sup>158</sup> The report acknowledged that the recent development of new markets for digital content shows an increasingly relevant shift from ownership-based to access-based business models. However, due to the fast-changing character of new markets for digital content, it is impossible for policy-makers to predict how consumer preferences will evolve in the long term and whether or not unauthorised private copying will shrink, as a result of the increasingly wider room for licensed content services. In the current situation - the mediator concluded - it seems wise to maintain the existing system based on the link between the persons causing the harm and taking advantage of the exception (i.e. the consumers) and the persons who are currently liable to finance the fair compensation system. In doing so, the mediator repeatedly emphasised that one of the guiding principles should be avoiding forms of double payments through the imposition of a levy in cases where rights-holders already obtain compensation via licensing agreements covering the private copying of their works.

### ***3.6.2 Policy recommendations of the mediator***

The mediator accomplished his institutional task by making policy recommendations aimed at ensuring the greatest possible consistency, effectiveness and legitimacy of the existing levy systems. The recommendations touched upon issues that were discussed by the Task Force participants as well as additional issues having a significant impact on the functioning of levies, especially in cases of cross-border exploitation.

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<sup>158</sup> Ibid., p. 2.

The mediation final report is based on the assumption that, at a time when content can be delivered to consumers in the exact way they expect to receive it, licensing opportunities have become much wider for rights-holders and digital content providers. To boost the development of new and innovative business models, licensed copies should not trigger the application of levies in order to avoid double payments which consumers would not show any understanding for.

As far as the reconciliation of national levies with the objectives of the EU Internal Market is concerned, the mediator acknowledged that divergent levy systems have raised obstacles for the functioning of the Internal Market for long time and that widely varying tariff levels add to the problem. However, there are reasons for such disparities that are linked to different traditions and values that underlie member state cultural policies and to economic factors like different income *per capita*. The mediator recommends that member states should remain free to decide about whether or not a product is subject to a levy, following the clarifications concerning the 'leviability' of products that the CJEU provided in the *Padawan* case. He took the view that it would be difficult for EU law-makers to make such determinations, which would also run the risk of being burdensome and too rigid, and would need to be updated constantly. In addition, Vitorino pointed out that an individualised approach is eventually justified by the fact that, while choosing what products should be made subject to levies and what tariffs should apply, member states can more easily transpose and quantify the economic harm in a way that reflects the different purchasing power of the consumers residing in their own countries.<sup>159</sup>

In order to remove the most severe barriers in the Internal Market (in compliance with the principles of subsidiarity and proportionality) the mediator believes that several measures should be undertaken: i) the liability to pay levies should be shifted to the entity selling the levied products to consumers (i.e. the retailer); ii) levies should be made visible for the consumer and iii) more coherence should be placed into the process of setting levies. In particular, levies should be set out through a common EU-wide definition of 'harm' based on the criterion of lost profit and on the economic value that consumers attach to additional private copies, which can be estimated considering the consumer's progressively decreasing

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<sup>159</sup> Ibid., p. 10.

willingness to pay for these copies if there were no exception. Tariff-setting mechanisms should also rely on a procedural framework aimed at reducing complexity (e.g. through faster and smoother procedures where national authorities should not intervene unless it becomes evident that an agreement between the parties is impossible), guaranteeing objectiveness (e.g. avoiding retroactive application of levies), and ensuring compliance with strict time limits (e.g. in case of introduction of a new product on the market, the decision as to the applicability of a levy on that product should be taken within one month following its introduction). In the above-mentioned context, iv) levies in cross-border transactions should only be collected in the member state where the end-user has her or his residence (as clarified by the CJEU in the *Opus* case). Moreover, the shift of the liability to pay levies from the level of manufacturers and importers to the retailer's level should be facilitated by v) simplifying the levy tariffs system and vi) obliging manufacturers and importers to inform collecting societies about their transactions concerning products subject to a levy.

Considering the limited scope of his mandate, the mediator envisioned a new model for national levy systems that would certainly improve the state of the art and would bring workable solutions to practical problems that have arisen so far in the implementation of levies on a wide and disparate variety of products across the EU. In particular, significant improvements would stem from shifting the liability to pay the levy from the manufacturer (or importer) level to the retailer's level. The recommended change would presuppose a drastic simplification of the applied tariffs, which should be reduced to a very limited number so as to give retailers the opportunity to reasonably handle this new task, together with that of providing customers with a receipt where the levy is visible. As a result of the shift, the mediator convincingly recommends that the previously liable persons (i.e. manufacturers and importers) should inform levy collectors (i.e. collecting societies) about their transactions concerning levied products in order to place collectors in a position to deal with and monitor a much bigger number of newly liable parties (i.e. retailers).

The mediator's report also embodies unconvincing recommendations showing an incomprehensible reluctance to embrace effective pan-European solutions, especially with regard to the non-harmonisation at EU level of the products (or classes of products) to be levied. The fact that economic harm and, as a result, the level of fair compensation should preferably mirror the different purchasing power of consumers in the various member states adopting levies has nothing to do with the identification of the products to levy. That is a policy goal that could still be

achieved by letting tariffs to be set at national level. At EU level, instead, the risk of a supposedly too burdensome mechanism of identification of the levied products could be easily avoided by entrusting a Directorate General of the Commission or another European administrative body with the task of making such EU-wide determinations and ensuring a periodical and technology-wise update of the list of levied products.

In conclusion, in spite of its valuable final recommendations, the mediation process does not seem to have achieved the expected results. As the mediator acknowledged openly, the attempt to reconcile stakeholders and to find common positions among them on the most critical issues concerning levy systems was as unsuccessful as the previous attempts in this field. Moreover, it is very unclear whether and how the Commission will be able to implement these recommendations before the expiration of its mandate in 2014. The recommendations indicate solutions in the abstract, without saying how they should concretely be implemented and by whom, i.e. at what level of legislation or regulation. This initiative was clearly weakened by an excessively narrow scope of the mediator's initial mandate (i.e. a mere mediation process involving stakeholders) and by his reluctance to explore opportunities for reform that would have required freedom to go beyond the boundaries of the existing legislative framework and of the case law that the CJEU has developed so far. The fact that a few relevant cases on levies are still pending before the CJEU certainly discouraged the mediator from accomplishing his task in a more open and forward-looking way. The most significant example of this excessively prudent and constrained approach is the mediator's full reliance on a judgment of the CJEU (i.e. *Padawan v. SGAE*) which actually sets out a very low standard for 'leviability' of products, making it possible that all equipment, devices and media that are technically capable of copying copyright works end up being subject to a levy. It is hard to believe that such a low standard, which might cause an increasingly higher proliferation of levies on different products in the various systems, will have to be taken as the parameter for the future application of levies in the EU.

It is not easy to understand why consultation with member states was not envisaged in the scope of the mediation process. The Commission should have considered more carefully that, as far as EU law stands, the choice about whether and how a levy system should be implemented in a given EU country depends solely on the discretion of national law-makers. The fact that member states appeared as the uninvited guests in this mediation process is even more surprising if one considers that, before the

start of this process, several European governments had already expressed their intent to radically reform their levy systems (e.g. Spain, Netherlands) or not to introduce levies despite the introduction of a new private copying exception (i.e. United Kingdom). Even the mediator emphasised the necessity to start discussions with member states at this stage.<sup>160</sup> It has to be seen now how the Commission will develop this dossier and whether it will continue to seek an apparently impossible agreement of stakeholders on very critical issues for the Internal Market that would require independent policy decisions based on economic evidence and a sufficiently wide democratic consensus by EU law-makers. At a time when the debate on digital copyright policy has become so turbulent, the issue of copyright levies would certainly require more than a mediation attempt and a clear and uniform solution at EU level based on sound economic evidence.

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<sup>160</sup> Ibid., p. 2.

## 4. ONLINE COPYRIGHT ENFORCEMENT IN THE EUROPEAN UNION: CURRENT SCENARIOS AND FUTURE PROSPECTS

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### 4.1 Introduction

The Task Force participants finally focused on unsettled issues raised by the unequal implementation of online copyright enforcement measures in the EU. This topic proved to be of great interest to all panellists and discussants because of the major impact that a significant reduction of online ‘piracy’ would have on the development of markets for digital content throughout the EU. In this regard, the rejection of the Anti-Counterfeiting Trade Agreement (ACTA) by the European Parliament in July 2012 and the ongoing review of the existing EU legislation on online copyright enforcement by the European Commission were key elements of the discussion.

This chapter starts with an overview of ACTA and of the reasons that led to its political rejection and to an unprecedented clash between the European Parliament and the Commission (see §4.2). A brief analysis of available data showing online copyright infringement rates in one of the most developed markets for digital content in Europe (i.e. the UK) and specific examples of enforcement measures issued by national courts (see §4.3) pave the way for an examination of the existing legislative framework in the EU. The chapter draws on the Task Force discussion about the implementation and the interplay of EU law provisions that, notwithstanding the existence of certain liability exemptions to the benefit of online content carriers and hosting service providers, place copyright holders in a position to ask national courts for injunctions against various online intermediaries aimed at bringing copyright infringements to an end (see §4.4). The discussion touched upon what the most suitable interpretation of potentially contradictory provisions should be and on whether or not EU law can be understood as creating a duty for online

intermediaries to cooperate with rights-holders in reducing online copyright infringement.

The chapter reports and comments upon the debate on the implementation of judicial remedies such as website blocking measures, the adoption of filtering technologies aimed at keeping copyright content distinct from free information and the disclosure of personal data revealing the origin and distribution networks of infringing goods and services. In doing so, the present report focuses briefly on the compatibility of enforcement measures with limits established by the protection fundamental rights that the CJEU has recently relied on in responding to questions on interpretation of EU law arising in the context of national enforcement proceedings (see §4.5). In particular, the Task Force group examined the potential clash of online copyright enforcement measures with the enforcement of user rights and civil liberties, including freedom of expression and communication on the Internet as well as freedom to conduct business online, the user right to a fair trial, and protection of user privacy in electronic communications.

## 4.2 ACTA, its rejection and the political battle on online copyright enforcement

The Anti-Counterfeiting Trade Agreement is an international treaty that sought to establish international standards and common rules to tackle large-scale infringements of intellectual property rights (i.e. copyrights, trademarks, patents, designs and geographical indications).<sup>161</sup> Discussions about this agreement started informally in 2007, whereas formal negotiations were launched in 2008. After seven rounds of negotiations, the agreement was finalised in November 2010.<sup>162</sup> As stressed by the ‘Trade’

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<sup>161</sup> See European Commission, *What ACTA is about*, DG Trade ([http://trade.ec.europa.eu/doclib/docs/2012/january/tradoc\\_149003.pdf](http://trade.ec.europa.eu/doclib/docs/2012/january/tradoc_149003.pdf)).

<sup>162</sup> The parties of the agreement were Australia, Canada, the European Union, Japan, Mexico, Morocco, New Zealand, Singapore, South Korea and the United States. The treaty was negotiated and concluded outside the institutional and legal framework established by the World Trade Organisation (WTO). Considering that all parties are WTO members and, as a result, are bound by the TRIPS Agreement (whose Part III includes provisions on enforcement of intellectual property rights), ACTA would have been a ‘TRIPS-plus’ instrument (i.e. an agreement providing more stringent rules and obligations on enforcement among the contracting parties). The text of the TRIPS Agreement is available at [www.wto.org/english/tratop\\_e/trips\\_e/t\\_agm4\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/t_agm4_e.htm).

Directorate General of the European Commission (which negotiated the agreement on behalf of the EU) the adoption of ACTA would have placed intellectual property rights holders in a position to benefit from improved access to justice, customs, and police to enforce their rights against counterfeiters or infringers in all those countries where the agreement would have entered into force.

With specific regard to online copyright enforcement, ACTA pursued the objective of making the civil and criminal enforcement measures referred to in the agreement available also in the digital environment. Such measures should have included expeditious remedies to prevent infringement and remedies that constitute a deterrent to further infringements.<sup>163</sup> The provision of Article 27(2) explicitly obliged each contracting party to apply enforcement procedures to infringement of copyright and of rights related to copyright over digital networks, which may include “[...] the unlawful use of means of widespread distribution for infringing purposes [...]”. At least in the final version of the agreement, the same provision specified that enforcement procedures should have been implemented in a manner that avoided the creation of barriers to legitimate activity, including electronic commerce and, in compliance with each party’s law, preserved fundamental principles such as freedom of expression, fair process and privacy.<sup>164</sup>

All parties, with the exception of the EU, Switzerland and Mexico, signed the agreement in December 2011. The EU and 22 EU member states signed ACTA in Tokyo in January 2012.<sup>165</sup> After that step, the European Parliament started its consent procedure, which ended in early July 2012 with the rejection of the treaty by the plenary assembly, following the negative recommendations made by all parliamentary committees that had previously examined the treaty (i.e. International Trade, Civil Liberties, Justice and Home Affairs and Legal Affairs).

Before the Parliament vote, the signature of the treaty had triggered an unprecedented and politically broad debate between its supporters and opponents that resulted in the resignation in protest of the Parliament’s

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<sup>163</sup> See ACTA, Art. 27(1).

<sup>164</sup> *Ibid.*, Art. 27(2).

<sup>165</sup> ACTA needed to be signed and ratified also by EU member states, on a separate basis, since the agreement embodied criminal enforcement provisions (i.e. criminal law is an area of shared competence between member states and the EU).

appointed chief investigator (French MEP Kader Arif) as well as widespread protests across Europe that strongly influenced and *de facto* paralysed the treaty's ratification process at national level. The newly appointed rapporteur (British MEP David Martin) recommended against the approval of the treaty concluding that the intended benefits of the agreement were far outweighed by the potential threats to civil liberties. Previously, in February 2012, the European Commission had referred ACTA to the CJEU seeking its legal opinion on whether or not this agreement harmed any of the fundamental rights of European citizens. This referral was eventually withdrawn in December 2012.

The Task Force discussion briefly touched upon the various negative factors that led to the political rejection of a treaty that the European Commission had negotiated for more than four years. A largely insufficient inter-institutional dialogue certainly played a crucial role in determining the bad outcome of the ratification process as well as a poor perception and insufficient communication of the potential benefits of the treaty. Secrecy in negotiations that had been developed outside the framework of the WTO and concerned an international agreement that, at least for a time, would seem to embody an obligation for contracting parties to adopt (or to strongly encourage the voluntary adoption of) graduated response regimes triggered the institutional reaction of the European Parliament. In a resolution approved in March 2010, the Parliament openly contested the lack of transparency in the ACTA negotiations until that time, asking the Commission for an assessment of the potential impact of the new treaty on fundamental rights such as freedom of expression and the right to privacy.<sup>166</sup> The resolution advocated that the new agreement should *not* have made the implementation of so-called 'three-strikes' law mandatory and that any sanctions implying disconnection of users from access to the Internet should have been made subject to prior examination by a court. In April 2010, in response to the resolution, the Commission made a draft version of the treaty publicly available, for the first time.

What was unanimously deemed to be an even more decisive factor in the political debate on ACTA was a new and unprecedented activity of protest and lobbying undertaken by activists and, more generally, Internet users through open letters, online petitions and emails addressed directly

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<sup>166</sup> See European Parliament Resolution of 10 March 2010 on The Transparency and State of Play of the ACTA Negotiations, OJ 2010/C 349 E/10, 22 December 2010.

to members of governments and of the European and of national parliaments. On the grounds of a draft of September 2009 that had been leaked, and embodied an enforcement chapter specifically targeted at the Internet, opponents of the treaty strongly warned that its approval might have stifled innovation and, even more importantly, would have threatened online freedom of expression and user privacy. That draft seemed to oblige ACTA contracting parties to follow US law in making the liability exemptions for ISPs conditional on the implementation of policies aimed at discouraging unauthorised storage and transmission of infringing content, like clauses in subscription contracts enabling also graduated response schemes.

By coincidence (at least as far as timing was concerned), this unprecedented wave of protest and lobbying by individual users, civic society organisations - with the support of ISP industry associations and of the largest Internet companies - developed and ideally extended at international level an equally prominent (and successful) political battle that took place when the US sought to adopt the Stop Online Piracy Act (better known as 'SOPA'). Technically speaking, SOPA had little to do with ACTA since it was a legislative proposal aimed at allowing under US law enforcement measures that are already been contemplated at EU level and/or in most of the EU member states.

The new bill sought to expand the ability of US law enforcement to fight online trafficking in unauthorised copyrighted materials. Provisions included the requesting of court orders to bar advertising networks and payment facilities from conducting business with infringing websites, and search engines from linking to the websites, and court orders requiring ISPs to block access to websites. The law would have expanded existing criminal laws to include unauthorised streaming of copyrighted content, imposing a maximum penalty of five years in prison. At the time of the discussion of SOPA in the US Congress, a mobilisation of Internet users, online intermediaries and content platform devisers culminated in a 'blackout' (i.e. a switching off) of approximately 7,000 websites (including top websites like Wikipedia and Reddit) seeking to raise awareness about the risks that the new law would have entailed (i.e. tension with the basic functioning of the Internet, risks of online censorship, etc).

As briefly recalled above, ACTA was officially rejected since, along with intended benefits, unintended consequences might have emerged, namely a potential limitation to civil liberties stemming from the interpretation of excessively vague provisions by each contracting party.

Interestingly, during the political process that led to the rejection of ACTA in Europe, the fact that, at least in its latest (and diluted) version, Article 27 explicitly preserved legitimate activities such as electronic commerce and the protection of fundamental rights (such as freedom of expression, fair process and privacy) was not deemed to be a sufficient guarantee against the potentially ubiquitous enforcement of copyright in the digital environment. The Task Force participants widely agreed that, in light of the above-mentioned political and legal objections, policy- and law-makers should aim at enacting clear and sufficiently precise legal texts leading to foreseeable consequences. This approach would be of great importance for policy-makers to be able to face objections related to unintended effects of online copyright enforcement.

More generally, the discussion about ACTA clearly evidenced that making civil enforcement measures work in compliance with the protection of fundamental rights and civil liberties will be the main challenge for law-makers in the close future. Such challenge will be even bigger in a context, like the EU, that is politically and legally fragmented and where national courts still grant different types of online enforcement measures and evaluate the potential conflict between copyright and human rights according to distinct criteria and priorities. The fact that the European Parliament voted against an international treaty that would *not* have eventually required the enactment of new EU law provisions clearly revealed the existence of a political bias against the *actual* system of copyright enforcement measures from a purely intra-European perspective.

Considering the conclusion of the saga on ACTA, the enactment of further EU legislative measures on copyright enforcement is very unlikely, at least for now. Meanwhile, it has to be seen whether and how the increasingly relevant case law of the CJEU will refine the interpretation of the existing legislative framework. For example, it is still unclear whether, and under which circumstances courts can issue injunctions against online intermediaries in order to oblige them to cooperate with rights-holders in activities of online copyright enforcement.

### **4.3 Online copyright infringement: Current scenarios**

The Task Force debate was stimulated by contributions made by several participants. This section provides a short summary of presentations which focused, respectively, on the scale of online copyright infringement in the

UK and on the adoption of so-called ‘website blocking measures’ targeted at ISPs in the Netherlands.

#### **4.3.1 *Measuring online copyright infringements in the UK: A recent study commissioned by OFCOM***

Under the Digital Economy Act (DEA) approved in 2010, UK law assigns to OFCOM crucial regulation tasks.<sup>167</sup> In short, the DEA established a new framework to regulate online copyright infringement by users of broadband Internet access services.<sup>168</sup> The overall approach of the DEA mirrors legislative initiatives previously adopted in countries like France.<sup>169</sup> The DEA requires ISPs to notify their customers when their accounts are supposed to have been used to infringe copyright and to keep a record of those subscribers who receive several warnings. The purpose of this activity is to enable copyright holders to bring legal action against allegedly repeat infringers.<sup>170</sup> In this new legal framework, OFCOM was required to prepare a code defining the initial obligations of ISPs that has to be approved with the consent of the Secretary of State and constitutes one of the major steps for the Act to enter into force. In addition to that, OFCOM is required to collect data to assess progress in reducing online copyright infringement.

OFCOM started such data collection before the entry into force of the DEA, commissioning to Kantar Media an independent consumer tracking study aimed at measuring online copyright infringement and at analysing

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<sup>167</sup> OFCOM is the independent regulator and competition authority of the UK communications industries. For further information see <http://ofcom.org.uk>.

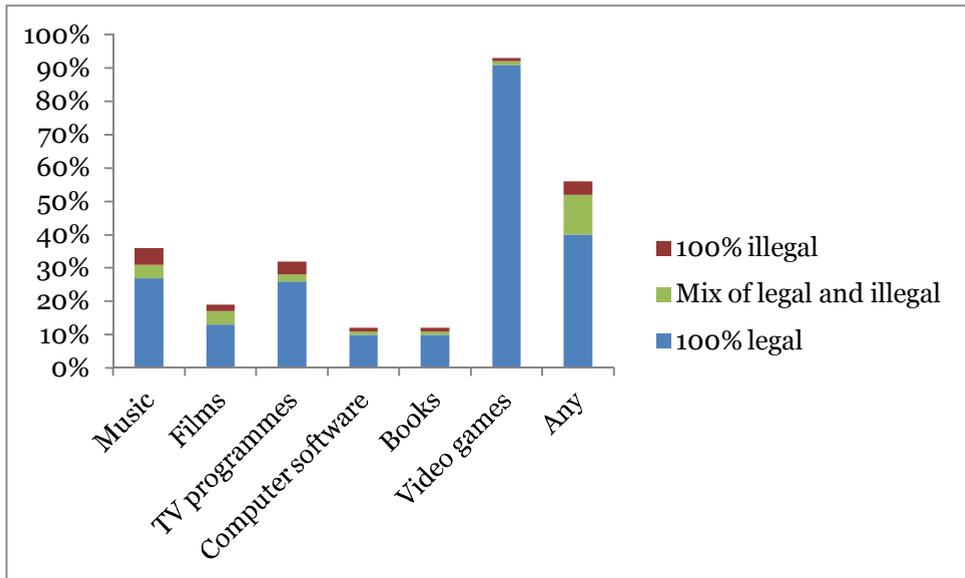
<sup>168</sup> See Digital Economy Act 2010 (‘Online infringement of copyright’, Sections from 3 to 16) ([www.legislation.gov.uk/ukpga/2010/24/contents](http://www.legislation.gov.uk/ukpga/2010/24/contents)).

<sup>169</sup> Adopted in 2008 and entered into force in 2010, the “*Création et Internet*” act (Law 2009/669 of 12 June 2009, amended on 15 September 2009, *Journal officiel de la République française*) established an administrative authority (HADOPI) that was granted supervisory powers with regard to the implementation of so-called ‘three-strike’ procedures. As we will see more in depth below, this authority was originally given the power to order ISPs to disconnect subscribers who were suspected of repeat copyright infringement.

<sup>170</sup> As explained by Barron (2011), “Graduated Response’ à l’Anglaise: Online Copyright Infringement and the Digital Economy Act 2010’, 3(2) *Journal of Media Law*, pp. 305-310, these obligations affect all ISPs irrespective of their liability (i.e. simply by virtue of being ISPs), even though the Act anticipates that secondary legislation will limit their application to the providers with the largest shares of the broadband market.

the behaviour and attitude of Internet users.<sup>171</sup> The research stemmed from a recommendation made in the 2011 Hargreaves Review. The study is based on what is considered the best-available methodology (i.e. user *self-reporting* behaviour). This study provides data collected through an online survey involving 20,000 persons (5,000 per quarter).<sup>172</sup> OFCOM stressed that data referring to illegal conduct, due to the adopted methodology, might be affected by a negative bias. The study points out that 15% of Internet users and 29% of users consuming online content are involved in illegal activities. Music, films and TV programmes are the types of online content that trigger the highest rates of illegal activities. See Figures 2 and 3 below.

Figure 2. Percentage of Internet users in the UK using legal, illegal and mixed online content (Q3 2012)

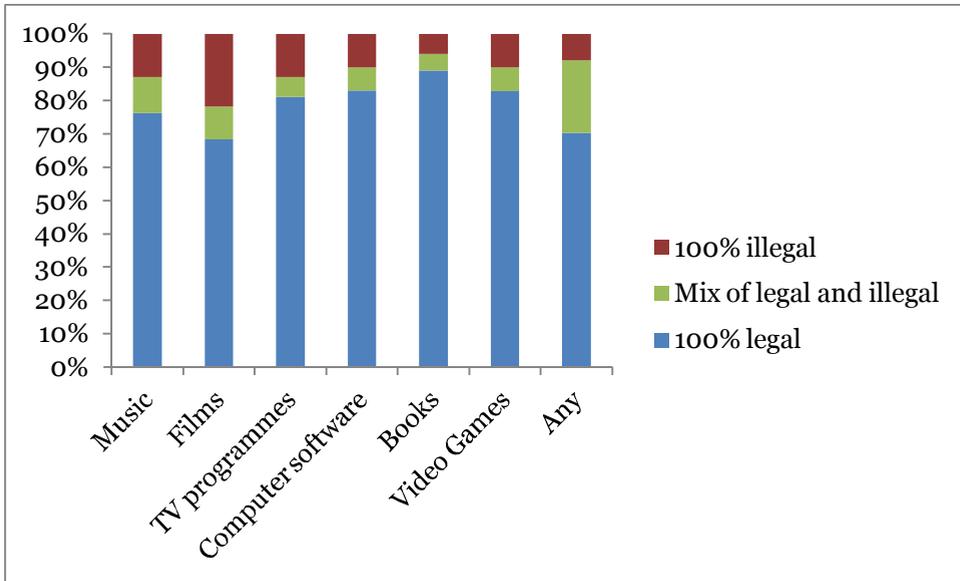


Source: Author's elaboration based on Kantar Media (2012), *Online Copyright Infringement Tracker Benchmark Study Q3 2012*, study prepared for OFCOM.

<sup>171</sup> See Kantar Media, *Online copyright infringement tracker benchmark study Q3 2012*, study prepared for OFCOM and published on 20.11.2012 (<http://stakeholders.ofcom.org.uk>).

<sup>172</sup> Data refer to year 2012.

Figure 3. Legal, illegal and mixed use of online content by Internet users in UK (Q3 2012)



Source: Author's elaboration based on Kantar Media (2012), *Online Copyright Infringement Tracker Benchmark Study Q3 2012*, study prepared for OFCOM.

In terms of volumes, the top 20% of infringers account for 90% of infringements. Interestingly, the study stresses that top infringers, who combine both legal and illegal activities, spend more money in purchasing content legitimately (i.e. digital and physical copies). According to the study, Internet users infringe copyright because of excessive costs, prices, and because of their limited financial resources. The study suggests that a cheaper access to legal services, along with a wider availability and a faster release of content, is the main factor that would encourage infringers to stop illegal activities and subscribe to online content services. According to the survey, UK Internet users consider warnings coming from ISPs about copyright infringements and possible sanctions (e.g. disconnection and/or reduction of connection speed) less effective than market-driven solutions based on a faster and cheaper supply of lawful digital content. Finally, the study also evidences the crucial role that education is deemed to play in fighting copyright infringement. Such conclusion is upheld by the fact that 44% of Internet users have acknowledged their inability to clearly discern what is legal and what is not when navigating the web and accessing content online.

### 4.3.2 ISPs and website blockings: An example from the Netherlands

In the last years the Netherlands has been one of the most interesting EU jurisdictions for the assessment of the impact of website blocking measures on online copyright infringement. From a legal point of view, these measures are undertaken through injunctions obliging ISPs to restrict access by their customers to infringing sites. Given the territorial character of copyright and of the related enforcement measures, website blockages can actually be obtained on a country-by-country basis under conditions and criteria that vary from one jurisdiction to another. Basically, this is a remedy that courts have normally granted when standard ‘notice-and-takedown’ procedures would be ineffective because of the large volumes of infringing content that are made available through a given site. Copyright holders effectively define sites with an overwhelming majority of illegal content as ‘structurally infringing’ sites.

To comply with their obligations under the safe harbour provisions created by the Electronic Commerce Directive,<sup>173</sup> in 2008 several Dutch operators adopted a voluntary code of conduct establishing a procedure for intermediaries to deal with notices of unlawful content on the Internet. This code has helped ISPs to deal with removal of content from the Internet at the request of third parties. In 2010, BREIN (i.e. the anti-piracy body of authors, artists, publishers, record and film producers, and producers of games, interactive software and books in the Netherlands) sued Ziggo, a Dutch ISP, in order to block access of its customers to ‘The Pirate Bay’ (TPB) website. After having being rejected by a first instance court,<sup>174</sup> the request of copyright holders was upheld by the appeal court, which ordered Ziggo and XS4ALL (another Dutch provider) to block access to TPB.<sup>175</sup> The Dutch appeal court considered that this was the only effective measure to reduce infringements occurring on that site. In January 2012, Ziggo appealed the decision claiming that ISPs should not be forced to police the Internet and that the decision creates a dangerous precedent,

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<sup>173</sup> See Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), OJ L178/1 (17 July 2000), [hereinafter *Electronic Commerce Directive*].

<sup>174</sup> Case number: 365643/KG ZA 10-573, 19 July 2010 - LJN: BN1445, Rechtbank’s-Gravenhage, 365643/KG ZA 10-573 (<http://zoeken.rechtspraak.nl>).

<sup>175</sup> Case number: 374634/HA ZA 10-3184, 11 January 2012 - LJN: BV0549, Rechtbank’s-Gravenhage, 374634/HA ZA 10-3184 (<http://zoeken.rechtspraak.nl>).

since it restricts Internet freedom without ensuring effectiveness of the implemented measure.

In the same way as Ziggo, all Dutch ISPs (i.e. Tele2, KPN, T-Mobile, UPC) have been forced to restrict access by their subscribers to The Pirate Bay by now.<sup>176</sup> According to ISPs, decisions of this kind favour rights-holders' interests in the trade-off between access to information, freedom to run a business and copyright protection. As recalled in the discussion, the role of ISPs in fighting online infringement has been central in the Dutch political debate on copyright enforcement, along with issues such as net neutrality.

A group of Dutch ISPs recently commissioned a study that gathered evidence on end-user behaviour in the Netherlands.<sup>177</sup> In the same way as the OFCOM study, the Dutch study showed that infringers are also the main consumers of lawful content as well as the ones who are more likely to attend live performances, movie shows and to purchase hard copies of digital content. Moreover, the statistics reported in the study showed that the blockage of TPB has not affected Dutch end-user behaviour in accessing unauthorised content online, whose consumption (at least as regards audio-visual content) has eventually increased. Considering the lack of effectiveness of blocking measures, and the ease with which Internet users normally circumvent them, representatives of telecommunications operators re-stated the view that the most effective solution to the problem of copyright infringement would seem to be the development of new business models fostering legitimate access to copyright materials.

#### 4.4 The existing legislative framework in the EU

One of main subjects of the Task Force discussion was the degree of harmonisation and implementation of online copyright enforcement measures throughout the EU. Three Directives embody the most important provisions that member states are required to transpose in their legal systems in order to guarantee an effective enforcement of copyright in digital settings and, most importantly, on the Internet. These Directives are

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<sup>176</sup> Case number: 413085/KG ZA 12-156, 10 May 2012 - LJN: BW5387, Rechtbank's Gravenhage, 413085/KG ZA 12-156 (<http://zoeken.rechtspraak.nl>).

<sup>177</sup> See IviR Institute for Information Law & CentERdata (2012), *File sharing 2©12 - Downloading from illegal sources in the Netherlands* ([www.ivir.nl/publications/poort/Filesharing\\_2012.pdf](http://www.ivir.nl/publications/poort/Filesharing_2012.pdf)).

the 2000 Electronic Commerce Directive, the 2001 Information Society Directive<sup>178</sup> and the 2004 Intellectual Property Rights Enforcement Directive.<sup>179</sup> As evidenced in the following sub-sections, the rules provided in these Directives are not perfectly coordinated with each other and their interplay and judicial implementation give rise to uncertainties and disparities in national jurisdictions.

#### ***4.4.1 Liability of online intermediaries and duties to cooperate with copyright holders***

As we have briefly recalled, the phenomenon of large-scale copyright infringement on the Internet is still rampant, even in those jurisdictions, like the UK, where on-demand offerings of lawful copyright works are well developed and highly diversified in terms of business models and price or subscription fee ranges. Available data show clearly that online ‘piracy’ is no longer based just on peer-to-peer networking (i.e. fully decentralised technologies of communication and data exchange among Internet users). The development and diffusion of broadband Internet access services and of Cloud-based platforms have made it easy for both large-scale copyright infringers and unauthorised users to access content made available through cyber lockers and other web-based platforms. This entirely new dimension of copyright infringement has inevitably expanded its negative consequences on the business of creative industries targeting sectors such as the film industry, that ‘piracy’ had not affected dramatically before the advent of broadband Internet and of Cloud computing.

In the Task Force debate, copyright owners, and in particular film producers, claimed that, especially in today’s technological context, the provision of Article 8(3) of the 2001 Information Society Directive should be implemented effectively and uniformly throughout the EU. This provision obliges member states to ensure that rights-holders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right. Film producers stressed that Recital 59 in the preamble to the Directive clarifies that Article 8(3) should be applicable on the (sole) assumption that online intermediaries are best placed to bring infringing activities to an end. Moreover, the same recital states that the possibility of an injunction should be available even

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<sup>178</sup> See the Information Society Directive Art. 4.2.

<sup>179</sup> See *IPRED*.

where the acts carried out by an online intermediary are exempted from the scope of exclusive rights under Article 5 of the Information Society Directive. However, as concluded in the recital at issue, “[...] the conditions and modalities relating to such injunctions should be left to the national law of the member states [...]”.

Copyright owners claimed that, despite the clarity of this provision, ISPs and online intermediaries such as search engine operators have been very reluctant to effectively cooperate in activities of online copyright enforcement. As a result, rights-holders have been forced to start legal actions before national courts and to request national law-makers to clarify the meaning and scope of application of laws that implemented Article 8(3). Major film producers, who have started many infringement proceedings across Europe, advocated that injunctions (and a subsequent duty to cooperate with online intermediaries) should apply independently of the liability of intermediaries.

The relevant case law of the CJEU and of courts in several member states have made it clear that the requested measures will have to pass a proportionality test, which allows courts to balance fundamental rights (e.g. right to property vs. freedom of expression or the user right to privacy) and justifies the issuance of website blocking measures against ‘structurally infringing’ websites (i.e. those sites that are conceived and designed to infringe copyright and to make profits from infringements). In general, when carrying out the proportionality test, national courts have constantly placed special emphasis on the review of key factual elements such as knowledge of the infringement by the website owner; the profit-making character of the infringement and the active role and the intent of the website owner; and the absence of voluntary measures that are sufficiently effective and dissuasive. In response a claim of ISPs, finally, copyright owners also advocated that website blocking measures in these cases effectively reduce the popularity of structurally infringing websites, even if blockings do not eventually affect end-user conduct.

The policy goals of balancing online copyright enforcement with the protection of other fundamental rights and ensuring proportionate results would ideally require a combined set of measures that all courts throughout the EU should have at their disposal. If courts embraced the approach advocated by copyright holders in the context of online enforcement proceedings, standard ‘notice-and-takedown’ procedures – stemming from the transposition of the well-known liability exemption laid down under Article 14 of the Electronic Commerce Directive for activities

of content hosting – would be complementary to exceptional measures such as website blockings and would apply against websites with relatively modest amounts of illegal content.

In *L'Oréal v. eBay*, the CJEU recently shed light on the complex interplay of online enforcement measures and of the liability exemption that the law grants to hosting service providers.<sup>180</sup> In that specific case, the online intermediary was a very well-known operator of an online marketplace (eBay) where users of the service were deemed to commit acts of trademark infringement. In assessing the scope of the exemption and considering whether or not eBay was aware of the infringements occurring on its online platform, the CJEU held that the online operator could have benefited from the safe harbour provision in so far as it confined itself to providing that service neutrally by a merely technical and automatic processing of the content provided by its customers. This means that the exemption should not apply when the online intermediary plays an *active role* that would imply knowledge of (or control over) such content. For instance, in that case the court mentioned, for example, the provision of assistance which entails, in particular, optimising the presentations of the customers' sale offers or the promotion of these offers. Interestingly, after having reached that conclusion, the CJEU held that injunctions against an online service provider aimed at bringing the infringement of its users to an end, and also at preventing further infringement of the same kind, should be admissible under national law irrespectively of the intermediary's liability. This conclusion may be very relevant also in the future of online copyright enforcement since the CJEU took such view on the grounds of a provision (i.e. Article 11 of IPRED) that re-states the principle of Article 8(3) of the Information Society Directive with regard to *all* intellectual property rights.

It goes without saying that the above-mentioned approach and conclusion raise the concerns of telecommunications network operators and Internet companies, which strongly reject an interpretation of EU law provisions that would end up creating a duty for ISPs and online intermediaries to cooperate with rights-holders in bringing copyright infringements to an end and, even more importantly, in preventing further infringements. In the Task Force debate, ISPs advocated that the exemptions embodied into the Electronic Commerce Directive are

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<sup>180</sup> See C-324/09, *L'Oréal v. eBay International*, 12 July 2011.

milestones for a correct understanding of their liability regime and should not be subject to any modifications.

From an impartial point of view, it seems fair to observe that the CJEU is currently refining and adapting to a fast-changing technological context the interpretation of potentially conflicting provisions embodied in Directives that the EU adopted a long time ago. The Court's aim is that of coordinating and making these provisions compatible and, possibly, complementary, without undertaking any legislative changes. It should be borne in mind that, in its recent case law on online enforcement of intellectual property rights, the CJEU has firmly relied on the 'milestones' of the Electronic Commerce Directive, in particular the principle embodied in Article 15 of the Directive, according to which member states (and national courts) cannot impose on online intermediaries general obligations to monitor the content they store or transmit. The CJEU has fully recognised and applied this principle in all cases where national courts had to deal with requests of injunctions from copyright holders that, to prevent future infringements, would have required the installation of permanent filtering systems or technologies by ISPs and social network operators.<sup>181</sup> In all these cases, the CJEU has constantly held that, in granting online enforcement measures, the protection of intellectual property should be balanced against the protection of fundamental rights of individuals and companies that unlimited filtering measures would inevitably affect (i.e. the freedom to receive and impart free information, the protection of personal data of Internet users, freedom of ISPs and social network deviders to conduct their online business: see §4.5 below).

#### ***4.4.2 IPRED, its additional enforcement tools and blocking measures against payment system operators***

The Task Force discussion focused on the 2004 Intellectual Property Rights Enforcement Directive (IPRED), which aimed at harmonising national systems in order to ensure a high, equivalent and homogenous level of protection of intellectual property rights in the Internal Market. In doing so, the Directive also intended to ensure that EU member states fulfilled the obligations regarding the enforcement of intellectual property rights embodied in the TRIPS Agreement, approved and concluded in the

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<sup>181</sup> See C-275/06, *Promusicae v. Telefonica*, 29 January 2008; C-70/10, *Scarlet Extended v. SABAM*, 24 November 2011; C-360/10, *SABAM v. Netlog*, 16 February 2012.

framework of the WTO. Unfortunately, as acknowledged by the European Commission in a 2010 report on the application of IPRED, it has become apparent that the Directive was not designed to cope with the challenges that the Internet poses to the enforcement of intellectual property rights.<sup>182</sup> This character of the Directive has inevitably made its application in the digital environment problematic.

At the time of the rejection of ACTA by the European Parliament, the Commission had started a review of IPRED, gathering data and observing how member states had concretely implemented it. As pointed out by Commission representatives in the Task Force discussion, IPRED has had relatively limited application in trials concerning online infringements. In addition, with specific regard to copyright, IPRED effectively works only for infringements occurring within the EU. Another source of dissatisfaction, according to the Commission, can be found in the high costs of access to justice for the enforcement of intellectual property rights. In this respect, EU policy-makers made it clear that a crucial step for any kind of review of the Directive would be that of finding an agreement among all member states, which should also extend to the harmonisation of the interface between online copyright enforcement and the protection of user personal data on the Internet (an issue about which member states do not seem to accept excessively stringent rules at EU level: see more in depth under § 4.5.4 below).

Not surprisingly, EU policy-makers are concerned about the potentially negative impact of the ACTA rejection on the review and possible improvement of IPRED. The Commission was (and still is) convinced that the provisions embodied in the definitive version of ACTA dealing with enforcement in the digital environment were consistent with the European *acquis*. Moreover, the European Data Protection Supervisor confirmed that IPRED is fully in line with the data protection *acquis*. Nevertheless, at a political level, the rejection of a treaty that would have extended to third parties a set of rules compatible with EU law might persuade some interest groups to lobby for a re-opening of IPRED aimed at

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<sup>182</sup> See Report from the Commission to the Parliament, the Council, the European Economic and Social Committee and to the Committee of the Regions, Application of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, COM(2010) 779 final, 22 December 2010, p. 9 (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0779:FIN:EN:PDF>).

reducing the scope of online enforcement measures that national courts are required to make available to rights-holders.

As IPRED stands, one of the most important enforcement measures that national courts are requested to implement is the disclosure of information on the origins and distribution networks of infringing goods or services in response to a justified and proportionate request.<sup>183</sup> This measure grants a ‘right to information’ to intellectual property rights-holders to be exercised against direct infringers and any person who possesses, uses or provides infringing goods or uses services for infringing activities on a commercial scale. If this provision was implemented literally in the online environment, copyright holders would be entitled to ask national courts for information revealing names and addresses of persons involved in the creation, management and supply of ‘structurally infringing’ sites, gaining the ability to target their revenue sources.

As emphasised in the Task Force debate, what is missing in the IPRED framework is a provision giving copyright holders the possibility of blocking payments addressed to individuals and/or entities carrying out online infringing activities on a commercial scale. The underlying idea is that, by preventing structurally infringing sites and large-scale infringers from collecting payments through cooperation of intermediaries such as payment system operators, incentives to infringe copyright would greatly be reduced.<sup>184</sup>

In the United States, since 2006 the law has obliged payment system operators to stop providing their services to unlawful online casinos. At a later stage, in 2011, American Express, Discover, Mastercard, Paypal, and VISA (i.e. the five main operators in the US) made a further step in the development of this policy while agreeing on best practices to address copyright infringement claims and the sale of counterfeit products on the Internet. Under this code of conduct, rights-holders can notify an infringement and ask that services provided to infringing websites should

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<sup>183</sup> See IPRED, Article 8(1).

<sup>184</sup> See C. Manara (2012), “Attacking the Money Supply to Fight Against Online Illegal Content?”, EDHEC Business School, September (position paper commissioned by Google), pp. 9-11. The first attempt to implement this strategy was made against a Russian website “alofmp3”. In particular, in 2007 rights-holders asked VISA to stop providing its services to this infringing company. VISA accepted, but after a long lawsuit, a Russian court reversed the decision. The same strategy was applied by the US Government to fight unlawful online gambling, firstly on a voluntary basis, and then by law.

be terminated. As pointed out in the literature, the adoption of these best practices is confined to the US market, and their practical application has been very rare.<sup>185</sup>

The EU scenario is different, since US major operators cannot easily adapt their best practices to different contract rules in the various member states. More generally, these best practices might create legal uncertainty considering that a finding about whether or not content and/or websites are lawful is not univocal. What happened to Wikileaks in a recent case is a good example that received great attention by the media: the Icelandic Supreme Court obliged VISA and Mastercard to re-start processing payments at a time when payment service operators had suspended their services to this whistle-blowing website, consequently blocking users' donations.<sup>186</sup>

In the debate it was pointed out that copyright infringers can earn money through direct revenues (i.e. payments made by users) or indirect revenues (i.e. advertising). The advertising business involves many operators all around the world. This means that there might be problems in regulating the operators' conduct as a result of their disparate location at international level. Nevertheless, providers of advertising services generally comply with a code of conduct and today's most powerful company in this business (i.e. Google) has implemented a strict policy against copyright infringement. Conversely, the payment business involves a very small number of operators (mainly credit card issuers).

Here a policy question concerned the most viable strategy to block payments addressed to copyright infringers on a commercial scale. Due to its 'offline' background, IPRED explicitly mentions orders aimed at blocking bank accounts and other assets of the alleged infringers within the set of provisional and precautionary measures that courts can take in the context of enforcement proceedings (in so far as the injured party evidences circumstances likely to endanger the recovery of damages).<sup>187</sup> There is no reference instead to the possibility of blocking payments addressed to accounts of infringers through injunctions targeted at payment system

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<sup>185</sup> Ibid., p. 11.

<sup>186</sup> See for instance I. Steadman, *Icelandic court declares Wikileaks donation ban 'unlawful'*, Wired, 26 April 2013 ([www.wired.co.uk/news/archive/2013-04/26/wikileaks-wins-visa-case](http://www.wired.co.uk/news/archive/2013-04/26/wikileaks-wins-visa-case)).

<sup>187</sup> See Art.9(2) of IPRED.

operators. Nor do these measures seem to fall within the scope of injunctions against intermediaries whose services are used by a third party to infringe copyright under Article 11 of IPRED. In this case infringers use the intermediary's services to receive the financial gains coming from an illegal activity, and not to commit the infringement itself.

An EU-wide solution that could facilitate the blocking of money transfers targeted at payment system operators could stem from either self-regulation or a legislative evolution. Self-regulation might lead payment service providers to approve a code of conduct (like the one approved in the US) under which copyright holders would have the possibility of notifying an infringement and asking service providers to terminate the account of infringers. As briefly recalled above, differences in national contract laws would certainly raise problems in adopting a uniform code for the whole EU.<sup>188</sup>

Another contract-based solution would be to apply the above-mentioned account termination policy by means of copyright infringement clauses, which would need to be inserted into standard agreements between credit-card owners and card issuers. An alternative to self-regulation would be a remedy based on a new legislative provision to be incorporated in a newer version of IPRED. As suggested in the discussion, this provision could replicate the 'notice-and-takedown' mechanism adopted for ISP liability under the Electronic Commerce Directive. Under this scheme, rights-holders might be required to send a notice to a payment system operator, who would inform their clients and would evaluate rights-holder notices. Funds deriving from illegal activities could be put in escrow accounts, whereas the accounts of infringing clients might be closed if such measure was found appropriate and/or justified.

In conclusion, there is no doubt that enabling copyright owners to attack the money supply to fight against online illegal content would enhance their chances to reduce online 'piracy' significantly. Still, the adoption of this strategy might raise objections and cause problems. In the same way as with all types of blocking on the Internet, proceedings aimed at stopping payments might end up targeting websites that earn both from legal and illegal activities. This means that a right to fair trial for the

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<sup>188</sup> Article 17 of IPRED provides that member states should encourage the development of codes of conduct at EU level by trade associations or organisations, aimed at contributing to the enforcement of intellectual property rights.

affected parties should be incorporated into the enforcement mechanism. Moreover, attacking the money supply would also increase the degree of online private policing, especially if ‘notice-and-takedown’ proceedings were based on self-regulation. Finally, this solution would inevitably have a geographically limited scope and infringers’ reactions might greatly reduce its effectiveness.

## 4.5 The enforcement of copyright and its compatibility with other fundamental rights

The complex intersection between copyright enforcement and the protection of competing fundamental rights has been scrutinised in the recent case law of the CJEU. As with all forms of intellectual property, copyright enjoys the status of a fundamental right under Article 17(2) of the Charter of Fundamental Rights of the European Union,<sup>189</sup> which refers to the right to intellectual property. This section identifies the main areas where copyright enforcement strategies and measures have to face limits raised by other fundamental rights protected under the Charter such as freedom of expression and information (Article 11) and the protection of privacy (Article 8).

### 4.5.1 *Copyright vs. freedom of expression*

As recently stated by the CJEU, injunctions that would end up imposing systematic and permanent filtering measures on online intermediaries contradict the principle of freedom of expression and communication in so far as filtering tools cannot distinguish between transmissions of unlawful and lawful content.<sup>190</sup> As evidenced in the discussion, a side effect on online freedom of expression (or even on the business of a website owner) and the risk of over-blocking is intrinsic in all measures based on content filtering, removal or disabling access to websites.

Copyright enforcement on the Internet can easily lead to restriction of lawful content communications, especially when the target of measures is

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<sup>189</sup> See Charter of Fundamental Rights of the European Union, OJ 2000/C 364/01, 18 December 2000, [hereinafter *Charter of Fundamental Rights*].

<sup>190</sup> See C-70/10, *Scarlet Extended v. SABAM*, 24 November 2011, [hereinafter *Scarlet Extended v. SABAM*], and C-360/10, *SABAM v. Netlog*, 16 February 2012, which dealt with, respectively, lawfulness of enforcement measures imposing permanent filtering technologies to an ISP and the owner of a social network platform.

an entire website where some lawful content might be stored. Even so-called 'graduated responses' (or 'three-strike') schemes – like the one introduced in France by the 'Création et Internet' legislation – raised serious concerns with regard to freedom of expression (and access to free information) in so far as an administrative body (and not a court) could issue the sanction of disconnection of repeat infringers from the Internet.<sup>191</sup> Through a well-known decision, in 2009 the French Constitutional Council held that the protection of freedom of expression and communication under the French constitution includes the freedom to access the Internet and censored the new law in so far as it allowed the sanction of disconnection to be taken by an administrative body.<sup>192</sup> The Council held that this provision was inconsistent with the presumption of innocence and the right to a fair trial.

A similar tension with freedom to access information on the Internet can arise in the context of graduated response schemes put in place on a voluntary basis by ISPs on the grounds of agreements concluded with copyright owners. This is an issue that gained momentum in Brussels in 2009, at the time of the extensive negotiations that led to the amendment of the so-called 'Telecoms Package', originally adopted in 2003.<sup>193</sup> As a result of this reform, the 'Framework Directive' has a new provision that now obliges member states that implement measures with the potential to restrict end-user access to (and use of) electronic communications networks (including the Internet) to impose such restrictions only if appropriate, proportionate and necessary within a democratic society and subject to adequate procedural safeguards.<sup>194</sup> The Framework Directive now provides that, while imposing restrictive measures in communications networks –

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<sup>191</sup> See Law 2009/669 of 12 June 2009, amended on 15 September 2009, *Journal officiel de la République française*.

<sup>192</sup> See French Constitutional Council, Decision n. 2009-580DC, 10 June 2009, *Journal officiel de la République française*.

<sup>193</sup> See Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2008 amending amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services [hereinafter *Framework Directive*], 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities [hereinafter *Access Directive*], and 2002/20/EC on the authorisation of electronic communications networks and services [hereinafter *Authorisation Directive*], OJ L 337/37 (December 18, 2009) [hereinafter *Directive 2009/140/EC*].

<sup>194</sup> See Article 1(3)(a) of the *Framework Directive*, as amended by Article 1(1)(b) of *Directive 2009/140/EC*.

like user disconnection from the Internet in the context of graduated response regimes – member states should guarantee to the affected parties a prior, fair and impartial procedure and an effective and timely judicial review. As observed in the literature, even though this amendment does not seem to prohibit EU member states from introducing ‘three-strike’ laws without judicial supervision, the new Framework Directive guarantees at least a court hearing on an appeal from an initial (necessarily fair and impartial) ruling to disconnect.<sup>195</sup>

As strongly evidenced by the global wave of protests against SOPA in the US and ACTA in the EU, arguments and policy goals such as ‘Internet freedom’ and net neutrality have been used very broadly by civil liberties organisations, activists and, sometimes, even by academics to criticise and reject all forms of online content blocking for reasons of copyright enforcement. A sort of equation between copyright enforcement and Internet censorship has been proposed often in order to describe the chilling (or side) effects stemming from content bans or technical restrictions to information made available online.

The recent global protest against legislation that would have allowed or facilitated copyright enforcement shows that, in addition to the complex legal issues that have to be settled in order to make copyright compatible with other fundamental rights, there is an additional problem for policy-makers to solve, which is more political and sociological than legal. This big issue consists of how to explain and to justify to a very vocal part of public opinion the various forms of control and enforcement that copyright entails in order to make professional content creation and distribution economically sustainable and, possibly, profitable. A strong argument of the advocates of Internet freedom is that the world wide web was not conceived to have sites blocked, and any blocking measure is intrinsically unacceptable since, in political contexts where real censorship exists, site blockings and other technical restrictions of the Internet architecture can be used to silence dissenting opinions and expression of individuals, companies and social media and networks. As acknowledged in the

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<sup>195</sup> See Barron, ‘Graduated Response’ à l’Anglaise, op. cit., p. 322, who stresses that the amendments referred to in the main text constitute a dilution of an earlier proposal that was known throughout the blogosphere as ‘Amendment 138/Article 8(4)(g)’ to the *Framework Directive*. Amendment 138 aimed at requiring that disconnection from the Internet should have been permissible (only) through a court decision except when public security was threatened.

discussion, the architecture of the Internet is certainly an invaluable resource to protect in order to ensure freedom of expression and information. It is also in light of this fundamental policy goal that lawmakers and courts should strictly comply with the principle of proportionality in shaping and implementing copyright-related restrictions.

#### 4.5.2 *Copyright vs. freedom to run a business*

Another kind of freedom that has been recently taken into consideration by the CJEU in its decisions on the limits that online copyright enforcement should deal with is the freedom to conduct a business (i.e. a fundamental right that is addressed under Article 16 Charter of Fundamental Rights). In the judgment on *Scarlet Extended v. SABAM*, in particular, the recognition of such freedom was a key part for the reasoning of the Court since the judges found that the broad filtering measure requested by the Belgian collecting society SABAM would have led to a serious restriction of the freedom of the ISP to conduct its business. As the CJEU held, such a measure would have obliged the ISP to put in place a complicated, costly, and permanent filtering technology at its own expense.

Interestingly, in this landmark decision, the CJEU established a link between Article 3 of IPRED and the freedom of an ISP to conduct a business, holding that measures enforcing intellectual property rights should not be unnecessarily complicated and costly. This was clearly an unintended association (or mistake?) that the CJEU made in referring to a provision that the IPRED drafters had taken verbatim from the TRIPS Agreement to make it clear that enforcement measures should not be too costly or complicated for copyright owners, and not for ISPs (who are not taken into any consideration under the Agreement). Through this judgment the Court has broadened the meaning of this general obligation for member states, extending it to the benefit of individuals, entities or companies having to face copyright-related objections or requests. Obviously, if the freedom to do business of online actors was granted an excessively broad protection under Article 3, this provision might (paradoxically) end up raising obstacles to the implementation of site-blocking injunctions, content removals undertaken as a result of 'notice-and-takedown' proceedings (especially where the volume of notices might seem excessive for some ISPs) and, where applicable, forms of cooperation by ISPs under graduated response schemes.

### 4.5.3 *Right to a fair trial in enforcement proceedings*

A fundamental right that is potentially at odds with copyright enforcement measures, and has not been taken into consideration by the CJEU yet, is the right to a due process (or fair trial). For injunctions against online intermediaries and ‘notice-and-takedown’ procedures to be fair, these remedies should be accompanied by the possibility for the hosting provider or for whoever has posted supposedly illegal content that has been removed of reacting and defending herself in order to prove that the removed content is lawful.

It was observed in the discussion that, unlike the US, the EU does not seem to require member states to grant judicial remedies in case of abusive or mistaken implementation of a copyright enforcement measure to the benefit of the addressee of the measure.<sup>196</sup> Among the stakeholders participating in the discussion, record producers, which make a very large use of infringement notices, claimed that at least in the field of music the rate of wrong notices in Europe has proven to be close to zero.

Nonetheless, there are relevant online surveys and observatories that show that ‘notice-and-takedown’ procedures have had chilling effects because of the strong preference of content platform devisers to obey to infringement notices instead of running the risk of facing copyright liability.<sup>197</sup> Objections focused on the absence of a right to fair trial have

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<sup>196</sup> In this regard, it has to be seen how the previously mentioned 2009 reform of the EU Telecom Package, and the guarantee of due process created under the new version of Article 1(3) of the *Universal Service Directive* (see Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on *universal service and users’ rights relating to electronic communications networks and services – Universal Service Directive* -, OJEC L108/51 - 24 April 2002), will impact on the implementation of restrictive measures affecting end-user access to (and use of) the Internet under national laws. The new version of Article 1(3) derives from the amendment made by Directive 2009/136/EC (see Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 *amending Directive 2002/22/EC on universal service and users’ rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws*, OJ L337/11, 18 December 2009).

<sup>197</sup> A good example is the ‘Chilling Effects’ project at the Berkman Centre for Internet and Society, Harvard Law School, which keeps track of threats to online expression, cataloguing cease-and-desist notices and helping Internet users to understand their rights. This observatory receives submissions from individuals and from ISPs and hosting providers, which enable researchers to study the prevalence of lawful threats and to allow Internet

been raised in France in the context of ‘three strike’ (administrative) procedures, where the law does not grant users the possibility to defend themselves by answering or reacting somehow to warnings that a given Internet connection was used to infringe copyright. Users need to go to court in order to be finally able to defend themselves.<sup>198</sup>

From a more general perspective, a problem of lack of clarity under EU law about how a fair trial should be guaranteed by member states in the context of ‘notice-and-takedown’ proceedings undoubtedly exists. Article 14 of the Electronic Commerce Directive does not specify how (i.e. by what type of notices) hosting service providers should be made aware (and acquire knowledge) of the storage of illegal content on their servers in order to expeditiously remove or disable access to that content. In the absence of clear guidance under EU law, national law-makers and courts in countries like Italy have ended up requiring that infringement notices should be sent through a judicial order so as to ensure fairness and to reduce the risks of potentially abusive or mistaken notices and content removals (and not also through informal notices, as the Directive allows).<sup>199</sup> The unintended consequence of this approach is that, in those countries, ‘notice-and-takedown’ procedures have been slowed down and made excessively costly and complicated for copyright owners.

#### 4.5.4 *Copyright enforcement vs. protection of Internet user privacy*

Online enforcement measures can easily conflict with the protection of personal data of Internet users when copyright holders collect evidence of

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users to see the source of content removals (see <http://cyber.law.harvard.edu/research/chillingeffects#>).

<sup>198</sup> As pointed out in the discussion, another problem of French law is that it presumes that the copyright infringer is the subscriber of the Internet connection service associated to the IP address from which an illegal content upload has been made. This has had some effects also on the presumption of innocence since, for instance, there have been cases in France where the subscriber receiving the warnings was a parent, whereas the infringer was a teenager.

<sup>199</sup> See Article 16 (Liability of hosting service providers) of Legislative Decree 9 April 2003 n.70 that transposed the Electronic Commerce Directive into Italian law. The text of this provision differs from that of Article 14 of the Directive since it explicitly requires that hosting service providers should promptly remove or disable access to illegal content (only) after having gained knowledge about the infringement through a communication of the competent authorities. The case law so far has held that by ‘competent authorities’ the legislator meant a judicial authority.

alleged infringements and seek to obtain disclosure of information about the identity of supposedly infringing users. Collection of evidence is usually based on monitoring of Internet users' activities by rights-holders. This activity involves the monitoring of electronic communications, extending to inspection of the content of those communications (through 'deep packet inspection' technologies) and leading to the gathering and storage of Internet Protocol (IP) addresses of alleged infringers.

As recently acknowledged by the CJEU, user IP addresses should be treated as personal data under EU law, because these data allow users to be identified precisely.<sup>200</sup> As a result, collecting such addresses on the Internet, processing them and identifying the persons acting behind each IP address represent a kind of personal data processing. This activity is not prohibited as such, but there are some key obligations to fulfil when doing it. In particular, EU law obliges member states to provide that personal data can only be collected for specified, explicit and legitimate purposes and any processing should be relevant and proportionate to the objective pursued.<sup>201</sup>

The CJEU has admitted that copyright enforcement is a legitimate purpose that justifies the treatment of personal data, but such treatment has to comply with a proportionality principle ensuring balance in the enforcement of conflicting fundamental rights.<sup>202</sup> Hence, whereas a systematic collection and identification of users' IP addresses and analysis of all content exchanged has been found disproportionate, a request by rights-holders to have access to a specific set of user personal data is admitted through judicial proceedings that aim at ensuring proportionality. Privacy problems emerge also in the so-called 'three strikes' laws, where ISPs have to process IP addresses, identify infringing users, and store and monitor infringers' data.

By intervening in the Task Force debate, the European Data Protection Supervisor (hereinafter 'EDPS') made it clear that, in this context, data protection authorities play a role of guarantors of lawfulness

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<sup>200</sup> See *Scarlet Extended v. SABAM*, para. 51.

<sup>201</sup> See Article 6 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L281/31 (November 23, 1995), [hereinafter *Data Protection Directive*].

<sup>202</sup> See C-275/06, *Productores de Música de España (Promusicae) v Telefónica de España SAU*, 29 January 2008, [hereinafter *Promusicae v. Telefonica*], para. 70.

of data processing. Such authorities are entitled i) to review the conditions under which the monitoring and storage of personal data is conducted, ii) to provide recommendations and iii) to set out limitations. Furthermore, the EDPS emphasised the relevance of the proportionality test that the CJEU has relied on from the *Promusicae v. Telefonica*<sup>203</sup> judgment onwards, arguing that a specifically targeted activity of monitoring should be preferred to a generalised (and massive) monitoring and storage of Internet user data.

Additional privacy-related problems may arise when disclosing the identity of supposedly infringing users. The fact that ISPs can technically identify users on the grounds of their IP addresses does not allow them to transfer personal data directly to copyright owners. As recalled in the Task Force debate, with the adoption of IPRED EU law-makers intended to encourage and facilitate purposes of effective enforcement targeted at users infringing copyright on a commercial scale, a requirement that was borrowed from Article 61 of the 1994 TRIPS Agreement.

If Article 8 of IPRED were applied fully in the digital environment, copyright holders would be entitled to ask courts throughout the EU to compel ISPs to disclose the identity of Internet users found in possession of infringing goods on a commercial scale or providing services used in infringing activities.<sup>204</sup> In particular, IPRED seems to enable judicial authorities, upon request of copyright owners, to identify and prosecute users who are caught to have knowingly allowed their computers to be used as high-volume uploaders of infringing materials in fully decentralised peer-to-peer architectures.<sup>205</sup> However, IPRED creates an interface with the Directive on Protection of Privacy in Electronic

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<sup>203</sup> See *Promusicae v. Telefonica*.

<sup>204</sup> See IPRED, Article 8(1).

<sup>205</sup> See IPRED, Article 8(2), which makes it clear that information on the origin and distribution networks of infringing goods comprises the names and addresses of distributors and suppliers of infringing goods as well as information on the quantities delivered or received. After having identified direct infringers, copyright owners are given broad and prompt access to civil proceedings that grant interlocutory measures intended to prevent any imminent infringement or continuation of infringements and other measures such as the seizure of goods suspected of infringing copyright: cf. Article 9 of IPRED.

Communications that raises an almost insurmountable barrier for copyright enforcement.<sup>206</sup>

In the EU legal system, Directive 2002/58 regulates access to users' confidential communications and personal data and their retention and processing.<sup>207</sup> This Directive allows disclosure of personal data only under exceptional circumstances spelt out under Article 15(1). This provision allows member states to adopt legislative measures to restrict user privacy rights when such restrictions constitute a necessary, appropriate and proportionate measure within a democratic society to safeguard national security, defence, public security, and the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communication system. As emphasised by the CJEU in *Promusicae v. Telefonica*, this provision does not oblige member states to establish an obligation under their laws to force ISPs to disclose user personal data in order to enable an effective protection of copyright. According to the CJEU, the only obligation created under EU law for member states and national courts is that of interpreting and transposing the relevant EU directives to ensure a fair balance between the various fundamental rights and proportionality in the enforcement of these rights.

The Task Force widely agreed on the fact that the *Promusicae v. Telefonica* judgment was (and still is) a strong encouragement to EU law-makers to adopt new legislation ensuring a better coordination between copyright enforcement and protection of users personal data in the context of *civil* proceedings. In the decision, the CJEU interpreted the exceptions to user privacy rights broadly, emphasising a reference that the 2002 Directive

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<sup>206</sup> See IPRED, Article 8(3)(e), which requires that the right to information should apply without prejudice to other EU law provisions which “[...] govern the protection of confidentiality of information sources or the processing of personal data.”

<sup>207</sup> See Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), OJ L201/37 (31 July 2002), [hereinafter *Directive on Privacy in Electronic Communications*], which ensures confidentiality of communications and the related traffic data by means of a public communications network and publicly available electronic communications services, through national legislation. In particular, Article 5 provides that member states shall prohibit listening, tapping, storage or other kinds of interception or surveillance of communications and the related traffic data by persons other than users, without the consent of the users concerned, except when legally authorised to do so in accordance with Article 15(1) of the same Directive.

on Privacy in Electronic Communications makes to the 1995 Data Protection Directive.<sup>208</sup> According to such reference, member states are given the option to restrict user privacy rights also in situations that may give rise to civil proceedings, in particular when the processing of personal data is necessary, *inter alia*, “[...] for the protection of rights and freedoms of others [...]”.<sup>209</sup> The CJEU concluded that, due to this reference, the two Directives should be interpreted as expressing the intention of EU law-makers not to exclude from their scope the protection of the right to intellectual property or situations in which copyright holders seek to obtain protection through civil proceedings.<sup>210</sup>

The fact that, in certain jurisdictions, the purpose of user privacy protection systematically prevails over judicial requests of disclosure of infringers’ identity has largely frustrated the objective of copyright enforcement against large-scale infringements through measures made available by IPRED. The Task Force widely agreed on the urgent need to create a uniform interface at EU level between copyright enforcement proceedings and the protection of privacy in electronic communications. This interface, which should ensure that copyright and user privacy are fairly balanced *also* in the context of civil proceedings, could either be inserted into the new framework for EU data protection law, currently in preparation, or be included in a possible revision of IPRED.<sup>211</sup> If this Directive was eventually re-opened, the Task Force widely agreed that its new version could also clarify the types of specific monitoring measures that would pass the above-mentioned proportionality test and the meaning of the crucial requirement of ‘commercial scale’ of an infringement.

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<sup>208</sup> Article 15 of the Directive on Privacy in Electronic Communications provides that restrictions to user privacy rights are permissible when they constitute a necessary, appropriate and proportionate measure to enable prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communication system, as referred to in Article 13(1) of the Data Protection Directive.

<sup>209</sup> See *Promusicae v. Telefonica*, para. 52. Article 13(1)(g) of the 1995 Data Protection Directive provides that member states are allowed to restrict the right to privacy in relation to the processing of personal data where the restriction is necessary for “[...] the protection of the data subject and of the rights and freedoms of others [...]”.

<sup>210</sup> See *Promusicae v. Telefonica*, para. 53.

<sup>211</sup> For an overview of the various issues concerning the modernization of EU data protection law, see K. Irion and G. Luchetta, *Online Personal Data Processing and EU Data Protection Reform*, Report of the CEPS Digital Forum, Centre for European Policy Studies, April 2013 ([www.ceps.eu](http://www.ceps.eu)).

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# ANNEX I. RETAIL PRICES FOR CONSUMER DEVICES IN 20 COUNTRIES AGAINST LEVY AND VAT RATES

The following tables show that there appears to be a pan-European retail price point for consumer devices (i.e. printers, music/video/game devices and tablet computers) regardless of divergent levy schemes (with only Scandinavian consumers willing to pay more). The data suggest that retail prices depend not only on the level of indirect taxation in a country, but also on market conditions and consumers' willingness to pay. The United States generally has the lowest prices, whereas France and Germany are the EU countries with the highest rates for levies. Interestingly, in spite of high charges, German consumers seem to benefit from good deals for the products listed in the tables.

The tables, which refer to online prices, are the author's elaboration of data provided by Kretschmer (2011), *Private Copying and Fair Compensation: An empirical study of copyright levies in Europe*, study commissioned by UK Intellectual Property Office (IPO).

Table A.1 Prices, levies and charges for printers (April 2011)

	Officejet 4500 AIO				Color Laserjet M1132			
	Market Price	VAT	Levy	Net Price	Market Price	VAT	Levy	Net Price
Austria	€ 68	€ 11	€ 4	€ 54	€ 173	€ 23	€ 37	€ 113
Belgium	€ 89	€ 15	€ 5	€ 70	€ 131	€ 13	€ 57	€ 62
France	€ 73	€ 12	€ 0	€ 61	€ 135	€ 22	€ 0	€ 113
Germany	€ 68	€ 9	€ 12	€ 47	€ 174	€ 21	€ 40	€ 113
Ireland	€ 89	€ 15	€ 0	€ 74	€ 139	€ 24	€ 0	€ 115
Italy	€ 68	€ 11	€ 0	€ 57	€ 119	€ 20	€ 0	€ 99
Latvia	€ 70	€ 13	€ 0	€ 57	€ 135	€ 24	€ 0	€ 111
Luxembourg	€ 88	€ 11	€ 0	€ 77	€ 149	€ 19	€ 0	€ 130
Netherlands	€ 70	€ 11	€ 0	€ 59	€ 141	€ 23	€ 0	€ 118
Poland	€ 66	€ 12	€ 1	€ 53	€ 129	€ 24	€ 2	€ 103
Spain	€ 69	€ 9	€ 8	€ 52	€ 166	€ 24	€ 10	€ 132
Sweden	€ 101	€ 20	€ 0	€ 81	€ 154	€ 31	€ 0	€ 123
UK	€ 68	€ 11	€ 0	€ 57	€ 144	€ 24	€ 0	€ 120

Canada	€ 69	€ 5	€ 0	€ 64	€ 105	€ 8	€ 0	€ 97
India	€ 117	€ 13	€ 0	€ 104	NA	NA	€ 0	NA
Japan	€ 132	€ 6	€ 0	€ 126	NA	NA	€ 0	NA
Korea	€ 79	€ 7	€ 0	€ 72	€ 105	€ 10	€ 0	€ 95
Norway	€ 120	€ 24	€ 0	€ 96	€ 152	€ 30	€ 0	€ 122
Switzerland	€ 78	€ 6	€ 0	€ 72	€ 124	€ 9	€ 0	€ 115
US	€ 49	€ 3	€ 0	€ 46	€ 87	€ 5	€ 0	€ 82

Table A.2 Prices, levies and charges for music/video/game devices (April 2011)

	iPod Touch 8 GB				iPod Touch 32 GB				iPod Touch 64 GB			
	Market Price	VAT	Levy	Net Price	Market Price	VAT	Levy	Net Price	Market Price	VAT	Levy	Net Price
Austria	€ 195	€ 32	€ 6	€ 158	€ 269	€ 44	€ 7	€ 218	€ 355	€ 58	€ 8	€ 289
Belgium	€ 229	€ 39	€ 3	€ 187	€ 299	€ 51	€ 3	€ 245	€ 379	€ 65	€ 3	€ 311
France	€ 205	€ 32	€ 7	€ 166	€ 265	€ 42	€ 10	€ 213	€ 353	€ 55	€ 15	€ 283
Germany	€ 199	€ 32	€ 0	€ 167	€ 219	€ 35	€ 0	€ 184	€ 299	€ 48	€ 0	€ 251
Ireland	€ 205	€ 36	€ 0	€ 169	€ 278	€ 48	€ 0	€ 230	€ 359	€ 62	€ 0	€ 297
Italy	€ 212	€ 35	€ 5	€ 173	€ 276	€ 45	€ 6	€ 225	€ 368	€ 60	€ 6	€ 301
Canada	€ 179	€ 13	€ 0	€ 166	€ 229	€ 17	€ 0	€ 212	€ 301	€ 22	€ 0	€ 279
Latvia	€ 193	€ 35	€ 1	€ 157	€ 270	€ 48	€ 1	€ 220	€ 290	€ 52	€ 1	€ 237
Luxembourg	€ 209	€ 27	€ 0	€ 182	€ 276	€ 36	€ 0	€ 240	€ 391	€ 51	€ 0	€ 340
Netherlands	€ 209	€ 33	€ 0	€ 176	€ 279	€ 45	€ 0	€ 234	€ 349	€ 56	€ 0	€ 293
Poland	€ 210	€ 38	€ 6	€ 166	€ 280	€ 51	€ 8	€ 221	€ 362	€ 66	€ 11	€ 285
Spain	€ 195	€ 29	€ 3	€ 163	€ 275	€ 41	€ 3	€ 230	€ 319	€ 48	€ 3	€ 268
Sweden	€ 266	€ 53	€ 3	€ 210	€ 347	€ 67	€ 12	€ 268	€ 459	€ 88	€ 19	€ 352
UK	€ 190	€ 32	€ 0	€ 158	€ 244	€ 41	€ 0	€ 203	€ 301	€ 50	€ 0	€ 251
India	€ 179	€ 20	€ 0	€ 159	€ 220	€ 24	€ 0	€ 196	€ 309	€ 34	€ 0	€ 275
Japan	€ 158	€ 8	€ 0	€ 150	€ 210	€ 10	€ 0	€ 200	€ 278	€ 13	€ 0	€ 265
Korea	€ 193	€ 18	€ 0	€ 175	€ 271	€ 25	€ 0	€ 246	€ 359	€ 33	€ 0	€ 326
Norway	€ 236	€ 47	€ 0	€ 189	€ 304	€ 61	€ 0	€ 243	€ 406	€ 81	€ 0	€ 325
Switzerland	€ 184	€ 13	€ 4	€ 166	€ 229	€ 16	€ 9	€ 203	€ 322	€ 23	€ 15	€ 285
US	€ 139	€ 9	€ 0	€ 130	€ 191	€ 12	€ 0	€ 179	€ 253	€ 16	€ 0	€ 237

Table A.3 Prices, levies and charges for tablet computers (April 2011)

	iPad 16 GB				iPad 2 16 GB				Samsung Galaxy Tab 16 GB			
	Market Price	VAT	Levy	Net Price	Market Price	VAT	Levy	Net Price	Market Price	VAT	Levy	Net Price
Austria	€ 389	€ 65	€ 0	€ 324	€ 639	€ 107	€ 0	€ 533	€ 399	€ 67	€ 0	€ 333
Belgium	€ 448	€ 78	€ 0	€ 370	€ 662	€ 115	€ 0	€ 547	€ 499	€ 87	€ 0	€ 412
France	€ 429	€ 69	€ 8	€ 352	€ 489	€ 79	€ 8	€ 402	€ 441	€ 71	€ 8	€ 362
Germany	€ 379	€ 59	€ 12	€ 308	€ 419	€ 65	€ 12	€ 342	€ 371	€ 57	€ 12	€ 302
Ireland	€ 423	€ 73	€ 0	€ 350	€ 479	€ 83	€ 0	€ 396	€ 430	€ 75	€ 0	€ 355
Italy	€ 379	€ 63	€ 2	€ 314	€ 551	€ 92	€ 2	€ 458	€ 408	€ 68	€ 2	€ 338
Latvia	€ 346	€ 62	€ 0	€ 284	€ 556	€ 100	€ 0	€ 456	€ 368	€ 66	€ 0	€ 302
Luxembourg	€ 429	€ 56	€ 0	€ 373	€ 610	€ 80	€ 0	€ 530	€ 399	€ 52	€ 0	€ 347
Netherlands	€ 379	€ 61	€ 0	€ 318	€ 479	€ 76	€ 0	€ 403	€ 439	€ 70	€ 0	€ 369
Poland	€ 423	€ 79	€ 0	€ 344	€ 607	€ 114	€ 0	€ 493	€ 384	€ 72	€ 0	€ 312
Spain	€ 429	€ 65	€ 0	€ 364	€ 479	€ 73	€ 0	€ 406	€ 385	€ 59	€ 0	€ 326
Sweden	€ 390	€ 78	€ 0	€ 312	€ 502	€ 100	€ 0	€ 402	€ 538	€ 108	€ 0	€ 430
UK	€ 374	€ 62	€ 0	€ 312	€ 409	€ 68	€ 0	€ 341	€ 455	€ 76	€ 0	€ 379
Canada	€ 414	€ 31	€ 0	€ 383	€ 486	€ 36	€ 0	€ 450	€ 367	€ 27	€ 0	€ 340
India	€ 420	€ 47	€ 0	€ 373	€ 694	€ 77	€ 0	€ 617	€ 366	€ 41	€ 0	€ 325
Japan	€ 371	€ 18	€ 0	€ 353	€ 603	€ 29	€ 0	€ 574	€ 587	€ 28	€ 0	€ 559
Korea	€ 400	€ 36	€ 0	€ 364	€ 404	€ 37	€ 0	€ 367	€ 612	€ 56	€ 0	€ 556
Norway	€ 508	€ 102	€ 0	€ 406	€ 521	€ 104	€ 0	€ 417	€ 503	€ 101	€ 0	€ 402
Switzerland	€ 357	€ 26	€ 0	€ 331	€ 422	€ 31	€ 0	€ 391	€ 347	€ 26	€ 0	€ 321
US	€ 256	€ 16	€ 0	€ 240	€ 458	€ 28	€ 0	€ 430	€ 339	€ 21	€ 0	€ 318

# ANNEX II. LIST OF TASK FORCE MEMBERS AND INVITED GUESTS AND SPEAKERS

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