

The Implementation, Application and Effects of the EU Directive on Copyright in the Information Society

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Abstract

This study provides an ex-post evaluation of the EU copyright framework as provided by EU Directive 29/2001 on Copyright in the Information Society (InfoSoc Directive) and related legislation, focusing on four key criteria: effectiveness, efficiency, coherence and relevance. The evaluation finds that the EU copyright framework scores poorly on all four accounts. Of the four main goals pursued by the InfoSoc, only the alignment with international legislation can be said to have been fully achieved. The wider framework on copyright still generates costs by inhibiting content production, distribution and creation and generating productive, allocative and dynamic inefficiencies. Several problems also remain in terms of both internal and external coherence. Finally, despite its overall importance and relevance as a domain of legislation in the fields of content and media, the EU copyright framework is outdated in light of technological developments. Policy options to reform the current framework are provided in the CEPS companion study on the functioning and efficiency of the Digital Single Market in the field of copyright (CEPS Special Report No. 121/November 2015).

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TABLE OF CONTENTS

LIST OF ABBREVIATIONS	I
EXECUTIVE SUMMARY	II
INTRODUCTION.....	1
1. Copyright in the digital era.....	1
2. Structure of the work	4
PART I. THE INTERVENTION LOGIC OF THE INFOSOC DIRECTIVE AND RELATED LEGISLATION	5
1. The rationale for the intervention: Why did the EU intervene in the field of copyright?6	
1.1 Needs and problems at the time of the InfoSoc Directive.....	6
1.1.1 Copyright and the principle of free movement.....	6
1.1.2 The principle of exhaustion and its scope of application	7
1.1.3 The progressive development of an EU copyright policy and regulation	8
1.1.4 EU copyright Directives and industrial policy objectives	9
1.1.5 From sector-specific interventions to horizontal legislation in the field of EU copyright.....	10
1.1.6 The 1995 Green Paper on Copyright in the Information Society.....	11
1.2 Objectives of the InfoSoc Directive	11
1.2.1 General and specific objectives.....	12
1.2.2 Operational objectives	12
PART II. EVALUATION OF SELECTED ISSUES	15
1. The legal aspects of copyright: harmonisation and efficiency of the EU copyright regime, and its impact on other policy areas.....	16
1.1 Legal basis of EU copyright legislation	16
1.2 Form and extent of harmonisation of the EU copyright system.....	18
1.2.1 Standard of originality.....	19
1.2.2 The scope of the exclusive rights of reproduction.....	21
1.2.3 The exclusive rights of communication to the public.....	23
1.2.4 The exclusive right of distribution and the exhaustion principle.....	25
1.2.5 The 'Europeanisation' of copyright exceptions and limitations.....	27
1.3 Legal protection of technological protection measures.....	31
1.4 Sanctions and remedies	35
1.5 On the current efficiency of the EU copyright system	36
1.5.1 Principle of territoriality and collective rights management.....	37
1.5.2 Procedures, regulatory and administrative burdens related to private copying levies	39
1.5.3 Is lack of clarity on copyright's scope a barrier to innovation? The examples of online news aggregation and text and data mining	43

1.6	Interplay between the EU copyright system and other EU policy streams.....	46
1.6.1	Copyright and liability exemptions under the e-Commerce Directive.....	46
1.6.2	Copyright and data protection.....	47
1.6.3	Copyright and fundamental rights.....	49
1.6.4	Copyright and support to cultural diversity.....	50
2.	The Internal Market aspects of copyright: EU copyright and the functioning of the Single Market.....	52
2.1	The market fragmentation effects of legislation on copyright and related rights in the European Union.....	52
2.1.1	The territorial application of copyright rules.....	52
2.1.2	Definitions that fall outside the scope of the EU copyright acquis.....	53
2.1.3	Territorial exercise of the right.....	56
2.2	Territorial licensing and geo-blocking in specific sectors.....	58
2.2.1	The audiovisual sector.....	60
2.2.2	The music sector.....	65
2.2.3	The book publishing sector.....	71
2.3	The market fragmentation effects of copyright exceptions and limitations.....	76
2.3.1	Exception and limitations at EU and Member State level.....	76
2.3.2	Transient and incidental copies.....	77
2.3.3	Exceptions for the benefit of libraries, educational establishments, archives and museums.....	78
2.3.4	Teaching or scientific research.....	80
2.3.5	Reporting of current events.....	82
2.3.6	Quotations.....	83
2.3.7	Parody, caricature and pastiche.....	83
2.3.8	Freedom of panorama.....	84
2.3.9	Private copying.....	84
2.3.10	Relationship between technological protection measures and copyright exceptions and limitations.....	87
3.	Industry aspects of copyright enforcement in the digital environment.....	89
3.1	Suitability of IPRED for use in the digital environment.....	91
3.2	Coherence issues between IPRED and the InfoSoc Directive.....	94
3.3	Interaction between copyright enforcement and the e-Commerce Directive.....	95
3.4	Interaction between copyright enforcement and the Charter of Fundamental Rights.....	97
3.5	The complementary enforcement provisions of the EU Action Plan on Counterfeiting and Piracy.....	98
3.5.1	The 'follow the money' approach.....	99
3.6	Effect of the current provisions on the level of infringements.....	101
3.7	The difficulties in estimating online infringements.....	103
3.8	Concluding remarks.....	105
4.	Remuneration and compensation of authors and performers.....	108
4.1	Economic analysis of legal provisions on remuneration and compensation.....	108

4.2 Literature review on market structure and revenue allocation in the creative content markets.....	112
4.2.1 Audiovisual products.....	114
4.2.2 Music.....	115
4.2.3 Books.....	115
4.2.4 Online platforms.....	116
4.2.5 Advertisers.....	117
4.2.6 Data on revenues.....	118
4.3 Techno-economic analysis.....	119
PART III. GENERAL EX-POST EVALUATION	122
1. Introduction: The framework of our evaluation.....	123
2. Main evaluation questions.....	125
2.1 How effective is the current InfoSoc Directive?.....	125
2.2 How efficient is the present EU copyright framework structure?.....	127
2.3 On the effectiveness of monitoring and evaluation.....	127
2.3.1 Have the existing implementation and monitoring tools been sufficient?.....	127
2.3.2 Is the available evaluation work on the Copyright Directive sufficient?	128
2.4 On implementation gaps	128
2.4.1 'Internal' coherence: what are the main gaps and fragmentation in the application of the existing EU InfoSoc Directive and related broader framework?.....	128
2.4.2 What are the economic and other quantified costs incurred by citizens, society and stakeholders due to these gaps and fragmentation?	130
2.4.3 What are the existing gaps that could be addressed through better application and implementation of the existing Directive and wider legislative framework?	131
2.5 Relevance	132
2.5.1 To what extent has the EU legislative framework been able to keep up with technological developments, in particular with the digital transformation?	132
2.5.2 What are the likely efficiency losses associated with the current inadequacy of the InfoSoc Directive?	133
3. Summary table.....	134
SELECTED REFERENCES AND CASE LAW	137
OTHER REFERENCES.....	141
OFFICIAL DOCUMENTS	142
EU CASE LAW	147
OTHER CASE LAW	149
ANNEX A: NATIONAL IMPLEMENTATION OF SELECTED COPYRIGHT EXCEPTIONS AND LIMITATIONS IN A SAMPLE OF MEMBER STATES	150

List of Abbreviations

ARROW	Accessible Registries of Rights Information and Orphan Works
CJEU	Court of Justice of the European Union
CMO	Collective Management Organisation
DMCA	Digital Millennium Copyright Act
DRM	Digital Rights Management
EC	European Community
ECJ	European Court of Justice
EEA	European Economic Area
GDP	Gross Domestic Product
HADOPI	Haute Autorité pour la Diffusion des Oeuvres et la Protection des droits sur Internet
InfoSoc	Information Society
IP	Internet Protocol
IPRED	Directive on the enforcement of intellectual property rights
ISP	Internet Service Provider
LCC	Linked Content Coalition
RDI	Rights Data Integration
RRO	Reproduction Rights Organisations
SEA	Single European Act
TEC	Treaty establishing the European Communities
TFEU	Treaty on the Functioning of the European Union
TPM	Technological Protection Measure
UGC	User-Generated Content
VPN	Virtual Private Network
WIPO	World Intellectual Property Organization

Executive Summary

Background

Since the diffusion of the Internet in the mid-1990s, governments around the world have sought to adapt copyright legislation to the new opportunities and challenges posed by the “network of networks”. The gradual digitisation of information and the Internet’s end-to-end design have made the exchange of content (including copyrighted content) much easier for end-users, with both positive and negative consequences. On the one hand, the new environment enables unprecedented communication, knowledge-sharing and even the creation of new content by end-users. On the other hand, attempts by right-holders to preserve control of their copyrighted works have so far been systematically frustrated. After the adoption of two World Intellectual Property Organization (WIPO) Treaties in 1996, the European Union has launched a far-reaching policy debate on the need for new copyright legislation, which culminated in the adoption, in 2001, of the Information Society (InfoSoc) Directive.

The InfoSoc Directive had the following major objectives:

- **To align EU legislation with international law**, especially after the 1996 WIPO Treaties that *inter alia* addressed the issue of Technological Protection Measures (TPMs) and introduced a ‘three-step test’ that confines the implementation of exceptions and limitations to special cases that do not conflict with a normal exploitation of the protected work and do not cause an unreasonable prejudice for the legitimate interests of the copyright holder;
- **To strengthen intellectual property protection** in light of technological developments that led to the emergence of the Internet as a major distribution channel for content;
- **To reduce the existing disparities between national legal systems** in terms of the basic definition of copyright, the scope of the rights to reproduction, communication, and distribution, the exceptions and limitations allowed, and the enforcement methods and practices; and
- **To ensure an adequate level of remuneration and compensation of authors and performers.**

More than a decade down the road, it is fair to state that the first objective has largely been achieved, with the other objectives having only been partially achieved, and in some instances, arguably not achieved at all. The InfoSoc Directive managed to introduce, at least partially and not without exceptions, the three-step test into the legal system of the EU Member States, and led to a very broad definition of intellectual property rights coupled with the effective endorsement of TPMs as a viable way to enforce copyright, enabling at the same time a system of copyright protection through the prosecution of actors that circumvent TPMs.

The same cannot be said for the other objectives, however. On the one hand, the InfoSoc Directive introduced common definitions and marked an important step towards the harmonisation of copyright legislation in the Member States, and gave the possibility to the Court of Justice of the European Union (CJEU) to develop, over time, a stream of decisions aimed at harmonising at least the interpretation of exceptions and limitations throughout the Union. In this respect, it is fair to state that the Directive has represented an important step forward in the harmonisation of the legal framework for copyright applied in EU Member States. However, there are a number of outstanding problems in the InfoSoc Directive, which

deserve careful analysis. Among these, enforcement certainly represents a particularly weak part of the protection system envisaged by the EU legislator, mostly due to an excessive reliance on TPMs, which in the end did not develop into the predominant approach for protecting online content, contrary to expectations when the InfoSoc Directive was first enacted. This led to a situation in which the remaining enforcement option in the InfoSoc Directive was recourse to injunctions against intermediaries whose services are used by third parties to infringe copyright (Article 8(3)), a remedy that proved to be inconsistent with the 'mere conduit' principle established in Articles 12-15 of the 2000 e-Commerce Directive, and was gradually marginalised, in particular due to difficulties in obtaining access to justice and in identifying infringers. Likewise, the objective of reducing fragmentation in the copyright regimes of the Member States was not fully achieved due to a number of factors; notably, although the InfoSoc Directive was rooted in Article 114 TFEU, its objective of deepening the Internal Market ended up being subordinated to the necessity of adapting EU legislation to reflect the WIPO Treaties, and strengthening copyright protection. As a result, the EU today is still characterised by 28 different copyright systems. Furthermore, the implementation and scope of exceptions and limitations in Member States vary significantly, which causes harm to certain categories of copyright holders and end-users.

Finally, the InfoSoc Directive was not successful in securing an adequate level of remuneration and compensation for the majority of authors and performers. The balance of powers between authors and performers, on the one hand, and distributors on the other hand, is such that reliance on market forces for the determination of a fair remuneration and compensation is likely to be a desirable choice only for those 'happy few' whose works enjoy a significant degree of success, with the vast majority likely to be under-remunerated.

To sum up, only one out of the four initial objectives of the InfoSoc Directive can be considered as having been fully achieved. Furthermore, the additional EU instruments introduced in the interim to address certain gaps in the EU legal framework on copyright do not appear to have satisfactorily responded to the other initial objectives of the InfoSoc Directive. In addition, technology and user behaviour have rapidly evolved since 2001, and so have the business models of the copyright-intensive industries. Accordingly, many of the basic problems that underpinned the objectives of the InfoSoc Directive have also evolved, and new problems have emerged. **However, two important new Directives concerning copyright were introduced in the recent past, namely the Orphan Works Directive and the Directive on Collective Rights Management, although it is too early to reasonably evaluate their full effect.**

How efficient is the present EU copyright framework structure?

Concerning the efficiency of the intervention, there are serious doubts about cost-effectiveness, where the assessment is negative overall since most of the intended objectives were not reached, also in consideration of the significant technological changes that have emerged since the adoption of the Directives. Moreover, the Directive has also not been successful in eliminating the need to negotiate licences under 28 different legal regimes. A recent study (KEA & Vrije Universiteit Brussel, 2012) estimated that commercial users that provide services in more than one country and offer more than one million titles face transaction costs up to €260,000 per year and require about six employees to deal with licensing issues; in particular, the identification of relevant right-holders may require up to six months and negotiations to clear rights may take up to two years. This costly and bureaucratic process, in an EU copyright intensive industry still dominated by micro-enterprises, might be considered as a serious shortfall in the legislative objectives of EU

copyright law. Furthermore, the failure of Member States to implement a consistent set of copyright exceptions and limitations, at least for those that have a significant impact on cross-border activities, has also led to a system that is inefficient for specific categories of users, affecting in particular research and innovation and the viability of new products and services that could target the whole EU Internal Market (e.g. social networks).

Finally, the EU *acquis* on copyright seems to have ensured benefits for only certain categories of authors, performers and end-users. This means that, **as things stand, the InfoSoc Directive and related legislation are, when taken together, limited in terms of their measurable general positive effect on industry and consumers and lack overall efficiency.**

'Internal' coherence: what are the remaining gaps and fragmentation in the application of the existing EU copyright framework?

The major remaining gaps that emerge from our analysis are related to:

- **Absence of clarity** as regards the compatibility of the InfoSoc Directive and IPRED with other legislation, most notably on fundamental rights, data protection, and e-commerce;
- **Absence of a clear legal framework for the remuneration and compensation of authors and performers**, due to the absence of clear provisions in the InfoSoc Directive;
- **Uncertainty as regards the responsibility of online intermediaries**, which have today become central in the distribution of content, and who are increasingly able to monitor traffic flowing through their servers;
- **Absence of clear rules on geo-blocking practices**, characterised by a sound distinction between practices that respond to lawful and legitimate business need, and practices that should be considered as discriminatory and detrimental to end-users (e.g. the deliberate blocking of service portability);
- **Uncertainty over the applicability of private international law** such as on which criteria apply to the determination of the applicable law in the case of copyright infringements occurring online;
- **Uncertainty as regards the applicability of the exhaustion principle** to making content available on intangible media, in particular concerning borderline cases such as 'download-to-own';
- **Lack of flexibility and adaptability to new uses** (e.g. mass digitisation, text and data mining, e-lending, e-learning and user-generated content);
- **Lack of clarity on the implementation of specific exceptions** (e.g. the exception covering parody, caricature and pastiche and the exceptions for the purpose of libraries and similar institutions); and
- **Lack of clear rules on access to justice and evidence** to be used in civil proceedings.

The main sources of fragmentation are summarised below:

- **Divergent definitions on key aspects of copyright law**, including the definition of derivative works/transformational uses and the authorship of copyrighted works;
- **Divergent implementation and interpretation of exceptions and limitations** across EU Member States, with some countries now even introducing new exceptions not originally envisaged by the InfoSoc Directive (e.g. in the UK on text and data mining);

- **Limited consideration of the cross-border effects of specific exception**, including *inter alia* the exceptions for private copying, but also the exceptions for teaching and scientific research, and in relation to certain cases concerning the freedom of panorama;
- **Divergent enforcement practices in Member States**, with some countries relying on administrative procedures to counter infringing behaviour, others relying on codes of conduct and other voluntary measures, and others relying on neither of the two; and
- **Different approaches to the remuneration and compensation of authors through private copying levies**. The disparate national treatment of exceptions, as well as the related levy systems, have so far raised significant national barriers and led to distortions of cross-border trade within the Internal Market.

What are the economic costs and other quantified costs incurred by citizens, society and stakeholders due to the remaining gaps and fragmentation?

There are several sources of cost that can be identified.

- While authors often manage to reduce their transaction costs by relying on collective rights organisations, distributors face **direct costs in the form of substantive compliance costs and transaction costs** due to the need to negotiate licenses on a country-by-country basis with one or more counter-parties.
- **The territoriality of copyright offerings limits content availability and portability and generates costs for end-users and businesses**. It harms competition and drives losses in terms of unrealised EU-wide consumer surplus. This type of market inefficiency reduces price competition and ultimately leads to **suboptimal quantities being sold on the market**.
- Another source of **direct costs is the existing uncertainty** about the rights and obligations of different types of industry players, as well as over-enforcement mechanisms.
- **Inefficiency is generated by a confusing and contradictory interpretation of certain exceptions and limitations, as well as by the interaction between the use of TPMs and available exceptions and limitations**. The current situation hinders the possibility for libraries to engage in e-lending, for example, and for researchers to engage in productive data processing for research and teaching purposes; this, in turn, leads to foregone benefits for society as a whole.
- In the era of big data and data-driven innovation and new business models, the **absence of legal certainty on text and data mining can also be hugely detrimental** to the development of new offers and services, which in turn limits benefits to society through a direct negative impact on so-called 'dynamic efficiency' (e.g. innovation and the development of new welfare-enhancing products and services).
- **Furthermore, the lack of a level playing field between 'traditional' distributors and online intermediaries** (especially in the audiovisual sector) can lead to insufficient incentives for the creation of content from the outset, which in turn would translate into a lack of dynamic efficiency. This problem can also account for a lack of adequate funding and exposure for 'niche' content.
- **The significantly superior bargaining strength of specific players (especially online intermediaries) could lead to unequal contractual conditions and consequently undesirable welfare losses** in the contracts concluded between authors and intermediaries.

- Finally, **the absence of a fully integrated Single Market for creative content dramatically reduces the value that end-users derive from Internet access.** The greater the amount of content that can be circulated among all users in the EU, the greater the value of the EU Digital Single Market as a whole.

Although it is difficult to estimate these costs in terms of GDP, available data sets show that a fully integrated Digital Single Market could contribute between €260 billion and €520 billion to European GDP. The long-term growth impact of the digital reform effort already undertaken has been estimated at above 1%, and further efforts in line with the Digital Agenda for Europe targets are expected to generate an additional 2.1% of GDP growth.

What are the existing gaps that could be addressed through better application and implementation of the existing Directive and wider legislative framework?

Among the main gaps we identified, only a narrow subset could be partly filled if the existing *acquis* were clarified and made more consistent in terms of both interpretation and implementation. This is perhaps the case for the compatibility of the InfoSoc and IPRED Directives with other legislation, most notably on fundamental rights, data protection and e-commerce, for which non-legislative documents and clarification efforts could probably address some outstanding problems without requiring legislative reform. Similarly, the lack of flexibility and adaptability of exceptions and limitations to new uses (mass digitisation, text and data mining, e-lending, e-learning, user-generated content) could be partly remedied if, for example, text and data mining were directly included in the scope of the mandatory exception for transient copies. Moreover, the lack of clarity on the implementation of specific exceptions (e.g. the exception for parody, caricature and pastiche) could be remedied, at least partly, through more coordinated and consistent implementation.

That said, there are many gaps that would require legislative intervention. These include the absence of a clear legal framework for the remuneration and compensation of authors and performers, which is due to the absence of clear provisions in the InfoSoc Directive; *the existing* uncertainty as regards the responsibility of online intermediaries; the lack of clear rules on geo-blocking practices; the uncertainty as regards private international law aspects such as the criteria to apply for the determination of the applicable law in the case of copyright infringements occurring online; the partial uncertainty as regards the applicability of the exhaustion principle to the making available of 'download-to-own' content on intangible media; and the lack of clear rules on access to justice and collection of evidence to be used in civil proceedings. As is apparent from the ongoing debate on copyright reform at EU level, all these are issues that only legislative intervention could begin to remedy effectively.

Is the EU legislative framework in line with technological developments?

As clarified throughout this report, **the EU legislative framework, and in particular the InfoSoc Directive, can be considered as increasingly outdated in light of technological developments:** not only are the original exceptions and limitations (envisaged as a closed set) now increasingly misaligned with technological developments, they also potentially limit the development of welfare-enhancing uses of information. Moreover, enforcement mechanisms outlined in the InfoSoc and IPRED Directives have been largely overtaken by technology and countries today hardly ever rely on civil litigation to enforce copyright laws.

Most notably, the lack of certainty over the application of a number of exceptions, including the one on text and data mining, represents an outstanding oversight in the EU *acquis* on copyright. For example, when it comes to libraries and similar institutions, the current set of exceptions and limitations does not cover e-lending and hampers mass digitisation projects, let alone new options for the 'online' consultation of digitised content. Similarly, unevenly implemented exceptions for teaching and research potentially impinge on the provision of pan-European e-learning services as well as on the creation of a truly integrated European Research Area. The creation of user-generated content and more simply the sharing of pictures on social networks encounter substantial obstacles in the fragmentation and uncertainty of the current EU copyright framework.

In summary, the relevance of the overall approach adopted by the InfoSoc Directive and its subsequent legislation deserve urgent and careful adaptation to address the problems and gaps identified in the scope of the rights and exceptions, the existing emphasis on 'copy' rights rather than authorship and also to address the insufficiencies concerning enforcement.

What are the likely efficiency losses associated with the current inadequacy of the InfoSoc Directive?

Our Study identifies a number of inefficiencies associated with the current inadequacy of the InfoSoc Directive. Generally speaking, such inefficiencies can be divided into the following categories:

- **Productive inefficiency.** Current legislation in the field of copyright increases costs for content producers and distributors, and also limits the availability of content for end-users. In particular, inefficient enforcement limits incentives to produce and distribute new valuable content for right-holders. In addition, current rules do not encourage those users who would make use of such content to create user-generated content or to engage in text and data-mining activities. This means that overall content production is hampered by an unnecessarily complex and restrictive *acquis*, and this might explain the differences in the relative performance of the EU *vis-à-vis* its global competitors in specific areas. There are good reasons to believe that both the production and the dissemination of knowledge would greatly benefit from the availability of more up-to-date rules, which would couple greater effectiveness in enforcement with more user-friendly provisions on content consumption, re-use and transformation.
- **Allocative inefficiency.** Legal fragmentation and limits to the availability of content in the Internal Market fundamentally reduce the value of the Internet for European end-users, because the end-to-end design of the internet (i.e., the ability of each user to communicate and exchange files with every other user) cannot be fully exploited to share and access all types of content. The untapped consumer and producer surplus brought on by the lack of availability of content and by widespread copyright infringement account for reductions in allocative efficiency that reverberate on the value of digital content available online, and hence also on the value of Internet access for end-users. Nevertheless, this does not necessarily lead to the conclusion that all price discrimination in the Single Market should be prohibited: as noted throughout this Study, there are several instances of price-discrimination, even those based on geo-blocking practices, which can be considered as welfare-enhancing, not welfare-reducing. The difficulty in the reform exercise consists precisely in singling out welfare-reducing practices and

curbing them while treating pro-competitive, welfare-enhancing forms of price discrimination as perfectly viable business solutions.

- **Dynamic inefficiency.** Typical examples are the dissuasive effects of piracy and ineffective enforcement, and also the impact of current uncertainty and existing legal constraints on fast growing new forms of content production such as user-generated content and text and data mining. Importantly, the reduction in quantity and quality of content available to end-users can also lead to a reduction in the demand for improved Internet connectivity and bandwidth, and could thus also end up stifling incentives to deploy broadband networks due to a sustained slowdown in demand from end-users.

Finally, and even more importantly, it is undeniable that, whatever the negative impact associated with the sources of inefficiency identified, it is only likely to increase over time as the Internet permeates a growing number of activities and carries an ever-larger share of copyrighted creative content.

Summary table

The table below summarises the results of our ex-post evaluation on the InfoSoc Directive and its related instruments and is based on four key criteria, namely effectiveness, efficiency, coherence and relevance. The table provides a score from • (lowest) to ••••• (highest) for each evaluation criterion, while the cell on the right end of the table includes a brief illustration of the motivation behind the decision to attribute a specific score.

Summary ex-post evaluation

Criterion	Score (1 to 5)	Motivation
<i>Effectiveness</i>	••	Of the four main goals pursued by the InfoSoc, only one can be said to have been fully achieved (alignment with international legislation), and even in that case there are exceptions and divergences (e.g. the three-step test, making available right). The other goals have only partly been achieved, and technological evolution makes them even harder to achieve today.
<i>Efficiency</i>	•	The InfoSoc Directive is inefficient because it could only partially achieve its initial goals (i.e. the failure to achieve intended benefits translates into low cost-effectiveness). Furthermore, the wider framework on copyright still generates costs in terms of its inhibiting factor for content production, distribution and creation, generating productive, allocative and dynamic inefficiencies. Some instruments, such as the Directives on Orphan Works and Collective Rights Management, are too recent to evaluate in full.
<i>Coherence</i>	•••	While the InfoSoc has achieved an unprecedented level of coherence in the European Union's legislation on copyright, and has been complemented by additional instruments (e.g. the Orphan Works and Collective Rights Management Directives), several problems remain in terms of both internal and external coherence .
<i>Relevance</i>	••	Despite its overall importance and relevance as a domain of legislation in the fields of content and media, the EU copyright framework is outdated in light of technological developments .

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Introduction

1. Copyright in the digital era

Over the past two decades, the emergence of the digital economy and the diffusion of the Internet have created significant new opportunities to create, disseminate and consume content, at the same time challenging the ways in which content production has been traditionally promoted and incentivised in industrialised legal systems. After all, that an environment in which every action implies a copy would create tensions in a system conceived for analogue, not digital copies, was to be expected. Since the mid-1990s, the debate on the future of copyright law has been hectic to say the least: some scholars, in light of the digital nature of information exchanged on the Internet and of the Internet's end-to-end design have simply doomed copyright law to death (Barlow, 1994). Other scholars thought that the digital environment would give authors enhanced possibilities to control content consumption through micro-payments, and predicted that the Internet would soon become a 'celestial juke-box' (Goldstein, 1994). And authoritative scholars argued that only technology would be an effective way to achieve effective law enforcement, since on the Internet it is 'code', and not 'law', that defines what is possible (Lessig, 1996).

A few years after the birth of the Web, it seemed fair to state that the prophets of the 'death of copyright' were right, and the advocates of the 'celestial jukebox' had simply gotten it wrong. The reason was simple, and related to the combination of three factors. First, content was flowing in digitised form over the Web, and for the first time the copy was identical to the original – some authors even started to state that on the Web, the 'license is the product', meaning that access rights are what count, and the product itself does not exist anymore

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(Gomulkiewicz, 1998). Second, the end-to-end architecture allowed end-users to exchange files (regardless of whether they were copyrighted or not) without having to pass any filter, as the pipe was 'dumb' and the 'code' of cyberspace allowed them to do it. Third, broadband connections were becoming more widespread, and increased connectivity made it easier for end-users to share content on the Web by shipping large files.

The result of all this was that copyright owners lost control of the use and distribution of their content on the Web, and users started to create a huge and uncontrollable secondary market for digital content. At the extreme, content owners would have been able to sell only one copy of their product: once sold, the digital copy could have been reproduced and shipped millions of times on the Web without significant losses in quality. Copyright enforcement as we had known it since then, in a word, had been killed by the Internet architecture. And this is why commentators have referred to the battle that followed as the battle between architecture and control (Renda, 2011).

A first policy response came with the 1996 *World Intellectual Property Organization Copyright Treaty* (WIPO Copyright Treaty), which called for a broadening and strengthening of copyright, at the same time endorsing technological protection measures (TPMs) and condemning any form of circumvention thereof. The United States (US) implemented the Treaty already in 1998 with the *Digital Millennium Copyright Act* (DMCA). The DMCA did not criminalise copying; on the other hand, it allowed whatever form of anti-circumvention technique, including TPMs aimed at restoring control over digital content. In the same year, the *Sonny Bono Copyright Term Extension Act* extended the validity of copyright to 70 years after the author's death. **In the European Union (EU), the WIPO Copyright Treaty was implemented by Decision 2000/278/EC of 16 March 2000, and copyright legislation for the digital environment was finally introduced with Directive 2001/29/EC (hereinafter, the InfoSoc Directive), which forms the starting point and main subject matter of our evaluation in this report.**

Already at the outset, it became clear that simply legislating to enable the use of TPMs would not suffice to avoid end-users' sharing content through the Internet on a massive scale. In the United States, cases like *Napster* and later *Grokster*, based on a legal precedent related to analogue technology (the 1984 Supreme Court decision in *Sony v. Universal Studios*), eventually led the Supreme Court to modify its interpretation of the law by developing in 2005 an 'inducement theory' aimed at capturing facilitators of online copyright infringements, and even this attempt to extend contributory infringement and vicarious liability to online facilitators did not fully stop the proliferation of new file-sharing services based on increasingly elusive technologies such as torrents (Renda, 2011). A similar approach was adopted some years later in Europe, and in particular in the Swedish *Pirate Bay* case.

The difficulty of limiting copyright infringement by relying exclusively on litigation in court has led to increased emphasis on ways to limit the possibility for end-users to share copyrighted files with their peers. In particular, the entry into the market of Apple's iTunes-iPod system determined the rise of Digital Rights Management (DRM) systems, initially hailed as a panacea against the perils of enduring illegal file-sharing. Not only the InfoSoc Directive was largely based on the belief that DRM would become a major way of ensuring copyright protection in the online environment (as will be recalled and illustrated in more detail in the next Sections of this report): a few years later, in 2005, a report by an *ad hoc* High-Level Group on DRM appointed by the European Commission concluded: "EU

Institutions and Member States [must] reflect in their policy positions that copyright abuse will not be tolerated, and that protection of content delivered via DRM is the way forward.”¹

But that, again, was only a chimera. **Even the most sophisticated protection mechanism ever conceived, such as DRM, combining both technological and legal protection measures, has not put an end to the quarrel on how to effectively protect copyright online.** For example, in an open letter dated 6 February 2007, Steve Jobs observed: “DRMs haven’t worked, and may never work, to halt music piracy...Much of the concern over DRM systems has arisen in European countries. Perhaps those unhappy with the current situation should redirect their energies towards persuading the music companies to sell their music DRM-free...Convincing them to license their music to Apple and others DRM-free will create a truly interoperable music marketplace. Apple will embrace this wholeheartedly.”²

The fact that DRM systems ended up becoming part of existing business models only in a limited subset of content markets (e.g. in e-books) led to a further reflection on how to strengthen copyright enforcement online. This reflection spurred a new wave of legislation that ended up **conflicting with one of the most fundamental tenets of Internet policy: the idea, largely based on the need to defend the neutral design of the Internet**, that Internet Service Providers (ISPs) could not be held liable for the conduct of their subscribers, as they would not be expected to inspect the bits of traffic that end-users shipped or received through their ‘pipes’. These new pieces of legislation violated this principle by relying directly on ISPs to detect copyright infringement and even directly enforce the law. For example, in 2009 France passed a controversial ‘content and creation’ law that called for the creation of the *Haute Autorité pour la Diffusion des Oeuvres et la Protection des droits sur Internet* (HADOPI), a new agency with a mandate to sanction those accused of illegal file-sharing. The law introduced a ‘three-strikes’ rule according to which ISPs should monitor infringing conduct by their subscribers, and after two warnings put them on a black list and block their account for up to one year. The ‘three-strikers’ would, by the way, continue to pay while being disconnected. During the following years, ‘three-strikes’ or ‘graduated response’ legislation was considered and also heavily debated in many other jurisdictions. At the same time, some countries (in particular those, like the Netherlands, that had already legislated in favour of mandatory net neutrality) decided to rely more on self- or co-regulatory remedies such as codes of conduct in order to strike a balance between the need to protect copyright, end-users’ right to privacy and intermediaries’ right to conduct business.

At the EU level, the debate on the scope and enforcement of copyright law has been heavily affected by these different approaches to copyright legislation, with an additional complication, related to the lack of a legal basis to act directly at the EU level, if not to achieve harmonisation and further market integration. The InfoSoc Directive, as will be explained below, was inspired by an array of goals, including alignment with WIPO Treaties and the need to broaden the scope and strengthen the enforcement of copyright in the online environment; however, the legal basis of InfoSoc was essentially linked to the market integration objective. **More than a decade after its adoption the Directive must be appraised in light of its original goals, and also of its coherence with other EU legislation, as well as its relevance in light of past, ongoing and upcoming technological developments.** This is the main motivation for this evaluation Study commissioned to the

¹ See the *Final Report of the High Level Group on Digital Rights Management*, 2004

² Steve Jobs, *Thoughts on Music*, at <http://www.apple.com/hotnews/thoughtsonmusic/>.

Centre for European Policy Studies (CEPS) and Economisti Associati by the European Parliamentary Research Service.

2. Structure of the work

The remainder of this report is structured as follows. **Part I analyses the intervention logic behind the InfoSoc Directive and discusses the developments that have led to its adoption.** More specifically, this part answers the following questions: Why did the EU intervene in the field of copyright and what were the objectives of such intervention?

Part II addresses a number of specific aspects of the implementation of the InfoSoc Directive and related legislation. In particular, **Section 1 discusses legal aspects of copyright** such as the extent of harmonisation of the EU copyright system, its regulatory efficiency and its interplay with other EU policy streams. **Section 2 deals with the Internal Market aspects of copyright**, and encompasses various issues such as the market fragmentation effects of current copyright legislation, the effect and underlying rationale of practices such as geo-blocking, and the effects of the current approach to copyright exceptions and limitations and their interaction with TPMs. **Section 3 looks at the industry aspects of copyright enforcement in the digital environment**, and focuses in particular on the suitability to the digital environment of the Directive on the enforcement of intellectual property rights (IPRED), as well as the compatibility between copyright legislation and other legislation such as the 2000 e-commerce Directive and the Charter on Fundamental Rights. **Section 4 addresses the issue of the remuneration and compensation of authors and performers³** by looking at the various approaches existing in EU legislation, as well as the existing data on market structure and revenue allocation in the creative content markets.

Part III concludes by answering selected ex post evaluation questions provided by the European Parliamentary Research Service, and associated with the effectiveness, efficiency, relevance and coherence of the InfoSoc Directive and related legislation. Finally, **Annex A contains a set of comparative tables on the national implementation of copyright exceptions and limitations in six Member States of the European Union.**

³ In this study the terms ‘remuneration’ and ‘compensation’ are often used together to broadly refer to the financial reward that EU copyright Directives require to be granted to authors and performers for certain uses of their works. These terms, which refer to the same concept and type of pecuniary obligation, are used interchangeably in the relevant legislation, also when the remuneration or compensation has to be paid to other categories of right-holders: for instance, reprography and private copying are allowed on condition that copyright holders receive ‘fair compensation’ (see InfoSoc Directive, Article 5(2)(a) and 5(2)(b)); music performers are given an unwaivable right to ‘equitable remuneration’ for the rental of phonograms (see Directive 2006/115/EC, Article 5); music performers are granted a right to an ‘annual supplementary remuneration’ for the 20-year period of additional protection of sound recordings provided by Directive 2011/77/EU (which amended Directive 2006/116, Article 3), and so on. In the Section concerning the legal aspects of copyright (see Section II.1) this Study gives priority to the specific terminology of the legislative acts taken into consideration.

Part I. The Intervention Logic of the InfoSoc Directive and Related Legislation

1. The rationale for the intervention: Why did the EU intervene in the field of copyright?

This Section identifies the reasons that led to the EU intervention in the field of copyright by first assessing the needs and problems to be addressed by the InfoSoc Directive and its related acts. As a second step, the Section will outline the main objectives that the EU legislators pursued while setting out the EU framework on copyright.

1.1 Needs and problems at the time of the InfoSoc Directive

In a review of the EU legal framework on copyright undertaken in 2004, the European Commission defined the 2001 InfoSoc Directive as the most comprehensive piece of legislation ever adopted in this field.⁴ Even though, as reflected by its title and apparent objective, its adoption was historically triggered by the advent of digitisation of information, **the InfoSoc Directive set out EU law provisions whose scope of application goes far beyond the realm of digital settings, and touches upon all dimensions of artistic and literary property.** Since the time of the submission of a Directive proposal by the Commission in 1997, commentators pointed out that, through this new piece of legislation, the European Community (EC) would have replaced “maybe two-thirds of national copyright laws” (Cohen Jehoram, 2001, p. 545). None of the former EU interventions in this field has been as wide as the legislative reform of 2001, which re-defined and harmonised, to a large extent, the most relevant categories of rights granted to copyright holders and took steps to make copyright exceptions as uniform as possible, in both digital and analogue environments (Cohen Jehoram, 2001).

1.1.1 *Copyright and the principle of free movement: a basic tension*

There was no EU copyright law until the early 1990s. National rules on copyright were taken into consideration insofar as the European Court of Justice (ECJ) found that national provisions created obstacles to the EC principles of free movement of goods and services, and unrestricted competition. National courts started seeking clarification about the basic tension that existed between EU-wide constitutional principles and national copyright rules. **The exercise of intellectual property rights within national borders allowed companies to partition the Common Market in order to prevent the free movement of goods on a cross-border basis.** By reserving to the owner the exclusive right to exploit a protected process, product or work within Member States’ territories, on the grounds of the principle of territoriality of intellectual property, national laws ended up conferring the right to oppose the importation of a good which enjoyed an identical or similar right into another Member State.

⁴ See Commission of the European Communities, Commission Staff Working Paper on the review of the EC legal framework in the field of copyright and related rights, SEC(2004)995, Brussels, 19.7.2004, p. 3.

The first time the ECJ analysed such a conflict in the field of copyright was ***Deutsche Grammophon v. Metro-SB-Grossmärkte***.⁵ The Court found that, although Article 295 of the EC Treaty reserved the creation and definition of the subject matter of an intellectual property right (in the Court's lexicon: the *existence* of the right) to national law, the *exercise* of such a right nonetheless fell within the field of the application of the Treaty. Moreover, the Court clarified that Article 36 of the Treaty on the Functioning of the European Union (TFEU), formerly Article 30 of the Treaty establishing the European Communities (TEC), exempted the exercise of an intellectual property right from the scope of Article 34 TFEU (formerly Article 28 TEC), but only insofar as it was necessary for the specific subject matter of that right to be protected. Embracing this distinction, the ECJ pointed out that, **once a copyright holder exercises his or her exclusive right of distribution by putting a copyrighted work on the market for the first time, the rights should have been 'exhausted', in the sense that Community law should prevent the right-holder from using his or her intellectual property right to prevent parallel imports and restrict Community-wide trade.** The ECJ found that, this way, Community law ended up respecting the existence of copyright while narrowing its exercise for the pursuit of the objective of free movement of goods.

1.1.2 The principle of exhaustion and its scope of application

After having been coined and implemented by the ECJ, **the principle of exhaustion progressively found legislative recognition in Article 4(c) of the 1991 Software Directive,⁶ which concerns the right of distribution.⁷** A similar provision was embodied in Article 5(c) of the **1996 Database Directive.⁸** Meanwhile, the ECJ detailed its definition of the scope of application of this principle in several decisions on Article 30 TEC (now Article 36 TFEU), whose wording justified restrictions on imports and exports on the grounds of national copyright protection.

In *Coditel and Others v. Ciné Vog Films and Others*,⁹ the ECJ made it clear **that the principle of Community-wide exhaustion applied only to the physical dissemination of copyrighted goods, without extending it to intangible forms of commercial exploitation such as a cross-border re-transmission of a film.** In that case, the Court excluded that the principle of free movement of goods and services could allow a Belgian trans-border cable re-transmission of

⁵ See C-78/70, *Deutsche Grammophon v. Metro-SB-Grossmärkte*, 1971, ECR 487. In this case a German manufacturer of sound recordings sought to enforce its copyright in Germany in order to block the import by a third party of copies of the records manufactured and sold in France by its French subsidiary (i.e. with the manufacturer's consent).

⁶ 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, 5.5.2009; which replaced Directive 91/250/EEC, hereinafter 'Software Directive'.

⁷ Article 4(c) of the 1991 Software Directive read as follows: 'The first sale in the Community of a copy of a program by the right-holder or with his consent shall exhaust the distribution right within the Community of that copy, with the exception of the right to control further rental of the program or a copy thereof...' This provision is now included into Article 4(2) of Directive 2009/24/EC.

⁸ Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ L 077, 27.03.1996, hereinafter 'Database Directive'.

⁹ C-62/79, *Coditel and others v. Ciné Vog Films and others* (1980), ECR 881.

a film, broadcast in Germany, without the authorisation of the copyright owner of the film. In *Warner Brothers v. Erik Viuff Christiansen*,¹⁰ the Court declined to apply the exhaustion rule to a case of unauthorised rental of a videocassette in Denmark that had been marketed in the United Kingdom, on the grounds that Danish law, unlike UK law, provided a rental right in favour of copyright owners. Even if the Court recognised that the protection of the Danish rental right had the effect of restricting the intra-Community market for videocassettes, it held that such protection was justified on the grounds of Article 30 TEC (now article 36 TFEU). In *EMI Electrola v. Patricia and others*,¹¹ the ECJ argued that the national protection of intellectual property based on Article 30 TEC (now article 36 TFEU) allowed a copyright owner of sound recordings to obtain an injunction in Germany against the unauthorised importation of records from Denmark, where copyright on such recordings had already expired.

1.1.3 The progressive development of an EU copyright policy and regulation

All the above-mentioned cases have a historical relevance for the integration of Europe in the field of copyright since the European Commission institutionally (and politically) objected to any restriction of the principle of free movement of goods. **The Commission started reacting to each of the above-mentioned ECJ judgments with a number of Directive proposals aimed at harmonising specific aspects of national copyright laws.** On the one hand, the harmonisation measures proposed by the Commission in the field of copyright sought **to remove distortions at the level of primary exploitation of exclusive rights.** On the other hand, these legislative initiatives intended to remove national disparities – under copyright law – that hindered free movement of goods and limited the scope of the exhaustion principle. These disparities affected internal trade at the level of the free trade of copyright products after their primary exploitation by their proprietors within the EC territory.

In the literature, commentators described the Directives proposed by the Commission as a direct consequence of the above-mentioned ECJ judgments (Cohen Jehoram, 2001). These institutional responses to the case law of the ECJ consisted of specific legislation that sought to put the conflict between free movement of goods and national copyright protection to an end. Looking at the legislative evolution of the early 1990s from this perspective, one can easily understand that the adoption of Directive 93/83/EEC on the coordination of certain rules concerning copyright in satellite broadcasting and cable retransmissions¹² is a (not so timely) reaction to *Coditel and Others v. Ciné Vog Films and Others*; Directive 92/100/EEC on rental and lending rights¹³ is linked to the *Warner Brothers* decision; and Directive 93/98/EEC on the harmonisation of the term of copyright protection¹⁴ was **an answer to a**

¹⁰ C-158/86 *Warner Brothers Inc. and Metronome Video ApS v. Erik Viuff Christiansen* (1988) ECR 2605.

¹¹ C-341/87 *EMI Electrola GmbH v. Patricia Im- und Export and others* (1989), ECR 79.

¹² See Council Directive 93/83/EEC of 27 September 1993 on the co-ordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJ L 248, 6.10.1993, p. 15.

¹³ See Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ L 346, 27.11.1992, p. 61.

¹⁴ See Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights, OJ L 372, 27.12.2006, p. 9, hereinafter 'Term Directive'.

disparity in the national term of copyright protection emphasised by *EMI Electrola GmbH v. Patricia Im- und Export and others*.

At that time, the idea of the Commission was not that of creating an entire European copyright system. The publication of the *Green Paper on Copyright and the Challenge of Technology*¹⁵ shows that the Commission mainly intended to put an end to the undesirable outcome of the ECJ's judgments, "and only for very particular subjects, such as computer software, databases, terms of protection and resale rights..." This Commission document explicitly emphasised that EU law should not have enacted horizontal (i.e. general) provisions (Cohen Jehoram, 2001).

1.1.4 EU copyright Directives and industrial policy objectives

This overview of the original Commission plan in the field of copyright would be incomplete without considering that the EU copyright legislation, while aiming to **avoid competitive distortions in internal trade, primarily sought to foster the industrial development and the international competitiveness of Europe especially in sectors, such the production of computer programs and databases, where the European industry needed a boost** (Ullrich, 2003). The Recitals of EU copyright Directives, including the InfoSoc Directive, always stress the need to ensure a high level of protection of copyright as an indispensable tool to achieve industrial policy goals. In the very first European copyright statute, i.e. the 1991 Software Directive, the need to ensure a broad and uniform protection of software triggered the definition at European level of one of the most horizontal aspects of copyright law, namely, the standard of originality of creative works, as a basic requirement for such works (i.e. computer programmes) to be protected as literary works.¹⁶ At that time, while **opting for a standard of originality borrowed from the continental-European *droit d'auteur* (i.e. the author's right) systems, Article 1(3) of the Software Directive obliged Member States such as the UK and Ireland to change their copyright laws on a basic point** (Cohen Jehoram, 2001). Until then, British and Irish laws granted copyright protection to computer programs that entailed "skill, labour or investment". To the contrary, the originality test under German law required at least certain categories of work such as designs and computer programmes to meet further qualitative or aesthetic requirements for copyright protection to be granted.

Even in the case of the 1996 Database Directive the Commission continued to act as a copyright legislator pursuing internal and external industrial policy goals. The end was that of removing the existing disparities in the standard of originality required for a database to enjoy copyright protection.¹⁷ On that occasion, the reasoning of European copyright policymakers was that the difference between the lower copyright standard applied in common law Member States (often referred to as 'sweat of the brow' standard, involving the

¹⁵ See Commission of the European Communities, *Green Paper on Copyright and the Challenge of Technology*, COM(88)172 final.

¹⁶ See Article 1(3) of the Software Directive: 'A computer program shall be protected if it is original in the sense that it is the *author's own intellectual creation*. No other criteria shall be applied to determine its eligibility for protection' (emphasis added).

¹⁷ See Commission of the European Communities, *First evaluation of Directive 96/9/EC on the legal protection of databases*, DG Internal Market and Services Working Paper, 12.12.2005, available at: http://ec.europa.eu/internal_market/copyright (hereinafter *Commission's Evaluation of the Database Directive*).

aforementioned “skill, labour and investment” and the higher standard of intellectual creation applying in *droit d’auteur* Member States triggered market distortions in database products. Hence, the enactment of horizontal rules aimed at granting a high level of copyright protection to two distinct types of databases: (i) ‘original’ databases, which would presumably obtain protection under *droit d’auteur* jurisdictions, as they were the fruit of the *author’s own intellectual creation* and (ii) ‘non-original’ databases (i.e. mere aggregation of data), which resulted from substantial investment in either the obtaining, verification or presentation of their contents, and would meet just the common law copyright standard. That was the reason why the Database Directive introduced at the EU level a new form of *sui generis* protection for these products.¹⁸

With the enactment of this kind of horizontal copyright law measure the European Commission sought to eliminate trade distortions at the level of *primary exploitation of exclusive rights provided under national laws*. The subject matter of the legal protection of computer programmes and databases was harmonised mainly in order to remove uncertainty on minimum requirements for such protection to subsist – so that protection of these works in all Member States could eventually be identical, uniform and complete – and to create higher economic incentives for the high financial investment of human and technical resources that the creation of software and databases required (Rodríguez Pardo, 2003). It is worth pointing out that, at the time of the adoption of these Directives, the co-existing objective of removing obstacles to the free movement of these particular goods and the operation of the exhaustion principle came into consideration only as a ***subsequent policy objective, which was that of facilitating the Community-wide exploitation of copyright goods after primary exploitation.***

1.1.5 From sector-specific interventions to horizontal legislation in the field of EU copyright

A change in the European Commission’s copyright policy, following the publication of the 1995 *Green Paper on Copyright and the Challenge of Technology*, which still advocated a piecemeal approach to copyright harmonisation, and the subsequent proliferation of horizontal measures in this field were mainly the consequence of an institutional change in the EU decision-making process. The constitutional amendments that followed the entry into force of the 1986 Single European Act (SEA) allowed the Community’s Internal Market legislation, including copyright measures, to be adopted by the European Council (i.e., by the Member States) on the grounds of *qualified-majority voting* instead of unanimity (De Witte, 2006).¹⁹ As stressed in the literature, the absence of any national veto under Article 100a (now Article 114 TFEU) ensured the vitality of this provision as a basis for the adoption of a large number of measures associated with the process of completion of the Internal Market (Weatherill, 1997). **This change of legal basis for Internal Market legislation, together with the re-orientation of the Commission’s Internal Market Directorate objectives around**

¹⁸ See Commission’s Evaluation of the Database Directive, p. 3.

¹⁹ De Witte stresses even that, following the enactment of the 1992 Maastricht Treaty and the 1997 Amsterdam Treaty, the scope of ‘pure’ Internal Market legislation, originally encompassed by the legal basis provided by Articles 94 (ex 100: unanimity) and 95 (ex 100a: qualified majority) was reduced by the creation of sector-specific policies such as environmental protection, health and safety of workers, social policy, migration, and civil law and procedure.

1990, contributed to a smoother implementation of harmonisation measures that ensured free movement of copyright goods within the Community.²⁰

1.1.6 *The 1995 Green Paper on Copyright in the Information Society*

The preparatory work for the adoption of such a comprehensive measure as Directive 2001/29/EC started with the publication of the above-mentioned 1995 *Green Paper on Copyright in the Information Society*.²¹ In this document, the European Commission identified several legislative adjustments that the EC would have needed to make in order to pave the way for a harmonised protection of copyright in the newly emerged digital environment. Interestingly, the *Green Paper* argued that, for such a framework to have been created, Community law should have enacted a number of measures that, eventually, were not incorporated in the InfoSoc Directive such as: **i) international private law criteria to identify the law applicable to the contracts and copyright infringements taking place on the Internet; ii) the redefinition at European level of the subject matter and the extension of moral rights on creative works; and iii) an effective harmonisation of provisions regarding collective rights management of copyright.**

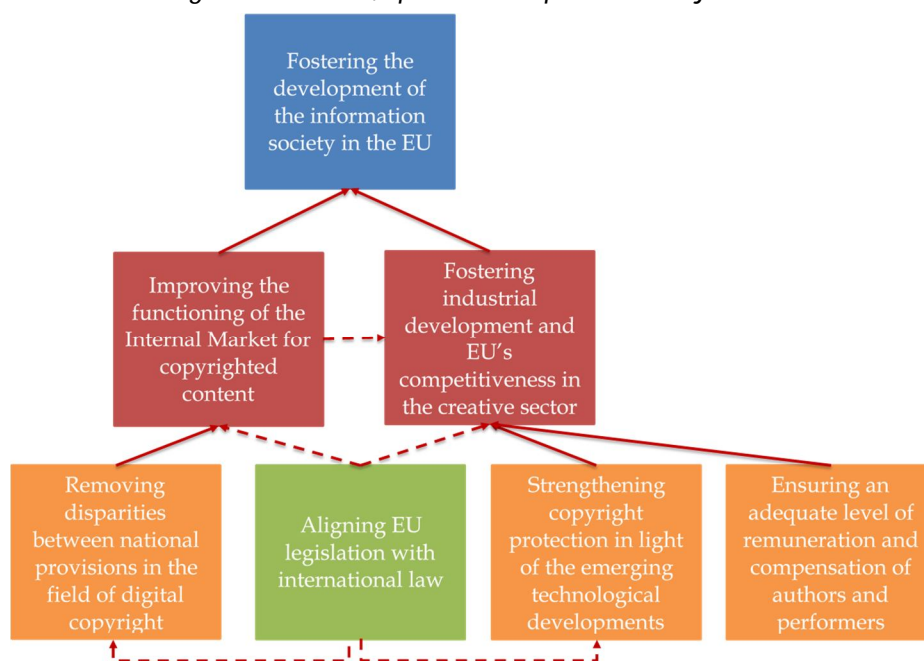
1.2 Objectives of the InfoSoc Directive

The objectives pursued by the InfoSoc Directive are summarised in Figure 1. In a nutshell, **to foster the development of the information society in Europe, the EU legislators decided on the one hand to improve the functioning of the Internal Market for copyrighted works and on the other to provide adequate incentives to boost the competitiveness of the EU creative content industry.** These policy goals as well as the underlying specific and operational objectives are revealed by the preamble of the Directive as further discussed below.

²⁰ See Cohen Jehoram who emphasised that, around 1990, the atmosphere in the copyright unit of what was, until recently, the Internal Market Directorate began to change. As the author stressed, 'New personnel was appointed with other ambitions and orientation than those that went before...' (Cohen Jehoram, 2001, p. 536).

²¹ See Commission of the European Communities, *Green Paper. Copyright and Related Rights in the Information Society*, Brussels, 19.07.1995, COM (95) 382 final, 49.

Figure 1. General, specific and operational objectives



Notes: General objectives in blue; specific objectives in red; operational objectives in orange; operational objectives imposed by international obligation in green.

Source: Authors' own elaboration.

1.2.1 General and specific objectives

As mentioned above, the InfoSoc Directive was adopted by the European Parliament and the Council with the intent to “create a general and flexible legal framework at Community level in order to **foster the development of the information society in Europe**” (Recital 2 of the InfoSoc Directive). To achieve this general objective, the EU legislator acknowledged **the need to both improve the functioning of the Internal Market for new copyrighted products and services** (cf. Recital 2 of the InfoSoc Directive) as well as **foster substantial investment in creativity and innovation and thereby improve the EU competitiveness in the creative sector**. More specifically, the Directive conceived copyright harmonisation and Internal Market integration as a means to an end, which was that of **aiming at “growth and increased competitiveness of European industry”** (Recital 4 of the InfoSoc Directive). To this end, copyright and related rights should have been adapted and supplemented in order to respond adequately to new economic realities by promoting investment in new forms of exploitation of creative works and in the development of network infrastructure.

1.2.2 Operational objectives

The creation of a truly integrated Internal Market for copyrighted works was to be achieved by **removing disparities between national provisions in the domain of copyright**, especially for digital uses. Harmonisation of national copyright laws was in fact deemed necessary in order to **avoid inconsistent national responses to technological developments**. The new Directive should have prevented Member States from responding to technological challenges in this field with isolated initiatives that might have resulted “in significant differences in protection and thereby in restrictions on the free movement of services and

products incorporating, or based on, intellectual property” (Recital 6 of the InfoSoc Directive). **In particular, the existing copyright exceptions and limitations, as set out under national laws, had to be reassessed in the light of the new electronic environment (cf. Recital 31 of the InfoSoc Directive).**

When it comes to supporting the EU creative content sector, as already done for the legal protection of software and databases, the Directive made it clear that any harmonisation of copyright and related rights should have taken as a basis a high level of protection “since such rights are crucial to intellectual creation” (Recital 9 of the InfoSoc Directive). Protection afforded by copyright and the related rights was regarded as a pre-condition for **the artistic work of authors and performers to be adequately rewarded and encouraged** (cf. Recital 10 of the InfoSoc Directive). The new regulation was based on the assumption that only a rigorous and effective protection of copyright and related rights would have ensured that European cultural creativity and production could receive the necessary resources, with a subsequent guarantee of intellectual autonomy for artistic creators and performers and the preservation of their dignity (cf. Recital 11).

Both the preamble of the Directive and its main provisions show that an operational objective of the intervention was that of restating the logic of copyright by **strengthening its legal protection and expanding the scope of the exclusive rights** it provides, at a time when digitisation of content and the development of electronic networks could have easily frustrated copyright’s traditional incentive/reward rationale. Without strong incentives and an adequate financial reward – this was the assumption – the EU would have run the risk of not promoting and preserving cultural creation – and, as a result, cultural diversity – at a time when access to content, and consumer demand for new creations and entertainment, could have grown exponentially. Specifically, the InfoSoc served as **a vehicle for the policy objective of promoting and protecting European industrial investment in copyright digital works and in network infrastructure by obliging Member States to uniformly redefine the scope of exclusive rights.**

In addition, when the Commission made its proposal for the text of a copyright Directive for the information society, another operational objective, external to the EC Treaty, prevailed over the accomplishment of intra-Community purposes. As explicitly mentioned in Recital 15 of the Directive, this objective consisted of the implementation, by the EU, of a number of international obligations set out in the 1996 WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, which were negotiated directly by the Commission with third countries.²² The two major reforms embodied in these treaties concerned, on the one hand, the explicit recognition in favour of both copyright and the related holders of the exclusive right of authorising any communication to the public, including the making available of copyrighted material to the public in such a way that members of the public may access these works from a place and at a time chosen by them.²³ On the other hand, the WIPO Treaties introduced into international copyright law the duty for contracting parties to provide **adequate legal protection and effective legal remedies against the circumvention**

²² See WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty, adopted in Geneva on 20 December 1996, available at: <http://www.wipo.int/treaties>.

²³ See Article 8 of the WIPO Copyright Treaty; Articles 10 and 14 of the WIPO Performances and Phonograms Treaty. A more in-depth commentary on the enactment of these measures is provided in Mazziotti (2008).

of effective technological measures that are used by right-holders in connection with the exercise of their rights.²⁴

²⁴ See Article 11 of the WIPO Copyright Treaty and Article 18 of the WIPO Performances and Phonograms Treaty.

Part II. Evaluation of Selected Issues

1. The legal aspects of copyright: harmonisation and efficiency of the EU copyright regime, and its impact on other policy areas

1.1 Legal basis of EU copyright legislation

Until the entry into force of the Treaty of Lisbon, the EU did not have a direct competence to legislate in the field of intellectual property. The EU acquired such a prerogative with the introduction of Article 118 under the TFEU. Even though this constitutional provision addresses mostly the creation of intellectual property rights whose protection requires “the setting up of centralized Union-wide authorization, coordination and supervision arrangements” (i.e. trademarks, industrial designs, and patents), **this new legal basis would matter if, in the future, the EU decided to establish a genuinely pan-European copyright system.**²⁵

For now, the EU legislative measures in the field of copyright have been legally based on the grounds of Article 114 TFEU (formerly Article 95 TEC). This provision enables EU lawmakers to enact measures that are designed to pursue the approximation of laws for the creation of a Single Market. **Under Article 114 TFEU, therefore, the EU is allowed to take harmonisation measures insofar as they help to remove disparities between national provisions that hinder the free movement of goods, or distort competition.** The only copyright directives that were adopted, more recently, with a different or broader justification under the TFEU were Directive 2012/28 on certain permitted uses of orphan works²⁶ and Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the Internal Market.²⁷ These directives were adopted to pursue additional or more specific policy objectives that were, respectively, those of allowing the mutual recognition of the status of orphan works on a cross-border basis (on the grounds of Article 53(1) TFEU) and facilitating the supply of services of collective rights management in the Internal Market (on the grounds of Articles 50, 53 and 62 TFEU).

As things stand, the unification of legislation in the field of copyright at EU level could be achieved through a regulation based on Article 118 TFEU. Such a process, however, would be more complex than that which occurred in areas such as EU trademark law since the EU layer of legislation would entirely replace national copyright laws. This is due to the fact that, contrary to what happens for industrial property, copyright protection is acquired by

²⁵ In the domains of trademark law and industrial design law such pan-European entitlements already exist, as a result of EU regulations that, in the absence of a specific legal basis at the time of their adoption, had to be based on the so-called implied powers conferred by Article 308 TEC to EU lawmakers, acting on the grounds of unanimity (see Council Regulation (EC) 207/2009 of 26 February 2009 on the Community trade mark (replacing Council Regulation 40/94 of 20 December 1993), OJ L 78, 24.3.2009; and Council Regulation (EC) 6/2002 of 12 December 2001 on Community designs, OJ L 3, 5.1.2002).

²⁶ 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, 27.10.2012.

²⁷ Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, OJ L 84, 20.3.2014, hereinafter ‘Directive on collective management of copyright’.

the act of creation, i.e. without any requirements of registration, but simply by operation of the law. As pointed out in the relevant literature, due to the automatic operation of a unified copyright system, a hypothetical EU copyright would simply supersede national copyright, in a way that the two titles could never coexist (as national and Community trademarks and designs, for instance, do) (Ullrich, 2004). This means that, in a context where harmonisation of national laws is still incomplete (see Section II.1.2), the enactment of a uniform and EU-wide copyright system can legitimately be regarded as a very difficult achievement, at least in the near future.

The InfoSoc Directive is the most comprehensive piece of legislation the EU has adopted in the field of copyright. On the grounds of former Article 95 TEC, the Directive sought to remove disparities between national provisions mainly through the redefinition at European level of the subject matter and the extension of economic rights on creative works. The assumption the whole InfoSoc Directive relies on is that copyright and related rights should have been adapted and supplemented in order to respond adequately to new economic realities by promoting investment in new forms of exploitation of creative works and in the development of network infrastructure (cf. Recital 5 of the InfoSoc Directive). In the view of EU lawmakers, **intervening at EU level with a set of harmonisation measures in the field of copyright would have prevented uncoordinated and isolated initiatives at national level that might have resulted “in significant differences in protection and thereby in restrictions on the free movement of services and products incorporating, or based on, intellectual property...”** (cf. Recital 6). These potential differences at national level would have caused distortions of competition in internal trade, weakening the industrial development of the information society.²⁸

The preamble of the InfoSoc Directive clearly shows that, in spite of the above-mentioned legal basis, the purpose of strengthening copyright protection through the expansion of the digital rights of authors, performers and content producers prevailed over the goal of paving the way for a ‘Digital Single Market’. An Internal Market for new products and services, whose creation, development and marketing was to be protected and stimulated by copyright and related rights was regarded as a pre-requisite for the development of an information society in Europe (cf. Recital 2). At a time when copyright became much easier to infringe (also at a commercial scale) because of the Internet’s decentralised structure, EU lawmakers intended to foster substantial investment in creativity and innovation with the aim of “growth and increased competitiveness of European industry” (cf. Recital 4 of the InfoSoc Directive).

The choice of EU lawmakers to give priority to the objective of redefining the scope of copyright protection over the accomplishment of purposes of Internal Market integration was due mostly to the obligations set out in the 1996 WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. **The goal of ensuring compliance with those international treaties forced the EU to effectively recognise broader rights that the treaties intended to grant to authors, performers and record producers with regard to their works.** These broader rights consisted of an adaptation and expansion of copyright’s logic and rationale to new forms of content dissemination and use that digital technologies and electronic networks had started enabling from the mid-1990s onwards. In particular, the 1996

²⁸ See Ullrich, who emphasised that all EU intellectual property measures, while seeking to avoid distortions of competition in internal trade, end up pursuing the goal of promoting Europe’s industrial development (Ullrich, 2003, p. 471).

WIPO Internet treaties required an extension of the traditional right of communication to the public with the purpose of including interactive transmissions of copyright content into the copyright scope.²⁹ With the advent of digital networks, the public may access creative works on demand (i.e. from a place and at a time chosen by each Internet user). The WIPO contracting parties sought to ensure that this new form of 'point-to-point' content transmission enabled by digital networks was explicitly included in the legal concept of 'communication to the public', to the benefit of authors, performers and the creative industries. Moreover, the WIPO Internet treaties influenced the drafters of the InfoSoc Directive by introducing into international copyright law the duty for the contracting parties to provide effective legal sanctions against the circumvention of technological measures (e.g. anti-copy devices, watermarks, DRM systems, etc.) that are used by copyright holders in connection with the exercise of their rights.³⁰

1.2 Form and extent of harmonisation of the EU copyright system

In spite of its very broad scope, the InfoSoc Directive is just one of the EU copyright Directives and does not deal (directly at least) with several aspects of copyright protection in the framework of the EU Internal Market. Firstly, **the Directive leaves intact and in no way affects the existing sector-specific Directives concerning the protection of computer programmes and databases** (cf. Article 1(2)). Secondly, **the Directive did not harmonise the standard of originality as a basic requirement for copyright protection**, as previous Directives on the protection of computer programmes, photographs and databases did in their specific fields of application. Thirdly, **the Directive does not provide any harmonisation measures with regard to transformative uses of copyright works** (i.e. translation, adaptation or modification), which are reserved to the copyright owner and require his or her consent in order to be undertaken lawfully.

The fact that the Directive was shaped more as an instrument of industrial policy rather than as a pro-Single Market initiative is also evidenced by the absence of provisions that would have been necessary to foster cross-border exploitations of digital works. For reasons that have never been clarified, issues that were identified as necessary for the purpose of removing barriers to market integration in digital markets in the Commission's 1995 *Green Paper on Copyright in the Information Society*³¹ were either taken into consideration at a much later stage (e.g. the harmonisation of collective rights management law through the aforementioned Directive on collective management of copyright) or remain unclear at present. **For instance, in its case law the Court of Justice of the European Union (CJEU) still relies on distinct international private law criteria to identify the law applicable to online copyright infringements.** This issue was regarded in the 1995 *Green Paper* as an important step towards the harmonisation of copyright laws in the information society. Yet, in the absence of a specific provision, the CJEU has relied so far on Article 7 of Regulation 1215/2012 (which replaced the so-called 'Brussels I Regulation'), which provides that "in

²⁹ See Article 8 of the WIPO Copyright Treaty; Articles 10 and 14 of the WIPO Performances and Phonograms Treaty.

³⁰ See Article 11 of the WIPO Copyright Treaty and Article 18 of the WIPO Performances and Phonograms Treaty.

³¹ See Commission of the European Communities, *Green Paper. Copyright and Related Rights in the Information Society*, Brussels, 19.07.1995, COM (95) 382 final, 49.

matters related to tort, delict, or quasi-delict” one can alternatively be sued before the courts of the place “where the harmful event occurred or may occur”.³² In recent judgments the CJEU has followed different criteria to define the place of infringement of copyright and personality rights, locating such a place in the country where the claimant has her centre of interests³³ or in the country where the persons targeted by a given exploitation of copyright works are located.³⁴ More recently, the CJEU opted for the so-called ‘accessibility’ criterion, according to which an infringement action can be validly brought before the courts of the place where the damage occurs or where the act causing such damage takes place.³⁵ It is evident that the criterion of accessibility, whose validity was recently confirmed by the CJEU, paves the way for a multiplication of courts, on the assumption that a copyright enforcement action can be brought in each Member State where the infringed work can be accessed, in accordance with the applicable national rules and in relation to the damages occurred in each single jurisdiction.³⁶

1.2.1 Standard of originality

The sector specific Directives that were adopted before the InfoSoc Directive explicitly identified the standard of originality as a basic requirement for copyright protection. The main reason for that was that EU lawmakers sought to ensure that Member States granted a uniform legal protection to types of works that either did not fall, at that time, within the traditional categories of copyrighted works or were protected in accordance with diverging criteria under national laws.³⁷ If this legislation had not defined at EU level the subject matter of copyright, a different understanding of the basic requirements for protection at national level would have caused distortions of competition in the Internal Market for these works. To avoid that scenario, sector-specific Directives provided a definition of ‘computer programme’, ‘photograph’ and ‘database’, embracing the continental-European criterion of originality. Articles 1(3) of the Software Directive, 3(1) of the Database Directive and 6 of the

³² Regulation (EU) 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351/1, 20.12.2012.

³³ Joined cases C-509/09 and C-161/10, *eDate Advertising GmbH v. X and Oliver Martinez*, Judgment of 25 October 2011, par. 48-52.

³⁴ C-173/11, *Football Dataco Ltd v. Sportradar GmbH*, Judgment of 18 October 2012, par. 38-39.

³⁵ C-170/12, *Peter Pinckney v. KDG Mediatech AG*, Judgment of 3 October 2013, par. 42-43.

³⁶ C-387/12, *Hi Hotel v. Uwe Spoering*, Judgment of 3 April 2014, par. 35 and 38-39 (where the CJEU held that the courts of the Member States where the damage occurs are ‘best placed, first, to ascertain whether the rights of copyright guaranteed by the Member State concerned have in fact been infringed and, secondly, to determine the nature of the damage caused’).

³⁷ For instance, when it comes to the protection of photographic works, Directive 93/98/EEC (Term Directive) provides that a photograph that fulfils the originality requirement set out under Article 6 (i.e. ‘the author’s own intellectual creation reflecting his personality’) should be protected by copyright under national law. As pointed out in the literature, as a result of this provision Member States are free to protect other types of photographs that do not meet the originality requirement through copyright-related rights with their own terms of protection; however, such protection should be based on requirements other than the (harmonised) originality requirement defined in the Directive: Minero, who recalled that countries like Italy and Spain protect non-original photographs by a related right for 20 and 25 years, respectively, after the date of creation (Minero, 2014) – cf. Article 92 of the Italian Copyright Act and Article 128 of the Spanish Copyright Act).

Term Directive clarify that the above-mentioned works are protected by copyright if they are original in the sense that they are their author's own intellectual creation.³⁸ Moreover, in order to reflect the respective standards of originality of common law and civil law countries, the Database Directive identified two distinct types of works that should have been protected under national laws: i) 'original' databases, which would presumably obtain protection under *droit d'auteur* jurisdictions (as they were the fruit of the author's own intellectual creation); ii) 'non-original' databases, which result from substantial investment in either the obtaining, verification or presentation of their contents, and would easily meet the common law copyright (i.e. 'sweat of the brow') standard.³⁹

Unlike the above-mentioned Directives, the InfoSoc Directive did not adopt a single standard of originality for all the creative works it should have applied to. There is no provision in this Directive that seeks to define what the subject matter of copyright is. However, the harmonisation of the concept of originality of creative works was the result of the interpretation of the InfoSoc Directive by the CJEU through a number of judgments where the Court showed an increased determination to promote the development and completion of the harmonisation of EU copyright law (cf. Griffiths, 2014; Rosati, 2011).

The CJEU sought to strike a fair balance between the relatively low standard of originality adopted in the UK and the higher standards applied in continental-European countries such as Germany and France. In the first and most important among such cases, i.e. *Infopaq International A/S v. Danske Dagblades Forening* (2009),⁴⁰ the CJEU found that the notion of copyright 'work' under the Directive should have been the same as the one adopted under sector specific provisions that define originality with regard to works such as computer programmes, databases, and photographs. The CJEU held that, for a matter of consistency with other EU law measures (cf. Recitals 4, 9 to 11 and 20) the rights harmonised under the InfoSoc Directive should have applied only in relation to a work (or parts of a work) which is original in the sense that it is its 'author's own intellectual creation'. Considering the purpose of harmonisation of the InfoSoc Directive, the CJEU developed the process of interpretation that started with *Infopaq International A/S v. Danske Dagblades Forening* (2009) in later judgments that clarified the notion of "author's own intellectual creation". According to the Court, for originality (and copyright protection) to subsist in the case of a graphic user interface, the features of such interface should not be differentiated only by their technical

³⁸ See, in particular, Article 1(3) of the Software Directive: 'A computer program shall be protected if it is original in the sense that it is the *author's own intellectual creation*. No other criteria shall be applied to determine its eligibility for protection'; similarly, Article 3(1) of the Database Directive provides that 'databases which, by reason of the selection or arrangement of their contents, constitute the *author's own intellectual creation* shall be protected as such by copyright. No other criteria shall be applied to determine their eligibility for that protection.'

³⁹ See, respectively, Article 1(2) of the 1996 Database Directive: 'For the purpose of this Directive, "database" shall mean a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means'; and Article 7, par. 1 and 4, of the same Directive, according to which Member States shall provide a *sui generis* right for the maker of a database to prevent extraction and/or reutilisation of the whole or of a substantial part of a database which shows that there has been qualitative and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents, irrespectively of the eligibility of that database for copyright protection.

⁴⁰ See C-5/08 *Infopaq International A/S v. Danske Dagblades Forening* (2009), hereinafter '*Infopaq*'.

function, in a way that the author cannot express his creativity in an original manner.⁴¹ In the case of a portrait photograph, the Court held that originality subsists insofar as the photographer makes creative choices and gives the work her personal touch.⁴² As for sport events, it was held that this type of ‘work’ does not satisfy the Court’s standard of originality insofar as the event is “subject to rules of the game, leaving no room for creative freedom for the purposes of copyright”.⁴³

1.2.2 *The scope of the exclusive rights of reproduction*

For the definition of the right of reproduction, the InfoSoc Directive adopted a notion taken from the specific Directives on information goods, i.e. computer programmes and databases.⁴⁴ This right is defined very broadly, as “...the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part...” of copyrighted works and of performances, phonograms, films and broadcasts protected by so-called neighbouring rights. As pointed out in the relevant literature, because of the inclusion of temporary copying in the copyright scope, the technical concept of reproduction gives rise to an unprecedented condition of simultaneity among the different modes of commercial exploitation of a work (cf. Ginsburg, 1995; Ricolfi, 2002; Hugenholtz, 1996; Hugenholtz, 2000a). This condition of simultaneity is easy to understand if one considers that, in the digital environment, reproductions constitute a technical necessity for digital content to be browsed, cached, used and transmitted over networks.

The preamble of the InfoSoc Directive emphasises the necessity to define the concept of ‘reproduction’ in conformity with the *acquis communautaire* (cf. Recital 21). The very broad definition of the reproduction right (i.e. any form of permanent and temporary copying) incorporated under Article 2 follows the technology-related concept adopted by Directive 91/250 with regard to computer programmes, ten years earlier. **To counterbalance such a broad notion, the InfoSoc Directive provides a mandatory exception that specifies that temporary acts of copying are to be exempted from the scope of reproduction right when they are: “[T]ransient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable: (a) a transmission in a network between third parties by an intermediary, or (b) a lawful use of a work or other subject matter to be made, and which have no independent economic significance...”**

Article 5(1) enacted two distinct provisions. On the one hand, Article 5(1)(a) exempts certain temporary acts, for example, caching,⁴⁵ and routing,⁴⁶ which enable intermediaries such as ISPs temporarily to store and reproduce digital packets of copyright works through their

⁴¹ See C-393/09 *BSA v. Ministry of Culture of the Czech Republic* (2011), par. 45-50.

⁴² See C-145 *Eva-Maria Painer v. Standard Verlags GmbH* (2012), par. 88-92.

⁴³ See C-403/08 and 429/08 *Premier League v. QC Leisure* (2012), par. 98.

⁴⁴ See Article 4(a) of the Software Directive and Articles 5(a) and 7(2)(a) of the 1996 Database Directive.

⁴⁵ ‘Caching’ (from the French ‘cacher’, i.e. ‘to hide’) is the automatic creation of temporary copies of data in order to make the data immediately available for subsequent uses.

⁴⁶ The term ‘routing’, instead, describes a modality of transmission by which each whole of digital data is fragmented into many packets, each of which is sent electronically to the required destination through the shortest way.

cables and network infrastructure.⁴⁷ On the other hand, Article 5(1)(b) allows end-users to engage in temporary acts (e.g. browsing and caching) that have “no independent economic significance”. The case law of the CJEU is of help to better understand the factual requirements that should be met for the exemption from the reproduction right to apply.⁴⁸ The Court found that a reproduction of copyright materials should be regarded as transient or incidental under certain conditions, each of which should be satisfied for the copyright exception to apply (*Infopaq*, par. 55). Firstly, the duration of the act must be limited to what is necessary for the proper completion of the technological process at issue (*Infopaq*, par. 64). Secondly, for temporary acts to be exempted, a reproduction should be an integral and essential part for the correct and efficient functioning of the technological process (*Infopaq II*, par. 30). Thirdly, the reproduction should aim at enabling either a transmission in a network between third parties by an intermediary or a lawful use, such as the ephemeral acts of reproductions that enable a satellite decoder and a television screen to function correctly.⁴⁹ Last but not least, the reproduction must not have an independent economic significance, in the sense that it is not be able to generate an economic advantage additional to the one generated by the intended use and it should not modify contents.⁵⁰

With particular regard to the transient reproductions made by information carriers and exempted under Article 5(1)(a), this exemption serves the purpose of excluding carriers from indirect liability for copyright infringements carried out by their customers (see also above, in the introductory Section to this report). The technical functioning of the Internet – like that of a gigantic ‘copy machine’ – requires intermediaries to engage in temporary reproductions of small digital packets for digital content to be communicated over networks. The above-mentioned provision of the InfoSoc Directive makes it clear that acts of transient reproduction do not fall within the legal notion of ‘copies’ that are subject to the control of copyright holders. The complementary provisions of Article 5(1)(a) of the InfoSoc Directive and Articles 12 to 15 of the 2000 Electronic Commerce Directive restrict, under certain clear conditions, the liability of ISPs acting as mere conduits, caching and hosting service providers for the communication of infringing material.⁵¹ It is worth recalling that, at the time of the negotiations for the 1996 WIPO Copyright Treaties, the issue of transient reproductions was far from being taken for granted. This question was highly debated in Geneva, where the US delegation proposed the adoption of a notion of copyright reproduction that would have intentionally invoked the liability of information carriers for

⁴⁷ See: ‘Did we really need a European lawmaker to tell us that caching and browsing are allowed without authorisation? A common sense right would have done the job as well, if not much better...’ (Hugenholtz, 2000b).

⁴⁸ See C-5/08 *Infopaq International A/S v. Danske Dagblades Forening* (2009); C-302/10 *Infopaq International A/S v. Danske Dagblades Forening* (2012), hereinafter *Infopaq II*; C-403/08 *Football Association Premier League Ltd and Others v. QC Leisure and Others* (2012), hereinafter *Premier League*.

⁴⁹ See *Premier League*, par. 165-172. By ‘lawful use’ one should mean a use either authorised by the right-holder or not restricted by law, as made it clear in the InfoSoc Directive, Recital 33. See also *Infopaq II*, par. 43-44.

⁵⁰ See *Premier League*, par. 176, and *Infopaq II*, par. 54.

⁵¹ 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, OJ L 178, 17.7.2000, hereinafter ‘e-Commerce Directive’, Articles 12 to 15. On the connection between the InfoSoc Directive and the e-Commerce Directive see Hart (2002) and IVIR (2007).

their acts of communication through networks. The intention was that of requiring such intermediaries to police unauthorised flows of copyrighted works through their infrastructure.⁵²

The landmark decision of the CJEU in *Infopaq* shed light on the scope of the exclusive right of reproduction by pointing out the existence of an inextricable link between the notion of 'reproduction' and the requirement of originality of the copyright work that is copied without the authorisation of the copyright owner. Interestingly enough, *Infopaq* did not concern the making of digital copies. Rather, the supposedly infringing activity consisted of storing an extract of a copyright work comprising 11 words and printing out that extract. The CJEU found that such an activity could come within the scope of Article 2 of the InfoSoc Directive "if the elements thus reproduced are the expression of the intellectual creation of their author" (*Infopaq*, par. 51). In a subsequent case concerning the copying of transient fragments of protected works within a satellite decoder and on a television screen, the CJEU found that the reproduction rights could extend to those fragments insofar as they contain elements which are the expression of the author's own intellectual creation and a court determines the subsistence of such elements while examining the units composed of such fragments simultaneously (Premier League, par. 159). As emphasised in the literature, if these judgments were deemed to mean that the reproduction of 11 words or of a few fragments of a protected work always infringes copyright, this would have maximising tendencies (Griffiths, 2014). Instead, this approach merely suggests that very short extracts of protected works *might* constitute a reproduction legally reserved to the copyright holder, within the meaning of Article 2.

1.2.3 *The exclusive rights of communication to the public*

The InfoSoc Directive provided an EU-wide adaptation of the traditional right of communication to the public to the realm of electronic networks (cf. InfoSoc Directive Articles 3 and 4). Taking as a model the broad definition embodied in Article 8 of the 1996 WIPO Copyright Treaty,⁵³ Article 3 of the Directive grants authors, performers and the producers of copyrighted works with the exclusive right "...to prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time chosen by them."⁵⁴

⁵² The US proposal, which was eventually rejected, had previously been elaborated in the so-called 1995 White Paper: see U.S. Department of Commerce, Patent and Trademark Office, Information Infrastructure Task Force, Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights, available at: www.uspto.gov/web/offices/com/doc/ipnii/front.pdf.

⁵³ Article 8 of the 1996 WIPO Copyright Treaty provides as follows: 'Right of Communication to the public: ...Authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at the time chosen by them.'

⁵⁴ The preamble of the Directive (cf. Recital 23) clarifies that this right 'should be understood in a broad sense, covering all communication to the public not present at the place where the communication originates...' and it should include 'any such transmission or re-transmission of a

The teleological and ‘interventionist’ approach the CJEU developed in its judgments touched upon the subject matter of right of communication to the public. In the same way as with the notion of the right of reproduction, the CJEU did more than merely interpret the existing law and ended up coining additional requirements and parameters aimed at specifying (and narrowing, in certain cases) the scope of this exclusive right.

In its interpretation of Article 3 of the InfoSoc Directive, the Court relied on the explicit objective of the Directive to ensure the extension of this right to all communications “to the public not present at the place where the communication originates” (cf. Recital 23). In interpreting this concept the CJEU made it clear that the harmonisation of the right of public performance fell outside the scope of Article 3, since ‘public performance’ requires actors and performers to be in direct contact with the public.⁵⁵ In other cases where the communication of copyright works occurred as a result of an intervention (i.e. the installation of TV screens and/or speakers) by a commercial user or operator (i.e. a hotel, a spa establishment or a pub owner) in the transmission of copyright works, the Court found that such a deliberate intervention gave rise to a distinct act of communication and required a separate authorisation of the copyright owner for the activity to be lawful.⁵⁶ The CJEU reached such a conclusion on the assumption that a company that had given its customers access to broadcast works via television sets installed in its clients’ bedrooms or in a public house intended to target a new public, by distributing in those places, with full knowledge of the position, the signal received carrying the protected works.⁵⁷ According to the Court, even though the ‘public’ refers to an indeterminate number of potential listeners or viewers, such a notion does not necessarily entail a large number of persons. Rather, this notion establishes a certain *de minimis* threshold and requires that, for the author’s exclusive right to come into play, a work is made available to persons in general, and not to specific individuals belonging to a private group.⁵⁸ In the above-mentioned cases, a ‘new public’ is a public that was not taken into account by the authors of the protected works when they authorised their use by the communication to the original public.⁵⁹

The implementation of the ‘new public’ criterion raised criticism and strong objections when the Court applied it in a landmark case where the question was whether the supply, on a given website, of a hyperlink to protected works freely accessible on another website

work to the public by wire or wireless means, including broadcasting...’ This means that the right covers, in particular, the interactive on-demand transmission of copyright works over digital networks (see Recital 25).

⁵⁵ See C-283/10 *Circus Globus Bucuresti v. UCMR-ADA* (2011).

⁵⁶ C-306/05 *SGAE v. Rafael Hoteles SA* (2006), par. 37-39 and 42; C-351/12 *OSA v. Lecebne lazne Marianske Lazne* (2014), par. 29-32; *Premier League*, par. 194-197.

⁵⁷ See C-306/05 *SGAE v. Rafael Hoteles SA* (2006), par. 42; *Premier League*, par. 194.

⁵⁸ C-162/10 *Phonographic Performance (Ireland) Limited v Ireland* (2012), par. 34-35; C-135/10 *Società Consortile Fonografici (SCF) v Marco Del Corso* (2012), par. 85-86.

⁵⁹ See *Premier League*, par. 197. In another relevant case concerning the retransmission of TV broadcasts by a company enabling its customers to watch streams of a third party’s TV broadcasts, the CJEU held that the circumstance that the online service provider used a specific technical means to ensure or improve reception of the terrestrial television broadcast should have been regarded as a new communication to the public ex Article 3 of the InfoSoc Directive by itself, i.e. without the necessity of examining whether the user intended to target or reach a new public: see C-607/11 *ITV Broadcasting Ltd v. CatchupTV Ltd* (2013), par. 26-27 and 38-39.

constituted an act of communication to the public.⁶⁰ A second question was whether acts of hyperlinking required the permission of the copyright holders. The CJEU gave a positive answer to the first question, holding that a hyperlink is a form of making content available to the public (*Svensson v. Retriever Sverige AB*, par. 20-23). The answer to the second question, instead, was negative since, according to the Court, the fact that the linked works were freely available on another site, without being subject to any restrictive measures, did not lead to a communication of such works to a new public: “since there is no new public” – the CJEU concluded – “the authorisation of the copyright holders is not required”.⁶¹ This conclusion was upheld at a later stage by the CJEU in a case which concerned the lawfulness of embedding a copyright audiovisual work freely accessible on YouTube onto a given website without the right-holder’s authorisation.⁶² In the same way as in *Svensson*, the Court found that the embedded video was neither communicated to a ‘new public’ nor transmitted through ‘new specific means’ that would make the act of embedding content distinct from the original act of communication (*Bestwater International*, par. 19). **In both *Svensson* and *Bestwater International*, then, the ‘new public’ criterion ended up narrowing the scope of the right of communication to the public.**

As emphasised by copyright experts, this approach by the CJEU is unfortunate from the perspective of right-holders since it enables third parties to capture the value created by the appeal of literary and artistic works made available by reference on certain sites without having to pay compensation. The conclusion of the CJEU is also unexpected insofar as it goes beyond the provisions of the InfoSoc Directive and deviates from the obligations of the EU under international copyright law, where the restrictions stemming from the ‘new public’ requirement are not contemplated. Moreover, the fact that these judgments draw on the absence of restrictions to access the works on the Internet seems to run contrary to the principle that copyright protection should not be made subject to formalities or any obligation to reserve rights, as provided under Article 5(2) of the Berne Convention on the protection of literary and artistic property.

1.2.4 The exclusive right of distribution and the exhaustion principle

From a legal perspective, a significant achievement of the InfoSoc Directive was that of defining (and distinguishing) the scope of the rights applicable to the different forms of circulation of copyright works in the digital environment. Articles 3 and 4 of the Directive established a careful distinction between the right of communication to the public of copyrighted works (which extends to making content available in an interactive manner, i.e. the ‘Internet way’) and the distribution right, which is strictly confined to the sale of physical media that incorporate a protected work.

As anticipated above, the Directive defines the right of making content available through digital networks by strictly delimiting the right of distribution of copyrighted works. The Directive refers to ‘distribution’ with exclusive regard to the circulation of physical (i.e. tangible) media that incorporate a protected work. The preamble of the Directive (cf. Recital 28) clarifies that copyright protection covers “the exclusive right to control distribution of the

⁶⁰ C-466/12 *Svensson v. Retriever Sverige AB* (2014), hereinafter *Svensson*.

⁶¹ See *Svensson*, par. 26-28.

⁶² C-348/13 *Bestwater International GmbH v. Michael Mebes* (2014), hereinafter ‘*Bestwater International*’.

work incorporated in a tangible article”, in such a way that the principle of EU-wide exhaustion cannot apply to the dissemination of intangible copies over networks.⁶³ The distribution right has been interpreted by the CJEU in a few judgments that acknowledged the application of such right only to the sale of physical copies of copyright works. **In particular, the CJEU’s case law made it clear that Article 4 of the InfoSoc Directive does not leave Member States with the freedom to provide for a rule of exhaustion having effects outside of the EU (i.e. international exhaustion).**⁶⁴ Moreover, the Court found that **the distribution right is not exhausted if a physical medium incorporating a copyright work has been altered after the sale of the medium in its original format without the copyright owner’s consent.**⁶⁵

Despite the clarity of the principle that links exhaustion (just) to physical media, in a landmark decision the CJEU caught the European Commission and copyright experts by surprise, holding that this principle can be applied also in the online environment. The Court held that the exclusive right of distribution of the owner of a computer programme should be regarded as being exhausted in relation to the sale of a copy of the programme that customers downloaded from the copyright holder’s site after having purchased it under a license granted for an unlimited period of time.⁶⁶ According to the CJEU, when this type of sale occurs, the copyright owner is no longer entitled to block a second-hand market for such copies. This means that 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 programme, to their own customers do not infringe the right of distribution of the copyright owner. The CJEU reached this conclusion with specific regard to the Software Directive that – unlike the InfoSoc Directive – does not incorporate a right of making computer programmes available as a species of the right of communication to the public. The *UsedSoft* judgment clarified that, for the distribution right to be exhausted with regard to computer programmes, the first acquirer should delete or make the original copy of the programme downloaded onto his/her computer unusable at the time of resale.⁶⁷

⁶³ According to Article 4(2), which draws from the *acquis communautaire* on exhaustion, the distribution right ‘should not be exhausted within the Community in respect of the original or copies of the work, except where the first sale or other transfer of ownership in the Community of that object is made by the right-holder or with his consent.’

⁶⁴ C-479/04 *Laserdisken ApS v. Kulturministeriet* (2006), par. 23-26.

⁶⁵ C-419/13 *Art & Allposters BV v. Stichting Pictoright* (2015), par. 37 to 40, and par. 46. This case concerned a business (*Art & Allposters*) which markets through its websites posters and other kinds of reproductions of copyright works of art by famous painters. The claimant (*Pictoright*) was a Dutch collecting society having the mandate to exploit copyright on behalf of the copyright holders. Among other products, *Art & Allposters* sells images on canvases, which are obtained through a chemical process by which images incorporated in posters are transferred from paper to canvas and then stretched over a wooden frame. *Pictoright* successfully claimed that this process and the related business was unlawful without the copyright owner’s consent and the exercise of the distribution right concerning the posters was not exhausted when it comes to canvases.

⁶⁶ C-128/11 *UsedSoft GmbH v. Oracle International Corp.* (2012), hereinafter *UsedSoft*.

⁶⁷ See *UsedSoft*, par. 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 programmes 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 sure the original acquirer has not made copies of the programme that she continues to use after having sold her material medium.

This judgment clearly shows a problem of compatibility between the concepts of 'distribution' and 'exhaustion' incorporated in the InfoSoc Directive and the same notions under the *lex specialis* of the Software Directive. In short, this judgment showed a problem of alignment between these Directives that is mostly due to the fact that the EU software legislation was enacted (and kept in force, in spite of the recast of the Directive in 2009) when the online environment did not exist and distribution occurred exclusively through physical formats. The European Commission is fully aware of this problem, to such an extent that it intervened in *UsedSoft* to endorse the arguments of Oracle and to claim (unsuccessfully) the non-applicability of the 'exhaustion' principle in the online distribution of software, which should have been regarded as a form of making content available to the public on the grounds of Article 3 of the InfoSoc Directive (*UsedSoft*, par. 50).

1.2.5 The 'Europeanisation' of copyright exceptions and limitations

As this Section shows, the InfoSoc Directive embodies an imbalance that lies in the fact that, whereas the vast majority of exclusive rights was harmonised and adapted to the digital environment, exceptions and limitations were conceived as optional for Member States. As a result, these provisions have been understood and implemented at national level in very different ways. In spite of its harmonisation purposes, the InfoSoc Directive did not distinguish between exceptions having a negative impact on cross-border activities and exceptions whose subject matter could have been left to national lawmakers without hindering the smooth functioning of the Internal Market of copyright and related rights. This approach openly contradicted a Directive Recital (cf. Recital 31) where the drafters acknowledged the relevance of the distinction for a proper definition of the degree of harmonisation of the classes of exceptions.

1.2.5.1 Optional character

The Directive opted for a list of non-mandatory exceptions and limitations that, as clarified under Recital 32, should be regarded as exhaustive. It would be hard to understand the compatibility of this approach with the institutional objective of the Directive without recalling the general lack of consensus among EU lawmakers on the definition of the acts and uses that should have been exempted from the copyright's scope, especially in the digital environment. It should be also borne in mind that, from a political point of view, national governments sought to preserve their sovereignty and prerogatives in defining and enforcing those exceptions and limitations through which national laws have traditionally pursued specific objectives of public and cultural policy (e.g. encouragement of education and research, criticism, freedom of expression and communication, news reporting, etc.). The only viable solution in order to quickly achieve a sufficiently broad consensus on harmonisation of copyright exceptions was that of allowing the Member States to include all of the exceptions that they wished to be in the list. Moreover, making the exceptions *non-mandatory* would have allowed the Member States to agree more easily on the contents of the list. **However, by making these concessions, the Directive largely missed its original purpose of integrating the Internal Market, since almost all of the exceptions are provided**

To solve that problem, the CJEU concluded, the software owner is allowed to use TPM (like product keys) in the distribution of both physical and digital (i.e. intangible) formats.

on an opt-in basis, irrespective of how relevant each might be for the purpose of enabling cross-border activities.

The final text of Article 5 makes mandatory only the technical exception regarding temporary reproductions, which served the purpose of transitory communication in a network between third parties (Article 5(1)). All the other exceptions, including the ones that the Directive seems to regard as most relevant from a public policy perspective, were conceived as *optional*, having been inserted into a list from which Member States are free to choose (Cohen Jehoram, 2001; Hart, 2002). The list of exceptions grew significantly from the original seven to more than 20 items.⁶⁸

1.2.5.2 Exhaustive character

It is worth recalling that the EU Commission targeted the complex issue of exceptions and limitations in the information society, initially, in its Follow-up to the 1995 *Green Paper on Copyright and Related Rights*. In that context, the Commission disclosed its intention of setting out specifically defined exceptions to the exclusive right of reproduction, with the purpose of accommodating the interests of users or the public at large.⁶⁹ In commenting on the Follow-up, the European Commission Legal Advisory Board expressed its scepticism on the possibility of enacting an exhaustive list of copyright exceptions, such as the one embodied in Article 5 of the InfoSoc Directive.⁷⁰ The Advisory Board argued that harmonisation of national exceptions did not necessarily mean that national systems were to be made uniform in this regard. As briefly recalled above, exceptions could have been maintained in national systems as long as they did not hinder the pursuit of market integration for copyrighted works. Member States such as Italy, Spain and France took the view that an exhaustive list of exceptions and limitations would have been more appropriate than an open-ended list since exhaustiveness would have ensured a higher degree of harmonisation and legal certainty (Cohen Jehoram, 2001). Scandinavian countries and the Netherlands, instead, unsuccessfully sought to oppose this approach while advocating the desirability of a more flexible system, **where the concept of 'fair use' (modelled on the homonymous US doctrine) could have allowed legislation to more easily keep pace with technological advancements.** As recalled above, the final text of the Directive did not follow the recommendations of the Legal Advisory Board and adopted an exhaustive list of (optional) exceptions.

⁶⁸ Whereas the exceptions provided under Article 5(2) concern just the right of reproduction, Article 5(3) provides a list of optional exceptions to the rights of reproduction and communication to the public. Article 5(4) provides that, where the Member States may create or maintain an exception or limitation to the right of reproduction in accordance with Articles 5(2) and 5(3), they are entitled to enact an exception or limitation to the exclusive right of distribution 'to the extent justified by the purpose of the authorised act of reproduction'.

⁶⁹ See Communication from the Commission of 20.11.1996, *Follow-up to the Green Paper on Copyright and Related Rights in the Information Society*, COM(96) 586 final (under the paragraph to 'Reproduction – Proposed Action').

⁷⁰ See *Commentaires du Legal Advisory Board sur la Communication de la Commission du 20 Novembre 1996*, available (in French) at: <http://europa.eu.int/ISPO/legal/fr/proprint/labcomment.htm>.

1.2.5.3 *The three-step test*

A legislative measure that, instead, was transposed in the 2001 Directive directly from the follow-up to 1995 *Green Paper* is the so-called three-step test (cf. Article 5.5 InfoSoc Directive) that EU lawmakers borrowed from international copyright law (cf. 9.2 Berne Convention; Article 13 Agreement on Trade-Related Aspects of Intellectual Property Rights). This provision is regarded as essential by copyright holders and, more in general, by the creative industries insofar as it confines the implementation of exceptions and limitations to special cases which do not conflict with a normal exploitation of the protected work and do not cause an unreasonable prejudice for the legitimate interests of the copyright holder.⁷¹ In short, the test makes sure that exceptions and limitations do not end up affecting unreasonably (i.e. excessively) the market for the copyrighted work. **What is still unclear, is whether the test should be regarded just as a set of (mandatory) requirements for national parliaments that codify their own national exceptions under their laws** (i.e. requirements that all Member States were already compelled to comply with as a result of their adhesion to the Berne Convention and the Agreement on Trade-Related Aspects of Intellectual Property Rights) **or also (and most important) as a binding test for national courts when they evaluate and apply the exceptions stemming from Article 5 of the InfoSoc Directive** (Mazziotti, 2008).

1.2.5.4 *Copyright exceptions and contract law*

Unlike the Software and the Database Directives, the InfoSoc Directive does not provide that contractual provisions aimed at restricting the exercise of copyright exceptions should be deemed null or void.⁷² To the contrary, the Directive (cf. Recital 45) seems to encourage the contractual overriding of copyright exceptions insofar as it provides that exceptions “should not, however, prevent the definition of contractual relations designed to ensure fair compensation for the right-holders insofar as permitted by national law”. **The absence of an explicit provision clarifying the legal status of copyright exceptions at the level of EU law, and in particular whether or not exceptions (or at least a few of them) should be regarded as non-waivable through contract, creates a situation of high uncertainty.**

1.2.5.5 *Unintended harmonisation as a result of the CJEU’s case law*

Even though the harmonisation of exceptions and limitations was deliberately shaped as minimal at the EU level, the CJEU recently interpreted several exceptions in a way that

⁷¹ As shown below (see §4.2.1.), the aforementioned restrictive requirements pointed out by the Commission in the Follow-up for the enactment of harmonised copyright exceptions are drawn from the so-called ‘three-step test’ embodied in Article 9(2) of the Berne Convention.

⁷² For instance, the Software Directive states, ‘The making of a back-up copy by a person having a right to use the computer program may not be prevented by contract insofar as it is necessary for that use’ (Article 5(2)); and: ‘Any contractual provisions contrary to Article 6 or to the exceptions provided for in Article 5 (2) and (3) shall be null or void’ (Article 9(1)). In addition, Article 15 of the Database Directive (‘Binding nature of certain provisions’) reads, ‘Any contractual provision contrary to Article 6(1) and 8 shall be null and void’ (Article 6 of the Database Directive provides exceptions to restricted acts with regard to databases protected by copyright; Article 8, instead, sets out rights and obligations of lawful users in relation to databases protected by the so-called *sui generis* right).

reflected their autonomous concepts under EU law and recognised their potential to protect the public interest. At the same time, in several judgments the CJEU had the opportunity to clarify that Article 5(5) of the Directive (i.e. the three-step test) should not be interpreted broadly, i.e. as a provision justifying an extension of the scope of the different exceptions and limitations.⁷³

Considering the low degree of harmonisation that EU lawmakers – deliberately – sought to achieve in this area of copyright, Member States maintained or transposed exceptions and limitations in their legal orders in a highly discretionary manner (see Section II.2.3 and Annex A). However, despite the flexibilities embodied in the wording of Article 5, the case law of the CJEU progressively acknowledged the necessity to preserve the harmonisation goal of the InfoSoc Directive and to restate, also in the area of copyright exceptions and limitations, the principle of unity and consistency of the EU *acquis*. This means that, for an increasingly relevant number of exceptions, the CJEU has restricted the room for manoeuvre that, under the text of the Directive, the Member States could take advantage of.

The pro-harmonisation approach of the CJEU materialised in relation to classes of uses that Member States are not (or ‘no longer’) entitled to modify or make more restrictive in scope, after having decided whether or not to maintain or implement a given exception or limitation. Examples of unintended harmonisation concern provisions of Article 5 such as those on fair remuneration and private copying,⁷⁴ quotations for purposes such as criticism and review (*Eva-Maria Painer*, par. 129-137), parody⁷⁵ and on-site consultation for purposes of research or private study of copyright works held by publicly accessible libraries, educational establishments, museums and archives (*Technische Universität Darmstadt*):

- The fair remuneration that should be paid to copyright holders in order to compensate the economic harm they suffer from private copying of sound recordings and audiovisual works (cf. Article 5(2)(b)) was regarded in *Padawan* as an autonomous concept of EU law since the purpose of the InfoSoc Directive was that of ensuring a coherent application of the exceptions to the reproduction right at the EU level (*Padawan*, par. 33-35). The case concerned the indiscriminate application of copyright levies on all copying devices and blank media in Spain, irrespective of whether the purchaser was a private individual or a professional user.
- In *Eva-Maria Painer* the CJEU interpreted the quotation exception as *not* precluding the Member States from applying this exception when the quotation of a copyright work is not made in a subsequent literary work (i.e. a ‘quoting work’) but in a mere press report. The case concerned the unauthorised publication of a portrait photograph by newspapers and magazines for a search of a kidnapped girl by the Austrian police in 1998. The judgment is relevant since the InfoSoc Directive remains silent on this issue and the interpretation of the CJEU clarifies that the requirements set out under Article 5(3)(d) do not also include the incorporation of the quoted work into another literary work, as the copyright law of Member States, such as France, requires in order to confine the

⁷³ See *Infopaq*, par. 58; C-145/10 *Eva-Maria Painer v. Standard Verlags and Others* (2011), par. 109; C-435/12 *ACI Adam and Others v. Stichting de ThuisKopie* (2014), par. 26; C-117/13 *Technische Universität Darmstadt v. Eugen Ulmer* (2014), par. 47; hereinafter *Technische Universität Darmstadt*.

⁷⁴ See C-467/08 *Padawan v. SGAE* (2010), par. 33-35, hereinafter ‘*Padawan*’.

⁷⁵ C-201/13 *Johan Deckmyn v. Helena Vandersteen and Others* (2014), hereinafter ‘*Deckmyn*’.

exception to cases where an editorial intervention shows the intent of criticism and/or review by the user of the work (see Section II.2.3.6).⁷⁶

- In a case concerning the publication in Belgium of a calendar incorporating a political cartoon, which represented one of the main characters of a well-known comic book without the copyright holder's consent, the CJEU did more than acknowledge that the parody exception (cf. Article 5(3)(k)) should be regarded as a unitary notion of EU law, as a result of the harmonisation goals of the Directive. In the absence of a definition under EU law of what a parody is, the CJEU filled the gap while holding that this notion should be determined in consideration of its meaning in everyday language, that is, a work whose essential elements are the evocation of an existing work in a noticeably different manner and the expression of humour or mockery (*Deckmyn*, par. 19-20). According to the Court, no additional requirement, apart from the above-mentioned elements, should be met for the unauthorised use to be lawful, on condition that the competent national court, after having considered all the circumstances of each case, finds that the implementation of the parody exception strikes a fair balance between the interests of the copyright holders and the freedom of expression of the user (par. 33-34).
- Last but not least, the CJEU found that the exception allowing the consultation of copyright items by dedicated terminals on the premises of a library, educational establishment, museum or archive (cf. Article 5(3)(n)) should be interpreted as incorporating the permission for one of these institutions to digitise some of the works from its collections. The CJEU acknowledged that the strict character of the exception to the reproduction right embodied into Article 5(2)(c) (which refers to "specific acts of reproduction") would make digitisation of the entire collections of copyright works held by these institutions unlawful. Nonetheless, the Court found that, for the on-site consultation exception to pursue its public interest mission, the provision should be regarded as incorporating an "ancillary right of dissemination" into its scope (*Technische Universität Darmstadt*, par. 27 and 43-49). In the *Technische Universität Darmstadt v. Ulmer* case, a German university library had digitised and made available a textbook contained in its collections to the benefit of students and researchers, who could then print out the book on paper or store a copy on a USB stick. The CJEU seized the opportunity to clarify that the exception at issue does not extend to the printing of a copyright work on paper or to its electronic storage (par. 50-57).⁷⁷

1.3 Legal protection of technological protection measures

Measures of technological protection and so-called DRM systems have developed at an impressive pace and become even more sophisticated in recent years. In spite of such technological advancement, the complex set of measures enacted by the InfoSoc Directive in order to afford legal protection of the technologies used by copyright holders to restrict

⁷⁶ According to Article 5(3)(d) of the InfoSoc Directive, quotations should refer to works that have already been lawfully made available to the public and must indicate the source and name of the author of the work, in accordance with fair practice and to the extent required by the specific purpose of the use.

⁷⁷ It is worth recalling that, on the grounds of the on-site consultation exception, the German Copyright Act (Article 52b) does not allow a library to make available a number of copies of a work that exceeds the number of copies the library has acquired in analogue format (see Annex A).

unauthorised uses of their works has not proven to be successful in *all* markets for copyright works. Whereas these technologies have been progressively abandoned in the digital music sector, they are still widely relied upon by the book and newspaper publishing industries.

Articles 6 and 7 of the InfoSoc Directive sought to implement the international obligation embodied in Article 11 of the 1996 WIPO Copyright Treaty. These provisions oblige Member States to outlaw: i) acts of circumvention of any technological measure and the removal or alteration of any rights management information carried out knowingly by any person (cf. Articles 6(1) and 7(1)(a)); ii) any act of manufacture and distribution of technologies which enable or facilitate circumvention of effective technological measures and the making available of copyrighted work whose electronic rights management information has been removed or altered without authority (cf. Articles 6(2) and 7(1)(b)).⁷⁸

In spite of their broad scope, the above-mentioned ‘anti-circumvention’ prohibitions failed to predict how control and rights management technologies would have developed in the years following the enactment of the Directive. **Fifteen years after drafting the Directive, the definition of technological protection of copyright works from acts of circumvention (and from technologies aimed at enabling acts of unauthorised access) no longer reflects the functioning of the most developed systems of control and rights management, which blend functions of access- and copy-control with rights management information.**

In the same way as equivalent provisions under US law, the EU anti- circumvention rules were widely debated in both industry sectors and society.⁷⁹ It was argued that the legal protection ensured by technological protection ended up granting copyright holders an unprecedented ‘access right’ over their works.⁸⁰ Considering the way they were shaped, these provisions seemed to establish a wholly separate tort of unauthorised access to copyright works, having the effect of restricting users from bypassing technological measures irrespective of whether their intent is to infringe copyright or not. **In short, the main objection that was raised with regard to these far-reaching provisions was that circumvention-related activities were outlawed with no link to copyright infringement, in a way that technological protection and a newly created access right could progressively replace copyright law and, even more important, prevail and restrict copyright exceptions**

⁷⁸ This type of regulation found a precedent in the EU in the law of the so-called ‘Conditional Access Directive’: see Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access, OJ, L 320, 28.11.1998, 54. In a way fairly similar to that of prohibitions laid down in Articles 6(2) and 7(1)(b) of the InfoSoc Directive, Article 4 of the Conditional Access Directive required Member States to prohibit on their territories all activities regarding the manufacture, marketing, use, possession and communication of any equipment or software designed or adapted to give access to a protected service (e.g. television and radio broadcasting) without the authorisation of the service provider.

⁷⁹ Anti-circumvention provisions were enacted in the U.S. DMCA, which entered into force on 28 October 1998 by adding Sections 1201 to 1205 to the U.S. Copyright Act (U.S. Code, Title 17). Section 1201 (‘Circumvention of copyright protection systems’) contains two types of prohibitions very similar to the ones laid down in Article 6 of the InfoSoc Directive.

⁸⁰ In the US literature, for instance, see Ginsburg, J., who argued that the so-called ‘access right’, as codified now under Section 1201 of the U.S. Copyright Act, was implicitly pre-supposed by the existence, under copyright law, of the exclusive rights of reproduction and distribution (Ginsburg, 2000).

and limitations.⁸¹ However, this was not the intent of the international copyright law provision the Directive intended to implement. Article 11 of the 1996 WIPO Copyright Treaty made it clear that circumvention torts should have been linked to an objective violation of copyright or of the rights related to copyright. As a negotiator of the 1996 WIPO Copyright Treaty on behalf of Member States, the Commission was fully aware of the fact that Article 11 of the Treaty immunised copyright exceptions from the operation of technological measures. Unsurprisingly, in the initial proposal of the Commission, anti-circumvention law was designed to protect technological measures as long as they restricted or prevented copyright infringements.⁸² This link between anti-circumvention protection and copyright infringements was removed from the text of the Directive at a later stage, when the Commission and the European Council reached a Common Position in September 2000.⁸³

The possibility of obtaining legal protection for technological measures implemented in order to protect more than just access to (and use of) copyright works was recently questioned by a judgment of the CJEU in a case concerning the circumvention of technical restrictions of videogame consoles.⁸⁴ In this judgment the Court showed the intent to ensure the application of a principle of proportionality for the protection of technological measures. Drawing on Recital 48, the Court held that Article 6(2) of the InfoSoc Directive should not have the effect of outlawing the manufacture and distribution of technologies that have a commercially significant purpose or use other than that of circumventing a technological protection (*Nintendo v. PC Box* par. 30). The CJEU stressed that the legal protection granted under Article 6 should not go beyond the purpose of restricting – with regard to copyright works – acts not authorised by the copyright holder (par. 31). A corollary of this conclusion is that equipment (such as the ‘mod-chips’ produced by PC Box) which allows deactivation of a technical measure installed by a videogame producer (like Nintendo) on its consoles to restrict the use of illegal copies of its works might be lawfully marketed if it is evidenced that the technology at issue is also used for legitimate purposes. It is still unclear, however, whether EU anti-circumvention law should leave users free to circumvent technical measures through the above-mentioned dual-use technologies insofar as the purpose of the use is not to infringe copyright but to enable non-infringing uses of the protected works or devices.⁸⁵

⁸¹ See: ‘The anti-circumvention provisions are the most interesting battlefield between the traditional vision of the copyright law and the dictates of technology...The scope of copyright is no longer decided according to what the proper scope should be, but according to what technology can do’ (Vinje, 2000, p. 556; Dusollier, 2005, p. 202).

⁸² See Article 6(2) of the Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society, COM (97) of 10 December 1997, OJ, C 108, 7.04.1998, p. 6.

⁸³ Whereas the position initially expressed by the Commission sought to preserve the vitality of copyright exceptions, several amendments coming from the Parliament extended the restrictive position adopted with regard to digital private copying to all other exceptions: see Common Position (EC) 48/2000 of 28 September 2000, OJ C 344, 1.12.2000, 1.

⁸⁴ See C-355/12 *Nintendo v. PC Box* (2014).

⁸⁵ *PC Box* argued that the actual purpose pursued by Nintendo through its technical measures was to prevent use of independent software which enables consoles to read MP3 files, movies and videos, giving users the possibility of using such consoles to a full extent: see *Nintendo v. PC Box*, par. 14-15.

As shown by Article 6(4), the Directive shaped the protection of TPM in a way that these measures can legitimately restrict the exercise of copyright exceptions. Only beneficiaries of a closed number of heterogeneous exceptions are expected to take advantage of a mechanism aimed at shielding copyright exceptions from the operation of TPM.⁸⁶ For the exercise of these exceptions to be effectively guaranteed, the Directive obliges Member States to monitor and evaluate whether right-holders take voluntary measures (including agreements between right-holders and other parties concerned) in order to place the beneficiary of those exceptions in a position to benefit from each of them. A subsidiary obligation for Member States to intervene with 'appropriate measures' subsists when right-holders fail to provide effective means that enable beneficiaries to take advantage of one of those privileged exceptions.⁸⁷

In spite of its detailed character, the system of safety nets adopted by the Directive under Article 6(4) was not designed to have a broad application. Firstly, the Directive provides that only users *who have already accessed* copyrighted works (i.e. lawful users) must be given the technical means to benefit from the mentioned exceptions. This means that the Directive enables just the lawful buyers of copyrighted works, who have already accessed the work – and not the general public – to exercise the few exceptions they are entitled to benefit from. Secondly, the Member States are not obliged to monitor and ensure the availability of technical means to exercise certain exceptions when copyrighted works are made available to the public through interactive on-demand services.⁸⁸

The very narrow scope of application of this mechanism evidences a clear intent of the InfoSoc Directive to restrict considerably the enforcement of copyright exceptions in light of their increased economic impact in the new electronic environment (cf. Recital 44). This is a solution that, as explicitly provided under Recital 50 of the Directive, does not apply to computer programmes, whose technological measures should be protected without prejudice to the exercise of the (mandatory) exceptions under Articles 5 and 6 of the EU Software Directive.⁸⁹

⁸⁶ This list of exceptions includes acts of copying by libraries, educational establishments or museums, ephemeral recordings made by broadcasters, copying of broadcasts made by non-commercial social institutions, photocopying, quotations for teaching or scientific purposes, and uses for the benefit of people with a disability (cf. Article 6.4).

⁸⁷ Whereas Member States are obliged to take safeguard measures in order to ensure the availability of these exceptions, they are given the mere option to take such measures for the sake of the private copying exception, where this exception proves to be entrenched by the operation of a technical measure (cf. Article 6(4), §2).

⁸⁸ See Article 6(4), §4 ('...shall not apply to works or other subject-matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them').

⁸⁹ Article 7 of the Software Directive, which provides that the legal protection granted under national law to technological measures applied to computer programmes should be *without prejudice* to the exceptions aimed at permitting back-up copies, uses aimed at observing, studying and testing the functioning of a programme, and so-called reverse engineering of a programme code for the creation of interoperable programs (cf. Articles 5 and 6).

1.4 Sanctions and remedies

The InfoSoc Directive obliges the EU Member States to provide appropriate sanctions and remedies in respect of infringements of the rights and obligations set out in the Directive.⁹⁰ In particular, Article 8(3) obliges Member States to make sure that right-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. This is by far one of the most controversial provisions in the whole Directive. Recital 59 seeks to clarify the exact meaning of the provision by pointing out that, in the digital environment, third parties may increasingly use the services of intermediaries for infringing activities. This Recital specifies that copyright holders should have the possibility of applying for an injunction against an intermediary who carries a third party's infringement of a protected work. The Directive left the Member States with the freedom to set out the conditions and modalities related to such injunctions, making it clear that an injunction against intermediaries should become available also where the acts carried out by the intermediary are exempted from liability under Article 5 of the Directive.

In the current debate about online copyright enforcement in Europe, the creative industries (in particular film producers) have claimed that Article 8(3) of the InfoSoc Directive has not (yet) been implemented effectively and uniformly throughout the EU (Mazziotti, 2013). The copyright industry argues that injunctions against online intermediaries should be available irrespective of the intermediary's liability for the infringing acts carried out by users of its platform or infrastructure. Content producers claim that, in spite of such a duty of cooperation, ISPs and online intermediaries have been very reluctant to help them put an end to infringements. As a result of lack of cooperation, legal actions have been undertaken before national courts with different and contradictory results across Europe.

The CJEU has made it clear that injunctions aimed at blocking access to infringing materials should pass a *proportionality test* in order to ensure a fair balance with the online intermediary's freedom to conduct a business and other fundamental rights. The recognition of such a freedom for an online intermediary was a key part of the reasoning of the CJEU in judgments such as *Scarlet Extended v. SABAM* and *SABAM v. Netlog*.⁹¹ In these cases the Court was asked to review the compatibility with EU law of injunctions that would have obliged, respectively, an ISP (Scarlet) and the deviser of a social network (Netlog) to install, at their own expense, filtering technologies that the Court viewed as excessively costly and complicated enforcement measures. Such technologies should have aimed at disabling access by users of the intermediary's services to the Belgian collecting society's musical repertoire. To acknowledge the existence of such a limit to injunctions *ex Article 8(3)*, the CJEU did not rely on the provision of Article 8(1) of the InfoSoc Directive, according to which sanctions should be "effective, proportionate and dissuasive". Rather, the CJEU developed a principle of proportionality on the grounds of Article 15 of the e-Commerce Directive (which does not allow Member States to impose duties of online monitoring on ISPs) and, even more

⁹⁰ Article 8(2) provides that each Member State shall take the measures necessary to ensure that copyright holders whose interests are affected by infringing activities carried out on its territory can bring an action for damages and/or apply for an injunction and, where appropriate, for the seizure of infringing material as well as of devices, products or components enabling acts of circumvention of TPM.

⁹¹ See C-70/10 *Scarlet Extended v. SABAM* (2011); C-360/10 *SABAM v. Netlog* (2012).

important, in consideration of the requirements laid down in Article 3 of IPRED.⁹² This reference is somehow surprising if one considers that Article 3 of the IPRED makes no mention of online intermediaries. This provision was introduced into EU law in order to restate the principle laid down under Article 41(2) of The Agreement on Trade-Related Aspects of Intellectual Property Rights⁹³, which clarifies that enforcement measures should not be “unnecessarily complicated or costly”, to the benefit of intellectual property rights holders. In a subsequent judgment, *UPC Telekabel v. Constantin Film and Wega Filmproduktionsgesellschaft*, the CJEU took a step further holding that, for a blocking measure to be fair and proportionate, an ISP (*UPC Telekabel*) should remain free to decide what the best means to be used against online infringements are.⁹⁴ If specific measures (e.g. targeted at an infringing site’s domain name and at its current Internet Protocol address) had to be ordered by a court, the online intermediary would be deprived of the freedom to opt for the means that are best suited to its resources and abilities and which do not end up restricting, in a disproportionate way (i.e. over-blocking), the user’s freedom to access unprotected information (par. 51-56).

1.5 On the current efficiency of the EU copyright system

As briefly recalled above, with the entry into force of the Treaty of Lisbon and the enactment of Article 118 TFEU, the EU acquired a direct competence to develop a genuinely pan-European copyright system through the adoption of an EU regulation. A unified copyright system – in principle – would be the easiest and most efficient way to establish a truly common market for copyright works, especially in a borderless environment such as the Internet and, more generally, digital networks. However, the EU has a long way to go in order to create a uniform copyright system, especially if one considers the non-negligible distance that still persists, in terms of substantive law, between common law and *droit d’auteur* national systems, and the various barriers, costs and burdens that national regulations also raise in the digital environment.

This Section briefly explores the inefficiencies of and obstacles to the free circulation of copyright works in the Internal Market by the principle of territoriality of copyright, and the territorial dimension of collective rights management, the implementation of disparate copyright levy systems, and the lack of clarity on the scope of copyright in the various Member States.

⁹² See *Scarlet v. SABAM*, par. 36, and *SABAM v. Netlog*, par. 34, where the CJEU emphasised that the requested injunctions would have required the online intermediary to actively monitor all the data of each of its subscribers in order to prevent future infringements (in violation of Article 15 of the e-Commerce Directive). To that end, the ISP should have implemented measures that would have conflicted with Article 3 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (hereinafter ‘IPRED’), while not being fair and proportionate and raising excessive costs.

⁹³ See The Agreement on Trade-Related Aspects of Intellectual Property Rights: https://www.wto.org/english/docs_e/legal_e/27-trips_05_e.htm

⁹⁴ See C-314/12 *UPC Telekabel v. Constantin Film and Wega Filmproduktionsgesellschaft* (2014).

1.5.1 Principle of territoriality and collective rights management

In the architecture of the InfoSoc Directive, the exclusive rights whose scope was expanded and adapted to the digital environment remained firmly territorial. There is no provision in that Directive which restricts the possibility for copyright holders of exercising and enforcing their rights on a strict country-by-country basis. Considering how many relevant aspects of copyright law were left outside the scope of the InfoSoc Directive (and are still regulated under distinct national laws), it was somehow inevitable that the exercise and licensing of national entitlements could end up partitioning the markets for online content services.

One of the very first attempts to target what today is known as 'geo-blocking' was an antitrust investigation launched by the EU Commission against Apple Inc. and the major record companies operating in Europe. The Commission took the view that the territorial sales restrictions embodied in the licensing agreements between Apple and each record company violated Article 81 TEC.⁹⁵ According to the Commission's statement of objections, the outcome of these agreements was the restriction of the consumer choice of where to buy digital music, what music to buy and at what price.⁹⁶

At an earlier stage the Commission had already started targeting a cause of territorial restrictions that the EU eventually sought to remove (or at least to reduce) through the adoption of Directive on collective management of copyright. The origin of this Directive lies in a 2004 Communication on "The Management of Copyright and Related Rights in the Internal Market" through which the Commission questioned whether, in this context, "it should be left for the market to develop Community-wide licensing further, while respecting the basic rules of intellectual property protection, including its territorial nature, or whether the Community legislator should seek to facilitate greater Community wide licensing".⁹⁷ A year later, the Commission accelerated the pursuit of this objective with specific regard to the recently emerged market for online music services through the adoption of a Recommendation of 18 October 2005 on collective cross-border management of copyright and related rights for legitimate online music services.⁹⁸ The 2005 Recommendation sought to trigger a radical change of the existing licensing structures in the online music sector. The Commission argued that the territorial restrictions stemming from reciprocal representation agreements concluded by national collecting societies were contrary to the logic of the EU common market.⁹⁹ Under those agreements, collecting societies have traditionally

⁹⁵ See Commission of the European Communities, Competition: European Commission confirms sending a Statement of Objections against alleged territorial restrictions in online music sales to major record companies and Apple, Press releases, Brussels, 3 of April 2007.

⁹⁶ Apple Inc. (iTunes) could easily verify the condition of the country of residence thanks to the compulsory requirement that consumers' payments took place through either debit or credit cards linked to bank accounts based in their country of residence.

⁹⁷ See Commission of the European Communities, Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, *The Management of Copyright and Related Rights in the Internal Market*, COM/2004/0261 final (see in particular Sect. 1.2.4: 'The Call for Community-wide Licensing').

⁹⁸ See Commission Recommendation on collective cross-border management of copyright and related rights for legitimate online music services of 18 October 2005, OJ L 276, 21.10.2005, pp. 54-57.

⁹⁹ See Commission Staff Working Document, Impact Assessment reforming cross-border collective management of copyright and related rights for legitimate online music services, Brussels 11.10.2005.

administered, along with their own national repertoires, the repertoire of the affiliated, foreign collecting societies in their countries of establishment and operation.¹⁰⁰ The main assumption in the 2005 Recommendation was that, in the European Economic Area (EEA), the territorial restrictions embodied in those contracts prohibited collective rights managers from licensing their repertoires outside their (national) territory of activity. The Commission, instead, intended to promote the adoption of a multi-territorial licensing policy that corresponded to the ubiquity of the online environment. In particular, the Commission sought to soften the burden of commercial users of digital music, who had to negotiate in every Member State with each of the respective collective rights managers for each right that must be cleared for online exploitations (i.e. the rights of reproduction and communication to the public) in order to be entitled to provide their services in the whole EU.

The plan the Commission started developing in 2004 for the purpose of removing (or at least reducing) barriers stemming from strictly national collective rights management became effective, one decade later, with the adoption of Directive on collective management of copyright.¹⁰¹ This Directive grants now individual right-holders the right to entrust the management of any of the rights, categories of rights or types of works of their choice, for the territories of their choice, to a collective rights management organisation, irrespective of

¹⁰⁰ The function of mutual representation agreements is addressed by the October 2005 Commission Working Document, op. cit., p. 6: '[I]n the traditional system of managing copyright and related rights, if copyright works are accessible in another territory, the society active in that territory (the "affiliated society") normally enters into reciprocal representation agreement with the collective rights Managers that holds the repertoire on behalf of the right-holder...' The same document, at p. 9, ft. 16, recalls that the Santiago and Barcelona agreements, referring respectively to the collective management of the right of communication to the public and of the reproduction rights, were not renewed by collecting societies of the EEA on the assumption that the European Commission was highly critical of the so-called 'economic residence' clause in them.

¹⁰¹ It is worth recalling that, before the adoption of Directive 2014/26 on collective management of copyright, through an antitrust decision of 2008 (known as the 'CISAC' decision, from the name of the international umbrella association of collecting societies) the EU Commission had found the clauses of territorial exclusivity and the membership requirement of economic residence embodied in the reciprocal representation agreements illegal because of their nature of cartels restricting competition in the EU market for services of collective management: 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. The Commission decision did not call into question the very existence of reciprocal representation agreements: the decision solely concerned the exploitation of copyright via the Internet, satellite and cable retransmission. Moreover, the decision prohibited clauses restricting authors' ability to freely join the collecting society of their choice and clauses having the 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. Interestingly, a much later judgment of the General Court of the European Union (see T-442/08 *CISAC v. Commission*, and all related/joined cases, 12 April 2013) in the action brought by the addressees of the CISAC decision (i.e. most of the EEA collecting societies and CISAC itself), 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. 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 societies was not the result of a cartel, but rather of the need to fight effectively against the unauthorised use of musical works.

nationality, residence or establishment of either the organisation or the right-holder (Article 5(2)). In addition to that, the Directive seeks to establish a common level playing field for collective rights management organisations in order to enhance the degree of their efficiency and transparency. Moreover, in the specific domain of online music services, the Directive seeks to combine the goal of fostering competition on the market for rights management services with the objective to preserve EU-wide access to diverse musical repertoires and to facilitate aggregation of different repertoires on online content platforms. To do so, the Directive creates a mechanism (so-called 'tag-on' regime) under which each society which has an EU online licensing 'passport' for the issuance of multi-territorial licences has an obligation, in the absence of a voluntary representation agreement, to represent the repertoire and the rights of a society without such a passport.¹⁰² The tag-on regime is expected to give societies a strong incentive to create voluntary rights management 'hubs' since it requires the requested society, in the absence of an agreement between them, to license the repertoires of the requesting society under the same conditions as those that it applies to its own repertoire and to include such a repertoire in all of its offerings to online service providers.

1.5.2 Procedures, regulatory and administrative burdens related to private copying levies

The provisions of the InfoSoc Directive concerning the exceptions of reprography and private copying are certainly the biggest source of regulatory and administrative burdens in the domain of EU copyright law. The Directive provides that these exceptions should confer a recompense to copyright holders in the form of a remuneration right. The Directive provides that the level of this compensation should take account of the presence and operation of technological measures.¹⁰³

Articles 5(2)(a) and 5(2)(b) of the Directive have actually enabled Member States to maintain or introduce national levy systems under which national law is free to determine the form, detailed arrangement and possible level of fair compensation, on the condition that Member States carefully evaluate, among other circumstances, whether private copying causes harm to right-holders or not (Recital 35). The fact that national levies on digital copying equipment and digital media were proliferating without any control and to the detriment of the Internal Market has been evident since 2005.¹⁰⁴ The idea of a copyright levy reform in the EU was

¹⁰² As laid down under Article 30 (cf. also Article 23), in order to be permitted to issue licences for pan-European or cross-border digital uses, collecting societies should meet a number of requirements (known as 'European Licensing Passport'). These requirements are all of a technical nature and impose high standards of service when it comes to processing the data needed for the exploitation of the licences, identifying the licensed repertoires through time-sensitive and authoritative databases, processing usage reports and invoicing, and so on (cf. Articles 24-28).

¹⁰³ The InfoSoc 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 right-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...": see Article 5(2)(b) of the InfoSoc Directive. See also Recital 35, *in fine*.

¹⁰⁴ 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*

already enshrined in a Roadmap document in 2006 in which the Commission 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 2006 a number of initiatives and stakeholder consultations have been undertaken, the last of which was a mediation process launched in April 2012 that drew upon a draft Memorandum of Understanding (2009) achieved under the shield of the Commission and was brought to an end with the release of recommendations by the European Mediator, Antonio Vitorino, in January 2013.¹⁰⁵

Whereas the vast majority of the Member States has provided compensation to right-holders through the creation of levy systems, others follow the '*de minimis*' rule to exempt the application of levies (e.g. the UK and Ireland in general and France and The Netherlands in the field of reprography) and still others (e.g. Spain and Norway) provide compensation in the form of public budget funding.

Significant barriers and distortions to cross-border trade within the Internal Market have emerged from the disparate national versions of levy systems.¹⁰⁶ One of the most evident problems is raised by the fact that the existing levy systems have not been conceived in a way that levies are collected just once in cross-border transactions. The fact that, in most Member States that have a levy system in force, levies are paid to collecting societies by manufacturers and importers in both the country of origin (or import) and in the country of destination of the products has inevitably resulted in double payments. Moreover, the fact that levies are paid at the manufacturer's or importer's level means also that it is practically impossible to distinguish between categories of final buyers of levied products and to effectively avoid undue payments by users other than natural persons (*i.e.* professional or business users), who are not obliged to pay levies. Last but not least, the fact that a significant portion of products subject to levies are sold to professional users raises the complex issue of either *ex ante* exemptions or reimbursements aimed at preventing undue payments.

None of the provisions of the InfoSoc Directive dealt with the above-mentioned issues. It was, once again, the CJEU that clarified and eventually clarified several uncertainties.

1.5.2.1 Unitary notion of 'fair compensation'

First of all, the Court held that, although it is open to the Member States to determine whether or not a private copying exception should be transposed into their national laws, 'fair compensation' is an autonomous concept of EU law and should be interpreted *uniformly* in all Member States where this exception exists (*Padawan*, par. 33-34). This means that, irrespective of the levy system or State fund each Member State opts for, national lawmakers

Digital Rights' Management, High level Industry Seminar/Global Industry Roundtable on Levies and DRMs, Brussels, 12 October 2005.

¹⁰⁵ See European Commission, Private copying levies, at:http://ec.europa.eu/internal_market/copyright/levy_reform/index_en.htm.

¹⁰⁶ It seems worth recalling that, from the perspective of the TFEU, these barriers could be regarded as compatible with Article 36 TFEU insofar as fair compensation for private copying were deemed to form part of the specific subject matter of copyright and, as a result, constituted a justified restriction to free movement of goods (cf. Article 34 TFEU).

are obliged to ensure consistency and uniformity in the way they compensate right-holders on the grounds of the harm they suffer from private copying. If that were not the case – as the CJEU held in the *Padawan* judgment (par. 35-36) – levy systems would prove to be incompatible with EU law insofar as they stifled the achievement of the main goal of Directive 2001/29/EC (i.e. harmonisation of certain aspects of copyright law and creation of undistorted conditions of competition that arise from different national provisions).

1.5.2.2 *Liability to pay levies*

The CJEU clarified also that the liability to pay fair compensation rests on the private end-users and the system of levies funded by the manufacturers or importers has been adopted for mere practical reasons (“where it is impossible to ensure recovery of the fair compensation from the purchasers”).¹⁰⁷ As the CJEU stressed, **a system of levies to be paid by those who make the devices available to consumers is legitimate insofar as it is possible for manufacturers and importers to pass the levy to the private end-users as part of the price of the product** (*Padawan*, par. 45-50, and *Stichting de ThuisKopie*, par. 29). The *Padawan* judgment held that there must be a necessary link between the application of copyright levies to digital devices and their use for private copying and that the indiscriminate application of private copying levies to all devices – including products sold to persons other than natural persons (e.g. professional users) – does not comply with Article 5(2) of the InfoSoc Directive (*Padawan*, par. 53).

1.5.2.3 *Where should levies be paid for cross-border sales?*

To solve the problem of undue or double payments, the CJEU found that in cross-border sales the levy should be paid just in the country where the final user resides, as this is the country where the harm caused by private copying occurs.¹⁰⁸ Moreover, the CJEU indicated its preference for the implementation of ex ante exemptions of business users from the payment of private copying levies rather than reimbursement systems. The CJEU also held that reimbursements can replace such ex ante exoneration only if: i) reimbursements are not made excessively difficult; and ii) practical difficulties exist for the exoneration (*Amazon*, par. 34-37).

1.5.2.4 *Applicability of levies when right-holders have licensed private copying*

Another relevant source of uncertainty concerns the applicability of levies and the related obligations and procedures when the copyright holders authorise (and control, through technological measures) private copying. By foreseeing the repeal of levies as a result of the progressive development of licensing systems, Article 5(2)(b) of the InfoSoc Directive clearly expresses a preference for the adoption of contractual arrangements *vis-à-vis* copyright exceptions in the online world. This policy choice is upheld by the fact that Article 6(4) also ensures that Member States do not render exceptions applicable in the context of on-demand content deliveries, where a license concluded by the service provider with the end-user

¹⁰⁷ See *C-462/09 Stichting de ThuisKopie v. Opus Supplies Deutschland* (2011), par. 41.

¹⁰⁸ See *C-462/09 Stichting de ThuisKopie v. Opus Supplies Deutschland* (2011), par. 36-41; *C-521/11, Amazon v. Austro Mechana* (2013), par. 57-61, hereinafter ‘*Amazon*’.

authorises and covers private copying, leaving no room for levies and, as a result, for double payments.

The main principle the Directive relies on is that, whenever the copyright holder authorises the copying of his works, copying cannot be subject to any additional form of compensation. If levies were applied in the context of online services that have already been licensed by copyright holders, consumers would end up paying twice, i.e. they would bear the cost of a levy after having paid a subscription fee in order to access the service. From a legal point of view, the private copying exception only applies in circumstances where right-holders cannot practically authorise the relevant acts in exercising their exclusive rights. The fact that licensing opportunities should be deemed to prevent the application of the private copying exception when content is delivered on-demand is explicitly mentioned in the InfoSoc Directive.¹⁰⁹ This means that, wherever a right-holder authorises an activity in exercising his/her reproduction rights, no claim for fair compensation can arise since the person performing that activity (i.e. the subscriber of an online content service) is a licensee, and not a person making private copies under an exception.

Despite the clarity of the above-mentioned provisions, the case law of the CJEU has raised uncertainties on this issue, unfortunately. Initially, in the *Padawan* judgment the CJEU held that fair compensation occurs only when private copies are made without the authorisation of the right-holders, as the InfoSoc Directive seems to suggest (par. 39, 40 and 45). A similar statement can be found in the subsequent *Stichting de ThuisKopie v. Opus Supplies Deutschland* judgment (par. 24, 26 and 35). Subsequently, the Court took a different view while delivering two judgments in *VG Wort v. Kyocera and Others*¹¹⁰ and *Copydan v. Nokia Danmark*,¹¹¹ where it held that the right-holders' authorisation (i.e. licence) of private copying has no effect on the obligation to pay fair compensation. **According to the CJEU, Member States retain the freedom, under the Directive, to introduce an exception to the right of reproduction, for which they are requested to provide a system of fair compensation to right-holders. Once such an exception has been introduced under national law, the exception deprives copyright holders of the right to authorise private copying, in a way that any authorising act has no impact on the harm that copyright levies are expected to compensate.**¹¹²

1.5.2.5 Proliferation and an unequal application of levies

It seems evident that the uncertainties that neither the InfoSoc Directive nor the case law of the CJEU has been able to bring to an end have facilitated a rapid proliferation and an unequal application of levies on digital copying equipment and media. Uncertainties and disparities concern also the amounts collected across Member States, with a subsequent fragmentation of markets at national level for all products subject to a levy (see Section II.2.3.9). In this respect, it is worth recalling that the CJEU clarified that the obligation to pay

¹⁰⁹ See Article 6(4) and Recitals 35 and 45, where the InfoSoc Directive provides that statutory exceptions should not endanger the conclusion of licensing contracts and that no additional compensation payment should exist in case of licensing – either because a separate payment has occurred or since authorisation implies that there is no or minimal harm.

¹¹⁰ See joined Cases C-457/11 to C-460/11 *VG Wort v. Kyocera and Others* (2013), par. 37-40.

¹¹¹ See C-435/12 *Copydan v. Nokia Danmark* (2015), par. 65-67.

¹¹² See also *VG Wort v. Kyocera and Others*, par. 37.

fair compensation arises just in relation to private copies of lawfully acquired works, and not with regard to copies made using unlawful sources (e.g. file-sharing content).¹¹³ This means that Member States are not entitled to provide fair compensation with regard to such copies, nor to make them fall within the scope of the private copying exception.

1.5.3 Is lack of clarity on copyright's scope a barrier to innovation? The examples of online news aggregation and text and data mining

As things stand, in many EU jurisdictions it is still very unclear whether certain classes of economically relevant digital uses fall within the (broad) scope of copyright. What characterises certain technology-enabled uses is the automatic processing of creative works for purposes that have little to do with traditional forms of exploitation of these works. Considering the very broad scope of the right of digital reproduction, for these uses to fall outside of the copyright scope an exception or limitation would have to be applicable. Under the InfoSoc Directive, because of the low harmonisation of copyright exceptions and in consideration of their exhaustive character, the legal treatment of new categories of uses of copyright materials may easily diverge on the grounds of the applicable national laws. Moreover, the fact that the InfoSoc Directive was drafted at a time when the Internet and digital technologies were still in their infancy makes it difficult to apply old-fashioned categories of exceptions to new types of uses.

1.5.3.1 Online news aggregation and the emergence of ancillary rights in favour of press publishers

A good example of digital uses whose exemption from copyright is difficult to assess is the automatic processing of newspaper articles and the online display of portions of such works performed by search engines and online news aggregators. Under the laws of the Member States that have preserved the technology-neutral wording of the InfoSoc Directive on exceptions, the above-mentioned reproductions could be regarded as quotations of copyright works (Hugenholtz & Senftleben, 2011). This may happen in the Netherlands and in the Nordic countries, where quotations and uses for purposes of news reporting are, in their statutory definitions, not linked to purposes of criticism and review.¹¹⁴

In other Member States where national laws set out such additional requirements for the quotation exception, online news aggregation services can easily be found to infringe copyright. For instance, in 2011 the Brussels Court of Appeal found that the news extracts displayed by Google News, in the absence of human intervention in the creation of its daily press review, could not be regarded as 'quotations' for purposes of criticism, review, education and research under Belgian law.¹¹⁵

More recently, considering that the aggregation of online copyright content available online without the authorisation of the copyright holder would give rise to an infringement,

¹¹³ C-435/12 *ACI Adam v. Stichting de ThuisKopie* (2014), par. 54-58; *Copydan v Nokia*, par. 74-79.

¹¹⁴ *Ibid.*

¹¹⁵ Cf. Article 21, Sect 1, Belgian Copyright Act; see Court of Appeal of Brussels (9th Chamber), C-2007/AR/1730, *Google Inc v. Copiepresse*, Judgment of 5 May 2011.

Germany and Spain introduced new ancillary rights in favour of press publishers.¹¹⁶ Even though these national provisions and the related rights are shaped in a different way, both end up obliging online commercial users of news products to pay compensation to their respective publishers. The Spanish ancillary right is conceived as a statutory limitation that authorises the aggregation of news and other online contents subject to a non-waivable equitable compensation. The German ancillary right is shaped as an exclusive right to make 'press products' (or parts thereof) available to the public for commercial purposes (Xalabarder, 2014).

1.5.3.2 Text and data mining

Automated processing of copyright works occur also for purposes of text and data mining, computational analysis on texts and automated extraction of data. These uses 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 activities – in the context of which copyright materials are treated not as 'works' but as (mere) data – might be beneficial for the extraction, collection and reuse of vast amounts of useful information. So-called 'non-display' uses of literary works in the context of large-scale book digitisation projects provide a very good example of such uses.¹¹⁷ **It is still uncertain, for instance, whether the unauthorised scanning and digitisation of literary works which are not displayed to users but are merely used for purposes of data¹¹⁸ and text mining¹¹⁹ infringe copyright or not.¹²⁰**

Considering that text and data mining entails a temporary reproduction of copyright works, as a technical necessity, the issue is whether or not such a reproduction should be regarded as transient or incidental under the mandatory exception of Article 5(1) of the InfoSoc Directive. Recently, in *Public Relations Consultants Association v. Newspaper Licensing Agency and Others*, the CJEU had the opportunity to clarify the scope of application of this exception

¹¹⁶ See, respectively, Article 87f of the 1965 German Copyright Act (as amended in 2013) and Article 32 (Quotation illustration for educational purposes) of the Spanish Intellectual Property Act 1/1996 (as amended in 2014).

¹¹⁷ In computer sciences 'data mining' is defined as the extraction of implicit, previously unknown, and potentially useful information from data (Borghi & Karapapa, 2011). 'Text mining' is the process of text analysis in order to extract information that is useful for particular purposes (Witten & Frank, 2005).

¹¹⁸ '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.

¹¹⁹ 'Text mining' indicates finding structural patterns in texts, extracting information out of these patterns and combining them with data on the use of works such as data on searching and accessing works.

¹²⁰ On automated text processing and data mining Borghi & Karapapa point out that automated data processing can pursue commercially valuable 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) (Borghi & Karapapa, 2013).

in a case concerning the unauthorised on-screen copies and cached copies made in the context of an online media monitoring service.¹²¹ The CJEU considered that the copies made in order to send emails containing the headlines of online articles, hyperlinks to the publishers' websites and short extracts of the articles themselves to the service subscribers were temporary, *transient* and an integral part of the technological process (i.e. the online receipt of the press reports), as prescribed by Article 5(1).¹²² This means that the mere copying and viewing of the copyright works did not infringe the publisher's copyright, since these acts were a technical necessity for the service providers to deliver its online reports after having obtained a web database license from the newspaper publishers' association. Despite the relevance of this judgment, it has to be seen whether and how courts, in the absence of *ad hoc* legislative provisions, will extend such a conclusion to the realm of text and data mining, where the volatility of the copies of protected works has a different technological dimension.

At a time when the European Commission had not even started taking into consideration a possible reform of copyright exceptions under the InfoSoc Directive, Member States such as the UK started developing a comprehensive reform plan that resulted, in 2014, in the enactment of new copyright exceptions that included an exception covering text and data mining for non-commercial research.¹²³ This reform was developed in response to a public consultation launched by the UK government¹²⁴ and to the policy recommendations embodied into the Hargreaves Review of May 2011 (Hargreaves, 2011). UK law allows researchers to make copies of any copyright works for the purpose of computational analysis if they already have lawful access to the copyright work, without having to obtain additional permission from the copyright holder to make the necessary copies.

While the UK was developing its reform plan on new copyright exceptions, the European Commission developed a multi-stakeholder dialogue in Brussels ('Licences for Europe') with the intent to explore standard licensing models that could have facilitated access to, and use of, data. The premise of this dialogue seemed to be that data mining requires an additional copyright licence on top of the licence to access the copyright works. For technology companies, if additional licenses were required, copyright would inevitably extend to facts and data embodied in the 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. The publishing industry, instead, can ultimately rely on the protection of non-original databases through a *sui generis* exclusive right granted under Article 7 of the 1996 Database Directive. This right ends up protecting mere aggregation of

¹²¹ C-360/13 *Public Relations Consultants Association v. Newspaper Licensing Agency and Others* (2014).

¹²² See *Public Relations Consultants Association v. Newspaper Licensing Agency*, par. 29-33 (arguing that the copies at issue were temporary since they were created and then deleted by the process used to view websites); par. 34-38 (arguing that without making temporary copies browsing would not function properly on the Internet) and par. 40 (where the CJEU recalled that a reproduction is transient if its duration is limited to what is necessary for the an automated process to be put to an end).

¹²³ See UK Intellectual Property Office (2012), *Modernising Copyright: A modern, robust and flexible framework*, 20 December, p. 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.

¹²⁴ See *Ibid.*

data on condition that a database has required a substantial investment. This prerogative might easily come into play and legitimately restrict text and data mining since publishers can be easily regarded as makers of databases who are entitled to prevent extraction and reuse of the whole (or of a substantial part of) the database. This legal barrier might be easily raised since, unlike the EU Software Directive, the Database Directive does *not* grant lawful users of protected works a number of non-waivable exceptions pursuing the goals of freedom of research and study and competition in downstream markets.¹²⁵

1.6 Interplay between the EU copyright system and other EU policy streams

This Section focuses on the interplay between the EU copyright framework and other policy streams: electronic commerce and the regime of liability for online intermediaries, data protection law, fundamental rights and cultural policies. **The complexity of such interplay originates mostly from a lack of coordination of a number of Directives with the objectives of the EU copyright policy and regulation.**

1.6.1 Copyright and liability exemptions under the e-Commerce Directive

As anticipated above, in a fast-changing technological context the CJEU has taken steps to coordinate and make the provisions of distinct EU Directives compatible and, to a large extent, complementary. When it comes to the copyright liability of online service providers, the CJEU has firmly relied on the so-called safe harbour provisions of the e-Commerce Directive (Articles 12 to 15). In particular, the Court has enforced the principle according to which Member States (and national courts) cannot impose on online intermediaries general obligations to monitor the content they store or transmit (Article 15). As mentioned above, this principle was applied in cases where national courts had to deal with requests for injunctions against ISPs and social network operators that, to prevent future infringements, would have required the installation of permanent filtering systems or technologies.¹²⁶ These judgments held that injunctions aimed at imposing *unlimited* filtering measures would inevitably affect the freedom to receive and impart free information as well as the protection of personal data of Internet users and the freedom of online intermediaries to conduct their businesses.

The interpretation of the liability exemptions created by the e-Commerce Directive has evolved over time also with regard to the role of online content platforms (i.e. 'hosting providers'). Under Article 14 of the e-Commerce Directive hosting providers are shielded from liability insofar as they remove illegal or infringing content (or disable access to it) as soon as they gain knowledge of the infringement (normally in response to a notice sent by a copyright holder, in the context of so-called 'notice-and-takedown' procedures). As clarified by the CJEU in two landmark judgments, online intermediaries whose services are used by third parties to infringe intellectual property rights (i.e. trademarks) cannot be exempted from liability if the service provider plays an *active role* that presupposes knowledge of (or

¹²⁵ See Articles 5(3) and 6(1) of the Software Directive.

¹²⁶ See C-275/06 *Promusicae v. Telefonica* (2008); C-70/10 *Scarlet Extended v. SABAM* (2011); C-360/10 *SABAM v. Netlog* (2012).

control over) such infringing content.¹²⁷ In *L'Oréal v. eBay*, the CJEU held that an online marketplace operator could benefit from the safe harbour provision if it confines itself to providing a service of merely technical, automatic and passive nature to its customers. In this case the Court found that eBay helped customers (who were caught to infringe trademarks) optimise the presentation of their offers for sale offers or promote those offers, in a way that eBay's activity evidenced knowledge of the infringing nature of the materials it hosted.¹²⁸ In *Google v. Louis Vuitton*, instead, the CJEU found that the sale of keywords corresponding to a third party's registered trademark to advertisers, in the context of a referencing service enabled by Google's search engine operation (i.e. 'AdWords'), was not sufficient by itself to justify the conclusion that Google had knowledge of, or control over, the data entered into its system by advertisers and stored on its servers.¹²⁹

1.6.2 Copyright and data protection

Anti-piracy activities run by copyright holders or specialised bodies established by right-holders aim at gathering evidence of alleged infringements and obtaining disclosure of the identity of supposedly infringing users. These activities entail the monitoring of electronic communications (which might extend to inspection of the contents of such communications by means of 'deep packet inspection' technologies) and enable the collection and storage of Internet Protocol (IP) addresses of alleged infringers. Collecting such addresses, processing them and identifying the individuals acting behind each IP address gives rise to a form of personal data processing.¹³⁰ **EU data protection law makes these activities subject to restrictions such as the obligation to collect personal data only for specified, explicit and legitimate purposes and to processing such data in a way that is proportionate to the objective pursued.**¹³¹

In *Promusicae v. Telefonica* the CJEU acknowledged that copyright enforcement is a legitimate purpose to justify the treatment of personal data. However, such treatment must be proportionate in order to ensure a balance in the enforcement of conflicting fundamental rights.¹³² Privacy-related problems also emerge under so-called 'three-strikes' laws, where ISPs have to process IP addresses, identify infringing users, and store and monitor infringers' data. As a consequence of the necessity to strike a balance between copyright and privacy protection, a systematic collection and identification of users' IP addresses and analysis of all content they exchanged is likely to be found disproportionate, whereas a request by right-holders to obtain a specific set of data through judicial proceedings would comply with the above-mentioned principle.

¹²⁷ Joined Cases C-236/08 and C-238-08 *Google France & Google v. Louis Vuitton and Others*, par. 114-120; C-324/09 *L'Oréal v. eBay International* (2011), par. 113.

¹²⁸ See *L'Oréal v. eBay International*, par. 114-116.

¹²⁹ See *Google France & Google v. Louis Vuitton*, par. 117.

¹³⁰ As acknowledged by the CJEU in *Scarlet Extended v. SABAM*, par. 51, user IP addresses should be treated as personal data under EU law since these data allow users to be identified precisely.

¹³¹ 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.

¹³² See C-275/06 *Productores de Música de España (Promusicae) v. Telefónica de España SAU* (2008), par. 70.

Additional problems might arise when ISPs are requested to disclose the identity of supposedly infringing users of their networks. The fact that ISPs can technically identify users does not allow them to give copyright owners *direct* access to user personal data. The e-Privacy Directive regulates access to users' confidential information in the context of electronic communications and their retention and processing.¹³³ This Directive allows disclosure of personal data only under the exceptional circumstances spelt out under Article 15(1).¹³⁴ The CJEU in *Promusicae v. Telefonica* clarified that the only obligation created under EU law for the Member States and national courts is that of interpreting and transposing the relevant EU Directives in order to ensure a fair balance between the various fundamental rights and a principle of proportionality in the enforcement of these rights. The CJEU interpreted this provision as *not* obliging Member States to force under their laws ISPs to disclose user personal data in order to enable an effective protection of copyright through civil proceedings.¹³⁵

Promusicae v. Telefonica clearly evidenced the need for better coordination at EU level between data protection and online copyright enforcement. **The absence of a uniform interface between these two bodies of law has inevitably made it possible that, in certain EU countries, the protection of user privacy systematically prevails over requests for injunctions aimed at disclosing the identity of large-scale infringers of copyright.** Here a lack of coordination between intellectual property law and data protection law is apparent, if one considers that the right to information *ex* Article 8 of the IPRED would allow the disclosure of the identity of Internet users found in possession of infringing goods on a

¹³³ 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, OJ L201/37 (referred to as 'e-Privacy Directive') 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.

¹³⁴ The e-Privacy Directive (Article 15) 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.

¹³⁵ In the decision, the CJEU interpreted the exceptions to user privacy rights broadly, emphasising a reference that the e-Privacy Directive makes to the 1995 Data Protection Directive. 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...' See *Promusicae v. Telefonica*, par. 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...' The CJEU concluded that, due to this reference, the two Directives should be interpreted as expressing the intention of EU lawmakers 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. See *Promusicae v. Telefonica*, par. 53.

commercial scale or providing services used in infringing activities.¹³⁶ However, IPRED requires that such right should apply without prejudice to other EU law provisions which “...govern the protection of confidentiality of information sources or the processing of personal data”, which includes IPRED and the harmonisation-related problem this Directive creates in the context of civil proceedings (Article 8(3)(e)).

1.6.3 *Copyright and fundamental rights*

Copyright enforcement on digital networks can easily have an impact on fundamental rights of citizens, Internet users and companies. The CJEU has recently evaluated the compatibility with EU law of several types of copyright enforcement measures that would end up imposing systematic and permanent filters or blocking access to sites through the cooperation of online intermediaries.¹³⁷ By placing emphasis on the fact that all measures based on content filtering, removal or disabling access to websites can easily lead to restriction of lawful content communications (running the risk of over-blocking), the Court held that such measures are bound by the principle of proportionality. Serious concerns regarding freedom to access the Internet insofar as an administrative body (and not a court) could issue the sanction of disconnection of repeat infringers from the Internet were raised by ‘graduated responses’ (or ‘three-strikes’) schemes, such as the one introduced in France by the ‘Création et Internet’ legislation, which established the HADOPI.¹³⁸

Another source of tension between copyright enforcement measures and free access to online information is the system of graduated response put in place on a voluntary basis by ISPs on the grounds of agreements concluded with copyright owners. This issue was widely debated in 2009, during the lengthy and complex negotiations that led to the amendment of the 2003 ‘Telecoms Package’.¹³⁹ This amendment introduced into the

¹³⁶ See IPRED, Article 8(1). In particular, it 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: 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.

¹³⁷ See C-70/10 *Scarlet Extended v. SABAM*, 24 November 2011, 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.

¹³⁸ See Law 2009/669 of 12 June 2009, amended on 15 September 2009, *Journal officiel de la République française*. 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 insofar as it allowed the sanction of disconnection to be taken by an administrative body. The Council held that this provision was inconsistent with the presumption of innocence and the right to a fair trial: see French Constitutional Council, Decision n. 2009-580DC, 10 June 2009, *Journal officiel de la République française*.

¹³⁹ See Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2008 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services (referred to as Framework Directive), 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities (referred to as Access

'Framework Directive' a new provision (cf. Article 1(3)(a)) on restrictive measures in communications networks – such as user disconnection from the Internet in the context of graduated response regimes. The Directive obliges Member States to guarantee a prior, fair and impartial procedure and an effective and timely judicial review to the affected parties. It was emphasised in the literature that, even though the new Framework Directive does not restrict Member States from introducing graduated response laws without judicial supervision, it guarantees at least a court hearing on an appeal from an initial ruling to disconnect.¹⁴⁰

1.6.4 *Copyright and support to cultural diversity*

In certain specific circumstances EU copyright law supports cultural diversity not only through mere copyright protection but also while seeking to mitigate the economic conflict and tension arising between individual creators and the assignees of their rights (i.e. content producers). **Certain EU copyright measures provide an exception to the 'market knows best' approach by granting authors and performers remuneration and compensation rights that are expected to guarantee a given income to them with the aim of supporting their artistic career and/or protecting their financial interests.** Such remuneration rights constitute an evident exception to the principle of freedom of contract, which copyright law widely relies upon, and give rise to non-waivable rights (i.e. rights that cannot be validly transferred to intermediaries exploiting commercially the results of the author's or performer's work). The non-waivability of these rights is particularly relevant since it aims to directly support – in a 'paternalistic' way – the creative endeavour of individuals, who are the actors who ultimately guarantee, more than cultural industries, diversity of cultural creations.

1.6.4.1 *Non-waivable remuneration rights from reprography and private copying levies*

Even though the InfoSoc Directive does not explicitly give compensation rights stemming from private copying and reprography levies a non-waivable character, a principle of inalienability of this compensation seems to have become binding for all the Member States as a result of a recent judgment of the CJEU in *Martin Luksan v. Petrus van der Let* (par. 90-109). In this case the Court had to assess whether the sharing of fair compensation between the director of a cinematographic work and the film producer under Austrian law was in line with EU law and whether such compensation right should vest by operation of law, directly and originally, in the principal director, in his capacity as author or co-author of the cinematographic work. The CJEU concluded that the holders of the reproduction right (i.e. those listed under Article 2 of the InfoSoc Directive) are the only ones entitled to the fair compensation directly and originally. According to the CJEU, the InfoSoc Directive restricts

Directive), and 2002/20/EC on the authorisation of electronic communications networks and services (referred to as Authorisation Directive), OJ L 337/37 (December 18, 2009).

¹⁴⁰ 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 (Barron, 2011).

national law from allowing the principal director of a cinematographic work to waive his right to fair compensation.¹⁴¹ This means that the author and original holder of the reproduction right must necessarily receive compensation.

1.6.4.2 *Resale right (droit de suite)*

A non-waivable resale right is granted to authors of original works of graphic and plastic art, and to their heirs under Directive 2001/84/EC.¹⁴² This right, known also as *droit de suite*, as it was first introduced in France in 1920, reserves a percentage of the resale price of artistic works when they are resold. The right covers any sales involving an art market professional as seller, buyer or intermediary, with the exception of private sales to non-profit museums. Despite the restrictions of its scope and the burdens it might raise for business actors in the European art market, the resale right matters in terms of support to cultural creation and, as a result, cultural diversity insofar as it provides extra financial resources to artists. **This additional source of remuneration creates a system of incentives for the artist to maintain a high artistic value for subsequent works and to gain abroad a reputation and exposure, which increases the value of earlier creations and generates higher resale royalties over time.**

1.6.4.3 *Remuneration and termination rights for music performers*

To avoid that music performers do not benefit effectively from the 20-year extension of the term of protection for sound recordings enacted under Directive 2011/77/EU¹⁴³ (which amended the Term Directive) the Directive grants performers two types of non-waivable rights: i) a termination right that places music performers in a position to regain their rights if the record producer does not effectively market the sound recording within a year from the notification by the performer of her intention to terminate the transfer or assignment; and ii) a right to remuneration calculated on the grounds of net revenues that the record producer has derived from the marketing of the sound recording during its extended period of protection (i.e. following the 50th year after it was lawfully published or communicated to the public). Interestingly, the termination right introduces a mandatory 'use it or lose it' clause in the contractual relationship between performers and their record companies.¹⁴⁴ As a result of the termination of the original contractual transfer or assignment, the rights of the producers should expire whereas the rights in the fixation of the music performance should revert to the performer. **This provision enables the performer to either find another record producer wishing to exploit his/her performance or to do it himself/herself, for instance via the Internet under open content licensing schemes.**

¹⁴¹ See C-277/10 *Martin Luksan v. Petrus van der Let* (2012), par 107-108.

¹⁴² See Directive 2001/84/EC of 27 November 2001 on the resale right for the benefit of the author of an original work of art, OJ L 272, 13/10/2001, 32.

¹⁴³ See Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights, OJ L 265, 11/10/2011, 1.

¹⁴⁴ See Directive 2011/77, Article 1(2)(c).

2. The Internal Market aspects of copyright: EU copyright and the functioning of the Single Market

2.1 The market fragmentation effects of legislation on copyright and related rights in the European Union

2.1.1 *The territorial application of copyright rules*

As already recalled in the previous Sections of this Study, the territoriality of copyright and related (or ‘neighbouring’) rights is a core principle enshrined in Article 5 of the Berne Convention¹⁴⁵ and in other international treaties and confirmed by the CJEU.¹⁴⁶ Copyright and related rights are acquired and enforced at national level on the basis of the applicable law, which is determined on the grounds of the place where protection is claimed (*lex loci protectionis*).¹⁴⁷ **The geographical scope of these rights is limited to the territory of the State where they are granted and protected.** Any aspect of copyright that is not harmonised at the EU level remains therefore regulated by Member States’ law.¹⁴⁸

The principle of territoriality may pose serious obstacles to the integration of the Internal Market.

- Firstly, if the EU had harmonised national copyright laws broadly, national divergences concerning crucial aspects such as the subject matter of copyright, the identification of right-holders, and the scope and content of protected rights would have been greatly reduced. To the contrary, and as the CJEU emphasised before the European Commission started enacting copyright statutes, **the very same work could happen to be protected by copyright only in some Member States; rights themselves may be differently defined at national level; and individuals or entities owning relevant rights may vary on a country-by-country basis.**
- Secondly, and most important, right-holders are entitled to exercise 28 different national rights rather than a single EU-wide right. Hence, **copyright and related rights can be exploited on a strictly territorial basis** and – at least until the adoption and enforcement of the exhaustion principle that applies to tangible copyrighted goods (see Section II.1.2.4) – parallel imports can be lawfully prevented.

It is worth stressing that in most cases obstacles to a fully integrated Internal Market end up **affecting both right-holders and users.** While users may be obliged to clear different rights in different Member States to use the same work, right-holders may be forced to seek legal

¹⁴⁵ See Berne Convention for the Protection of Literary and Artistic Works, last amended on 28 September 1979 available at: http://www.wipo.int/treaties/en/text.jsp?file_id=283698.

¹⁴⁶ See for instance Case C-192/2004 *Lagardère Active Broadcast v. Société pour la Perception de la Remunération Equitable (SPRE) and Others*.

¹⁴⁷ See Regulation 864/2007 on the law applicable to non-contractual obligations (Rome II), L 199/40, 31.7.2007, Article 8 (Infringement of intellectual property rights).

¹⁴⁸ See JURI Committee (2010), *Copyright Territoriality, Collective Management and Remuneration*, Working Document, European Parliament 15 September 2010.

advice to ascertain the rights they are entitled to in different Member States as well as to effectively enforce these rights.¹⁴⁹

2.1.2 Definitions that fall outside the scope of the EU copyright acquis

As already recalled, in spite of the harmonisation measures provided under the EU Directives on copyright, **there are still core aspects of copyright law that have not been harmonised** (see Section II.1.2).

Some notions that originally fell outside the scope of the InfoSoc Directive have been further elaborated by the CJEU in its case law, in order to preserve the original function of the Directive and to remove barriers to intra-EU trade that diverging standards might otherwise have caused. This is the case for the standard of originality. As emphasised above, EU law deliberately intervened by introducing a unitary concept of originality in those fields where this notion would have potentially generated the highest Internal Market obstacles, namely computer programmes and databases and, to some extent photographs. This definition is based, for all creative works protected by copyright, on the ‘author’s intellectual creation’ standard.¹⁵⁰ While the InfoSoc Directive fell short of defining a standard of originality for other types of creative works, the CJEU intervened by extending the ‘author’s intellectual creation’ standard to all the works to which the rights harmonised under InfoSoc Directive apply (see Section II.1.2.1). **Lack of harmonisation persists when it comes to the definition of derivative works/transformative uses and the attribution of authorship.**

2.1.2.1 Transformative uses and derivative works

Transformative uses take place when users create new works by incorporating earlier copyrighted works. Derivative works such as translations, adaptations, and any other alteration or modification, as well as other uses such as quotations for teaching, criticism and scientific research, are examples of transformative uses. On the one hand, in some cases derivative works can constitute an ‘intellectual creation’ and therefore be considered worthy of an autonomous (although derivative) protection, similar to those granted to the original works they are based on. In other circumstances, derivative works can be the result of copyright infringement insofar as they require transformative uses of copyrighted works that need to be authorised by the relevant right-holders.

The InfoSoc Directive does not harmonise the scope of the exclusive right of authorising transformative uses of copyrighted works. This issue has been addressed only by Article 4(1)(b) of the Software Directive¹⁵¹ and Article 5(b) of the Database Directive¹⁵² granting to

¹⁴⁹ See JURI Committee (2010), *Copyright Territoriality, Collective Management and Remuneration*, Working Document, European Parliament, 15 September.

¹⁵⁰ This notion of originality has been to a large extent taken from the continental-European *droit d’auteur* (i.e. the author’s right) rather than from the prevalent common law approach that is deemed to cover also less ‘creative’ content. In common law countries, originality requires that the work must not be copied and must be the result of ‘skill, judgement and/or labour’ (the so-called ‘sweat of the brow’), i.e. the author needs to be diligent during the creation of a certain work. In practice, the two approaches do not lead to a different extension of the copyright subject matter for the majority of works (Margoni, 2014).

¹⁵¹ Directive 2009/24/EC.

the author the exclusive right of translating, adapting and transforming computer programmes and databases.¹⁵³ As a result, the definition of derivative works and transformative uses for other copyright subject matter is left to Member States' discretion.¹⁵⁴ While this is not surprising as significant linkages exist between lawful transformative uses and moral rights of authors (and especially the right of integrity), which are a matter of Member States' law, the market fragmentation potential for this lack of legal harmonisation is becoming increasingly central in the digital environment (Margoni, 2014). Indeed, **new technologies multiply the options for transformative uses of copyrighted works and, as a consequence, raise new issues in terms of compliance with national copyright law, especially for what concerns so-called user-generated content (UGC)**. In the current scenario, the creation by end-users of derivative works based on earlier works is easier and cheaper than ever before (Mazziotti, 2008). In addition, UGC is becoming commercially relevant by virtue of the availability of new and easily accessible distribution channels (e.g. web platforms, social networks, blogs) and licensing schemes.¹⁵⁵

Box 1. User-generated content

UGC broadly refers to any form of content created and uploaded on the Internet by end-users: blogs, wikis, discussion forums, posts, chats, tweets, podcasting, pins, digital images, videos, audio files and other forms of content that have been created by users of an online system or service and shared through websites and social media. UGC poses problems to the traditional scope of exclusive rights, namely to the reproduction rights, the communication to the public (including the right to 'make available') and the adaptation right. With the massive dissemination of smartphones, online social media, interactive distribution platforms and various copying means, the rise of the so-called 'amateur creators' largely relies on broadband rollout and access to Internet services. Those new technologies have drastically reduced transaction costs to produce and share content. Consequently, the consumer of cultural goods traditionally conceived as a passive spectator has become a proactive user. This tendency raises many challenges for the copyright regime and awakes the fears of creators as regards their right to fair remuneration.

The OECD¹⁵⁶ has defined UGC on the ground of three main criteria: "i) a content that has been made publicly available over the Internet; ii) which requires a certain amount of creative effort; and iii) which has been created outside of professional routines and practices" (Margoni, 2014). However, a formal categorisation of UGC following those criteria remains difficult: while the formulation adopted by the OECD is still general, some underlying concepts such as originality, transformative use and derivative work are not harmonised across Europe. An

¹⁵² Directive 96/9/EC.

¹⁵³ Exceptions and limitations apply to these exclusive rights.

¹⁵⁴ Interestingly, several transformative uses (e.g. use for the purpose of caricature, parody or pastiche) are listed in Article 5(3) of the InfoSoc Directive among the optional exceptions and limitations that can be implemented by Member States.

¹⁵⁵ See European Commission (2013), *Public Consultation on the Review of the EU Copyright Rules*, Consultation Document available at: http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/consultation-document_en.pdf.

¹⁵⁶ See OECD, DSTI/ICCP/IE (2006)7/Final, Working Party on the Information Economy (2007), Participative web user-created content, available at: <http://www.oecd.org/sti/38393115.pdf>.

attempt to categorise UGC types was made by De Wolf & Partners (2013) that identified three main types of content: i) “user-created content” or “user-authored content”, i.e. original works that do not rely on transformative uses of pre-existing works (‘creation from scratch’) and are made available by their authors through the Internet; ii) ‘user-copied content’, i.e. protected or non-protected content provided by a third party and made available without any substantial alteration (e.g. video format shifting or mere upload); iii) ‘user-generated derivative content’, i.e. works that combine pre-existing works with inputs of original creativity giving birth to a proper secondary creation.¹⁵⁷ The emergence of the third type of UGC is relatively new in terms of scale and distributional impact on the creative content value chain. This phenomenon becomes even more complex when it comes to reuse of copyrighted content for the emergence of new business models for commercial purposes.

So far, the main issue raised in the debate is whether UGC should be subject to particular exceptions and limitations. The heart of the problem stems from the fact UGC blurs traditional distinctions between professional versus amateur dichotomy, as between public and private spheres (especially when distinguishing the private/non-private reproduction or making available to the public or to a private group), as well as the commercial and non-commercial purpose criterion. Although a work has not originally been designed as commercial in the first place, its success and popularity over time could generate substantial revenues via advertising incomes. The emergence of new licensing and monetising schemes for small-scale users of copyrighted content provides practical commercial and contractual solutions to ease UGC and facilitate micro-licensing for private or small commercial users. However, as highlighted in the Commission’s Communication on Content in the Digital Single Market,¹⁵⁸ the main challenge lies in fostering transparency and access to information related to the scale and coverage of licenses and to the terms of agreements between publishers and platforms.¹⁵⁹ In addition, the information related to a particular content should provide greater certainty to end-users over the potential legitimate and illegitimate uses of copyrighted work to facilitate rights clearance for small users.

2.1.2.2 Authorship

The notion of ‘authorship’ of copyrighted works has not been subject to a significant harmonisation at the EU level, except for the EU provisions on computer programmes and databases¹⁶⁰ and cinematographic and audiovisual works.¹⁶¹ Nonetheless, for the latter, while Member States are obliged to consider the principal director as the author of the work, they

¹⁵⁷ In light of the abundance of content available over the Internet that are easily usable or copied and of the increasingly blurred distinction between copyrighted and non-copyrighted content online, the possible copyright infringement in the case of a ‘user-generated derivative content’ is considered very high.

¹⁵⁸ See Communication from the Commission, *On content in the Digital Single Market*, COM(2012)789 final.

¹⁵⁹ The terms of agreement between platforms and third parties are usually not accessible. Moreover, some monetising schemes based on views or clicks rates raise concerns in terms of transparency and good practice.

¹⁶⁰ See Article 4 of the Database Directive (Directive 96/9/EC) and Article 2 of the Software Directive (Directive 2009/24/EC).

¹⁶¹ See Article 2(1) of the Term of Protection Directive (Directive 2006/116/EC).

are still free to designate co-authors; hence the harmonisation degree of this measure is quite limited (see Table 1).

Table 1. Audiovisual authors in a sample of Member States

	Director	Scriptwriter	Music Composer	Some creative technicians by law	Creative technicians can be accepted by contract	Producer
Austria	Blue	Red	Red	Blue		
Belgium	Blue	Blue	Blue			
Czech Republic	Blue	Red	Red	Red		
Estonia	Blue	Blue	Blue	Blue		
Finland	Blue	Blue	Blue	Blue		
France	Blue	Blue	Blue			
Germany	Blue	* -	Red	Blue		
Hungary	Blue	Blue	Blue	Blue		
Italy	Blue	Blue	Blue			
The Netherlands	Blue	Blue	Blue	Blue		
Poland	Blue	Blue	Blue	Blue		
Portugal	Blue	Blue	Blue			
Romania	Blue	Blue	Blue		Blue	
Slovakia	Blue	Blue	Blue			
Spain	Blue	Blue	Blue			
Sweden	Blue	Blue	Blue	Blue		
Switzerland	Blue	Blue	Blue		Blue	
United Kingdom	Blue	Red	Red			Blue

Notes: Authors of the audiovisual work in blue; authors of a pre-existing or separate work in red; * according to the prevalent opinion.

Source: Authors' own elaboration on Despringre *et al.* (2015).

In terms of market fragmentation, national divergences in the designation of the authors of a copyrighted work may have minor effects on the demand side, especially in those sectors where users can acquire licenses from a single entity (e.g. the producers of audiovisual content or the publisher of books) or from collective management societies (e.g. in the music sector). Nonetheless, **this issue is central since the remuneration or compensation of artists can vary among Member States**, thus providing different incentives to the creation of creative content and affecting the Internal Market on the supply side.

2.1.3 Territorial exercise of the right

As mentioned above, **according to the principle of territoriality, copyright and related rights are conferred by national laws and are limited to the territory of the granting State.** By way of example, Article 2(a) of the InfoSoc Directive does not grant a reproduction right that immediately covers all the territory of the EU to the author of a musical work. The author is in fact entitled to 28 separate national reproduction rights, each of them covering the territory of a single Member State. As a result, a right-holder can separately exercise each of these 28 rights on a strictly territorial basis.

Copyright territoriality does not pose any obstacle to the integration of the Internal Market when it comes to the distribution of tangible copyrighted goods. In fact, according to Article 4(2) of the InfoSoc Directive, the distribution right is limited by the exhaustion principle. This principle, which was for the first time laid down by the ECJ in the *Deutsche Grammophon* case, provides that once a copyrighted good has been sold by the right-holder, or with his/her consent, in a territory of the European Union, further distribution of this good cannot be prevented.¹⁶² In other words, parallel imports of tangible copyrighted works are lawful as long as consent for their exploitation has been given in at least one Member State. Hence, the principle of exhaustion mitigates the market fragmentation effects of the principle of territoriality (see Section II.1.2.4).

The InfoSoc Directive confines the scope of the exhaustion principle to the distribution right, which concerns just physical media embodying copyright works. Therefore, **territorial licensing of intangible copyrighted works, which are equated with services, is entirely lawful and parallel imports can be prevented by relying on copyright territoriality.** Indeed, the online market for copyrighted goods is still fragmented and end-users are currently facing access denials and other forms of restriction on the grounds of copyright territoriality (see Section II.2.2).

Notwithstanding the prevalent interpretation of the principle of exhaustion, in many circumstances the online transmission of digital copyright works that are purchased by end-users and downloaded on their own computer is equivalent, in its effects, to distribution of tangible copyrighted goods. **Interestingly, the Dutch Court of Appeals (Hof Amsterdam), in a preliminary ruling, extended the controversial findings of the UsedSoft case¹⁶³ to the resale of e-books.¹⁶⁴** The progressive extension of the principle of exhaustion to download-to-own¹⁶⁵ copyrighted goods by national Courts may potentially lead to additional problems in terms of Internal Market as only in some Member States a second-hand market of copyrighted digital works (e.g. films, video-games, MP3 files) would be lawful.¹⁶⁶ In addition, this new interpretation of the principle of exhaustion would deeply affect commercial strategies of online business models that currently sell digital copies of content on a strictly territorial basis and might foster the switch towards access-based services.

As things stand now, the main question is whether market fragmentation is rooted either in the cost barriers generated by the combined effect of the principle of territoriality and the lack of legal harmonisation in many areas of copyright law, or in the market opportunities, given to both right-holders and commercial users by the principle of territoriality, to exploit rights on a territorial basis.

¹⁶² Case C-78/70, *Deutsche Grammophon v. Metro-SB-Grossmarkte*.

¹⁶³ Case C-128/11 *UsedSoft GmbH v. Oracle International Corp.*

¹⁶⁴ For further details see <http://kluwercopyrightblog.com/2015/01/28/the-dutch-courts-apply-usedsoft-to-the-resale-of-ebooks/>.

¹⁶⁵ The term download-to-own refers to the legal download to a private computer of copyrighted good via a network such as the Internet.

¹⁶⁶ It is worth stressing that, besides the lawfulness under the current EU copyright framework, the reselling of digital copies also raises additional issues such as: i) the need to avoid resellers keeping a copy of the file in their own computer; and ii) the creation of a market for second-hand digital files that are of the same quality of first-hand ones and potentially never deteriorate.

2.2 Territorial licensing and geo-blocking in specific sectors

A widely debated issue within the context of the current EU Digital Single Market Strategy is the need to avoid the fragmentation of the Single Market generated by territorial licensing and geo-blocking. The latter is a technological measure that prevents online consumers from accessing a web-site or purchasing content based on location; such practice sometimes involves also re-routing to a local web-site (Madiega, 2015).

Territorial licensing and geo-blocking create two main obstacles to the integration of the Internal Market.

- **First, they limit cross-border portability of copyrighted works.** In a nutshell, consumers that lawfully subscribe to online services in their Member States to stream, e.g. music or audiovisual content, are not able to access the same service when moving, even temporarily, to another Member State.¹⁶⁷ Limited portability may affect up to 4.7 million of Europeans per day, including both short-term migrants and travellers (Plum Consulting, 2012).
- **Second, and most important, they limit cross-border trade.** Consumers living in a certain Member State are not able to subscribe to online services providing copyrighted content in another Member State. The effect of this 'trade barrier' is twofold:
 - Some EU consumers cannot access contents that are instead available to other EU consumers;¹⁶⁸
 - Even when the same service is provided in several EU Member States, consumers can access only their 'national' offer.^{169, 170}

¹⁶⁷ It is worth stressing that, in the music sector, some service providers operating in more than one Member State allow for cross-border portability in geographic areas covered by their services. This is for instance the case of Spotify, which ensures full portability to premium users across 25 EU countries (Croatia, Romania, and Slovenia are still excluded). In such a context, cross-border portability is the result of the business acumen of some providers that are able to meet a pan-European demand by acquiring licenses in more than one Member State. In fact Spotify ensures portability beyond EU borders, in 60 countries worldwide.

¹⁶⁸ For instance Italian consumers cannot subscribe to Netflix, an online service that is instead available to UK and Ireland consumers. More generally, the availability of online music services largely varies among Member States: in 11 countries fewer than five services were available in 2012; in seven countries between five and nine; only in nine countries were more than ten service providers detected (see European Commission (2012), 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, SWD(2012)2014 final).

¹⁶⁹ For instance, although Apple iTunes reached EU-wide coverage, German consumers can purchase content only from their national iTunes Store and available content varies significantly among national web-stores. YouTube created a local version of the service in some EU countries where additional content is provided, but a consumer from Italy cannot access the UK national version. Also, content provided by Xbox Live is filtered according to the location. For further details see Plum Consulting (2012) and JURI Committee (2011), *Copyright in the Music and Audiovisual Sectors*, Working Document, European Parliament 29 June 2011.

These problems have been faced by the vast majority of end-users responding to the public consultation on the review of the EU copyright rules launched by the European Commission in 2013.¹⁷¹

The fragmentation of the Internal Market stemming from territorial licensing and geo-blocking is certainly rooted in the territoriality of copyright and related rights. **On the one hand, the insufficient harmonisation of copyright law across the EU obliges providers of copyrighted works to clear relevant exploitation rights on a national basis.** The transmission of copyright content in digital networks involves two different rights: i) the reproduction right;¹⁷² and ii) the communication to the public right, which includes the right of making copyrighted works available to the public. As a result a single act of exploitation requires clearing two autonomous and independent rights, which might raise transaction costs and make the rights clearance more complicated in sectors, like the music business, where these categories of rights might be held by different right-holders in different several Member States.

On the other hand, the combined effect of i) the principle of copyright territoriality, ii) the application of the principle of exhaustion exclusively to tangible goods, and iii) the contractual freedom¹⁷³ enshrined in the Charter of Fundamental Rights of the EU enables right-holders as well as service providers to exploit copyright and related rights on a national basis without breaching EU law. Indeed, the online provision of copyrighted content on a territorial basis can be the result of the deliberate commercial decisions of right-holders and/or commercial users. In other words, while the current EU copyright framework may inflate transaction costs¹⁷⁴ and make the online provision of pan-European copyrighted content too costly, right-holders and service providers may autonomously decide to partition the Internal Market irrespective of copyright obstacles to multi-territorial

¹⁷⁰ The compatibility of these business arrangements with Article 20(2) of the Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (referred to as 'Services Directive') should be further investigated: 'Member States shall ensure that the general conditions of access to a service, which are made available to the public at large by the provider, do not contain discriminatory provisions relating to the nationality or place of residence of the recipient, but without precluding the possibility of providing for differences in the conditions of access where those differences are directly justified by objective criteria'.

¹⁷¹ See European Commission (2014), Report on the responses to the Public Consultation on the Review of the EU Copyright Rules, available at: http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/contributions/consultation-report_en.pdf.

¹⁷² It is worth stressing that each digital transmission of copyrighted works entails several acts of reproduction, including, *inter alia*, uploading and downloading of the digital work.

¹⁷³ The lion's share of sectoral stakeholders agreed that contractual freedom should be preserved and that commercial users of digital content should be free to pursue the commercial strategy they prefer (Mazziotti, 2013). In addition, this principle has been explicitly confirmed by the European Commission (European Commission (2010), 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)245final).

¹⁷⁴ Service providers might be required to negotiate licenses with a wide range of stakeholders located in various Member States rather than clearing all the required rights for all the territories of the EU in a single transaction.

licenses on the grounds of commercial motivations.¹⁷⁵ This is not surprising, especially when considering that geo-blocking measures are adopted also in e-commerce of non-copyrighted goods.¹⁷⁶

Many additional obstacles to the Internal Market integration other than EU copyright law have been mentioned: i) technological barriers and limited access to broadband; ii) different degrees of computer literacy; iii) lack of legal harmonisation in other relevant areas of law (e.g. consumer protection, taxation, contract law); iv) uneven diffusion of electronic payment methods; v) diverging consumer trust in online transactions; vi) lack of demand for lawful content due to illegal downloading (i.e. piracy); vii) shortage of pan-European sponsors for advertisement-funded services.

In order to assess the reasons and implications of territorial licensing and geo-blocking, it is necessary to focus on specific sectors as right-holders, bundle or rights as well as contractual practices largely vary among sectors and have different impacts on the proper functioning of the Internal Market. In what follows the main features of the audiovisual, music, and book publishing sectors will be discussed.

2.2.1 The audiovisual sector

While the WIPO generally defines an audiovisual work as “a work which appeals at the same time to the ear and to the eye and consists of a series of related images and accompanying sounds”,¹⁷⁷ **this Section focuses only on the film sector as it is characterised by the centralisation of the majority of relevant exploitation rights in the hands of a single entity, namely the film producer.**

As mentioned above (see Section II.2.1.2.2), in principle several intellectual creators (e.g. the director, scriptwriters, music composers, etc.) can be acknowledged as authors of a film; nonetheless, the main economic rights are transferred from the authors (and performers¹⁷⁸) to the producer, by law or by contractual agreements.¹⁷⁹ As a result, the producer is the single licensing entity for the exploitation of these audiovisual works (Charles River Associates, 2014). Nonetheless, some of the authors or performers involved in the production of the movie can still be entitled to separate remunerations or compensations for certain uses of

¹⁷⁵ Licensing content on a territorial basis enables not only service differentiation (taking account, for instance, of cultural and linguistic diversity) but also price discrimination. Hence, mono-territorial licensing schemes can be more profitable for right-holders and commercial users than multi-territorial or pan-European licenses.

¹⁷⁶ For instance, Belgian consumers can purchase clothes only on the Belgian Zara website. Similarly, Italian consumers can only access the Italian online Apple Store (and at the time of writing they cannot purchase an Apple Watch which is available only to British, French and German consumers).

¹⁷⁷ See WIPO (1980), Glossary of Terms of the Law of Copyright and Neighbouring Rights, World Intellectual Property Organization.

¹⁷⁸ Please note that, besides the fragmentation of authors' rights, another grey area is represented by the rights of performers (actors) that are not fully harmonised at the EU level (DG INFSO and DG MARKT (2009), *Creating Content in a European Digital Single Market: Challenges for the Future*, A Reflection Document).

¹⁷⁹ See European Commission (2011), *Green Paper on the Online Distribution of Audiovisual Works in the European Union: Opportunities and Challenges towards a Digital Single Market*, COM(2011)427final.

their creative works incorporated in audiovisual fixation.¹⁸⁰ Remuneration and compensation arrangements for audiovisual authors and performers in principle do not affect licensing schemes as the film producers are still vested with all the relevant economic rights. The only obstacle is represented by certain uses (e.g. online exploitation) of music works (i.e. pre-existing musical compositions or movie soundtracks) embedded in a film.¹⁸¹ For this kind of content, the relevant rights (including so-called 'public performance' rights) have still to be cleared by dealing with the relevant collective management societies¹⁸² and can involve substantial transaction costs on a country-by-country basis.¹⁸³

Setting aside issues related to the clearance of rights for music incorporated in films,¹⁸⁴ **in principle the producer is free to decide the optimal licensing scheme for exploiting his/her audiovisual works.** As regards the licensing 'value chain', producers may directly license their works or rely on distributors playing the role of intermediaries between producers and commercial users (see Figure 2). In addition, especially for foreign markets, sales agents can facilitate contractual agreements to transfer the rights from producers to territorial distributors. When it comes to the online supply of copyright audiovisual works, service providers have to acquire online rights (i.e. both the making available right and the reproduction right) from the relevant right-holders. Whereas service providers may directly deal with producers or resort to sales agents or distributors, in many circumstances they clear rights by concluding agreements with aggregators that are companies holding the relevant rights for large catalogues of movies. This is especially the case for video on-demand services (Charles River Associates, 2014).

It is apparent that in the film sector there are no significant obstacles to licensing agreements between producers and commercial users. In addition, in compliance with the current EU copyright system, producers may decide to exploit their rights via pan-European licenses. In principle, EU copyright law does not constitute a major obstacle to market integration.

¹⁸⁰ In some Member States (e.g. Belgium, Bulgaria, France), collective management societies representing audiovisual authors collect 'per use' remuneration for TV broadcasting of copyrighted audiovisual works. In some other Member States (e.g. Spain), audiovisual performers are entitled to an equitable remuneration for the exploitation of their performances.

¹⁸¹ Music right-holders are entitled to receive communication/'making available' to the public royalties as a result of the broadcast of film on television, the exhibition of the film in movie theatres or the online exploitation. 'Cue sheets are the primary means by which performing rights organizations track the use of music in films and TV. A typical cue sheet contains a log of all music used in the motion picture and includes such information as the film's title, air date, music length, song title, composer and publisher information, name of the performing rights society, timing/usage information, and percentage splits among copyright proprietors' (Kushnir, 2005).

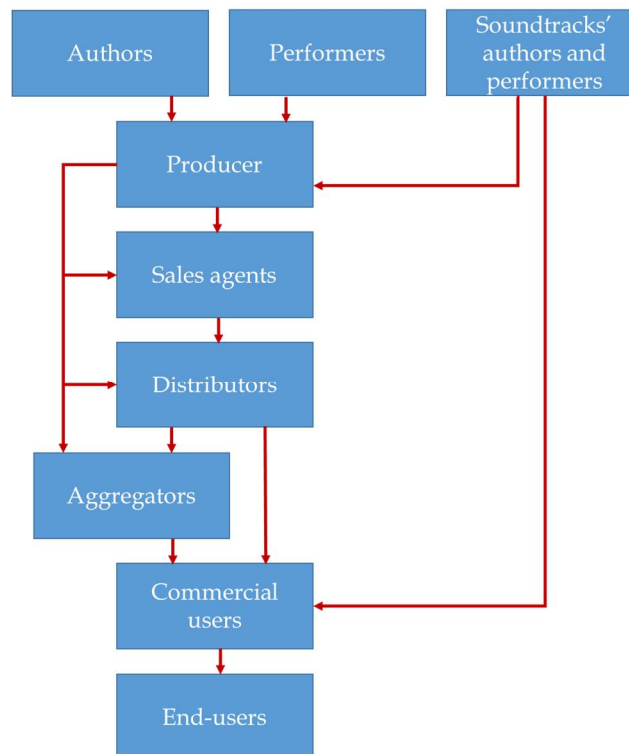
¹⁸² In some Member State (e.g. Czech Republic, Spain, Germany), based on national legislation and collective bargaining agreements, in the audiovisual sector collective management societies play a role also for clearing certain rights (e.g. rental right) of certain right-holders (e.g. performers) (DG INFSO and DG MARKT (2009), *Creating Content in a European Digital Single Market: Challenges for the Future, A Reflection Document*).

¹⁸³ See European Commission (2011), *Green Paper on the Online Distribution of Audiovisual Works in the European Union: Opportunities and Challenges towards a Digital Single Market*, COM(2011)427final.

¹⁸⁴ Please note that in terms of market fragmentation, these issues are equivalent to those discussed below for the music sector.

Nonetheless, territorial or multi-territorial licensing schemes¹⁸⁵ are still the prevalent and probably the most profitable system of right exploitation in this sector for a variety of reasons (see below). While licensing practices reflect lawful commercial strategies based on the principle of copyright territoriality, competition policy issues (cf. the *Premier League* case) may still arise, especially when licensing agreements are based on absolute territoriality exclusivity.¹⁸⁶ The compatibility between EU competition law and EU copyright law is an important issue that requires further investigation. In this respect, in January 2014 the European Commission started a formal antitrust proceeding to examine territorial licensing agreements between US film studios and the largest European pay-TV broadcasters that may result in the partitioning of the Internal Market.¹⁸⁷

Figure 2. Licensing chain in the film sector



Source: Authors' own elaboration on Charles River Associates (2014).

¹⁸⁵ Several platforms providing on-demand services serve multiple territories of the EU insofar as they can still address customers included in a common language group (see European Commission (2011), *Green Paper on the Online Distribution of Audiovisual Works in the European Union: Opportunities and Challenges towards a Digital Single Market*, COM(2011)427final).

¹⁸⁶ These agreements exclude also the so-called passive sales, i.e. those sales resulting from a response to unsolicited requests from customers residing outside the territory covered by the license of the service provider.

¹⁸⁷ See European Commission (2014), Press Release, 'Antitrust: Commission investigates restrictions affecting cross border provision of pay TV services', 13 January 2014, available at: http://europa.eu/rapid/press-release_IP-14-15_en.htm.

One of the main challenges to the development of the Internal Market for audiovisual content lies in the strong cultural and linguistic diversity across EU Member States. As a result, consumer preferences diverge substantially across EU countries. Accordingly, the provision of audiovisual works requires national adaptations such as subtitling and dubbing as well as tailoring marketing investment and, to some extent, versioning content to meet local preferences (e.g. general consumer tastes, holiday periods). In addition, some works (e.g. European film productions that are targeted to a specific national audience) are able to meet the demand only of a limited part of the EU population in terms of humour, popular characters or local stories and are bound to national contexts.¹⁸⁸ For instance, in 2013 the average share of admissions of EU films in national markets was equal to 79%, in other words four spectators out of five were based in the same Member State where the film was produced.¹⁸⁹ Interestingly, while the cross border penetration rate of EU films is below 10% in the majority of national markets, US films have a market share above 50% all over Europe (see Table 2). Dubbing is still required to release movies in four out of the five largest EU markets (i.e. France, Germany,¹⁹⁰ Italy and Spain).¹⁹¹ Against this background, pan-European licensing schemes are often not profitable for right-holders, especially when a substantial pan-European demand is absent.¹⁹²

Table 2. Language transfer practices for cinema works and percentage share of admissions for national, EU, US films in selected Member States

Country	Main language transfer practices	Admissions (% over EU total)	National films (%)	Other EU films (%)	US films (%)
Czech Republic	Subtitling	1.22	24.2	11.06*	64.74
France	Dubbing and subtitling	21.34	33.8	7.29	54.24
Germany	Dubbing and subtitling	14.30	26.2	6.10	65.4
Hungary	Subtitling	1.12	1.5	9.85	86.86
Ireland	Subtitling	1.62	0.9	n.a.	n.a.

¹⁸⁸ By way of example, MTV initially decided to provide a pan-European TV channel. At a second stage, the cultural diversity and linguistic specificities within the EU territory obliged MTV to change its strategy and create country-specific TV channels (RBB Economics and Value Partners, 2009 as quoted in Charles River Associates, 2014).

¹⁸⁹ European Audiovisual Observatory (2014), *Yearbook Online Premium Services*.

¹⁹⁰ Some small budget films are released in Germany only with subtitles.

¹⁹¹ Please note that in UK, the share of admission for films in foreign languages is about 3%.

¹⁹² The absence of demand for pan-European licenses, *mutatis mutandis*, can explain the lack of online transmission of sports events on an EU-wide basis (Mazziotti, 2013). Interestingly, in a recent interview, Mathieu Moreuil (Head of EU Affairs at Premier League) stressed that Premier League contents are worth £1 billion in the UK market and about €150 million in the rest of Europe and an even bigger ratio applies to the French *Ligue 1* where €700 million are collected in France and €7 million in the 27 other Member States. See Strömbäck, P. (2015), *Interview with Mathieu Moreuil, Head of EU Affairs at Premier League*, Netopia available at: <http://www.netopia.eu/2015/05/04/be-careful-what-you-wish-sports-on-the-dsm/>.

Italy	Dubbing	11.76	30.5	9.90	53.7
Poland	Subtitling	4.00	20.4	16.10	63.39
Spain	Dubbing	8.62	14.00	9.99	69.69
UK	Subtitling	18.25	22.1	3.00	72.7

Note: *Estimated value.

Source: Authors' own elaboration on European Audiovisual Observatory (2014) and on Media Consulting Group 2007.

An additional and complementary reason for partitioning the Internal Market is rooted in the financing scheme adopted to fund the production of movies. A substantial share of the overall budget is gathered by pre-selling exclusive exploitation rights on a territorial basis and for a certain period of time to sales agents, distributors, or television broadcasters in exchange for an upfront payment.¹⁹³ In some Member States, broadcasting organisations and more rarely telecommunication operators are even obliged to contribute to the financing of audiovisual productions.¹⁹⁴ In addition, some territorial licensing schemes transfer or used to transfer to distributors or commercial users full packages of rights covering also the online exploitation. As a result, **in many circumstances, online exploitation on a pan-European basis is not possible as relevant rights are locked up for a certain period of time in contractual agreements on a territorial basis.**¹⁹⁵ Finally, territorial licensing schemes are deemed instrumental also to distribution strategies based on the so-called 'release windows', i.e. on the sequential release of audiovisual content via different media platforms (e.g. cinemas, DVD/Blue Ray, Video on Demand, Pay-TV, and free-to-air television), especially when the dates of first release and/or the length of the various 'windows' are different across Member States.

In this context, geo-blocking is a lawful technical measure allowing commercial users to comply with territorial or multi-territorial licensing schemes for online exploitation rights. In light of the ubiquitous nature of the Internet, services providers acquiring licenses for the reproduction and making available rights of copyrighted content in a certain territory are obliged to resort to measures such as geo-blocking in order to avoid copyright infringement as well as breach of contract.

¹⁹³ Based on case study approach FIAPF, IVF and IFTA pointed out that between 32% and 66% of the total financing plan of a European movie is covered by pre-selling rights (Charles River Associates, 2014). It is worth stressing that when it comes to online service providers, some European telecommunication operators have purchased pre-selling rights from major Hollywood film studios to provide video on-demand services in certain territories (KEA, 2010).

¹⁹⁴ In Poland, Germany, Slovakia and Romania, statutory stakeholders' contributions also involves providers of video on-demand rights, thus posing a potential obstacle to pan-European licensing of online exploitation rights (KEA, 2010).

¹⁹⁵ For instance, the majority of broadcast distribution contracts also entitle broadcasters to the right to make available online the relevant audiovisual work after the first broadcast (KEA, 2010).

2.2.2 *The music sector*¹⁹⁶

Irrespective of the business model adopted for the supply of digital music, **generally online commercial users have to clear both the reproduction right (the so-called ‘mechanical’ right) and the making available right (the so-called ‘public performance’ right)**. Interestingly, in the music sector authors (i.e. composers and lyricists) hold a copyright on their musical compositions whereas performers (i.e. singers and musicians) and phonogram producers (i.e. record companies) hold related rights (‘related to copyright’ or ‘neighbouring rights’), respectively, on their performances and sound recordings of the authors’ musical compositions.¹⁹⁷ These three layers of rights co-exist when it comes to exploitation of recordings, in a way that all such rights should be cleared for each exploitation to be lawful. In addition, each of the aforementioned right-holders is entitled to transfer its economic rights to other entities, as occurs with music authors, who traditionally share their rights with music publishers.

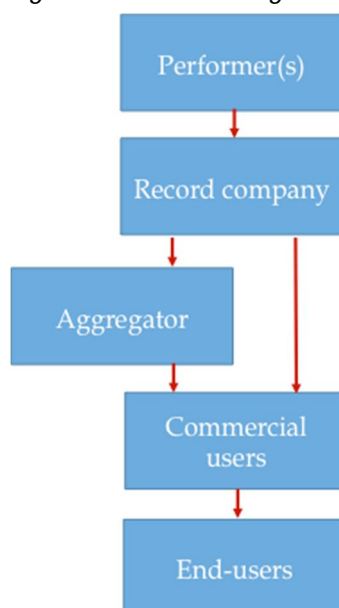
As for neighbouring rights, they are generally transferred from performers to record companies based on contractual agreements. As a result, online commercial users can clear the bundle of related rights required for online exploitations by dealing, directly and individually, with record producers. This is usually the case for rights belonging to major labels. For related rights held by smaller independent record companies, instead, given their greater number and limited resources, commercial users interact with rights and content aggregators, on a collective basis.¹⁹⁸ Record companies as well as aggregators, similarly to film producers, are potentially able to grant multi-territorial or pan-European licenses (see Figure 3).

¹⁹⁶ At the outset of this Section, it is worth stressing that in 2014 the European Parliament and the Council enacted a Directive on collective management of copyright and related rights (Directive 2014/26/EU) that is expected to facilitate the clearance of exploitation rights on a multi-territorial or pan-European basis in the music sector. As Member States have to comply with this Directive by 10 April 2016, the present interim evaluation of the EU copyright framework does not take into account the expected outcome of this new EU measure. Before the enactment of the 2014 Directive, the European Commission has sought to simplify and encourage the development of multi-territorial licenses of online music rights (see Section II.1.5.1). In spite of such efforts, music rights are very fragmented thus increasing transaction costs and posing an obstacle to the integration of the Internal Market.

¹⁹⁷ Related rights also belong to broadcasters as regards their own broadcasts.

¹⁹⁸ Interestingly, some aggregators can be specialised in certain online services: ‘Aggregators convert and encode music formats and deliver technical copies of the music, and act as distributors of music over the Internet, negotiating directly or through an intermediary the deals with online music services’ (KEA & VRIJE Universiteit Brussels, 2012). For instance, Merlin offers a one-stop shop for streaming and mobile services (e.g. Deezer, Spotify) by negotiating licenses on behalf of independent music companies that already possess their own aggregator and distributor services dealing separately with traditional download platforms (e.g. iTunes). Merlin is a non-profit joint-licensing organisation established in 2007 as a global digital rights agency. It gathers 650 members representing more than 20,000 independent labels and distributors worldwide. Its mission is to represent the independent music sector worldwide and to act as a central point of entry to the music repertoires it represents, in particular for digital, new media and mobile rights. Hence, Merlin issues multi-territorial licenses to streaming and mobile services via a single deal and redistributes revenues accrued from its commercial agreements to its members.

Figure 3. Licensing chain for related rights in the music sector



Sources: Authors' own elaboration on KEA & Vrije Universiteit Brussel (2012) and Charles River Associates (2014).

Complexity arises when it comes to the author's copyright in the music sector. The vast majority of music authors mandate a certain collective management organisation (CMOs) to manage, on an exclusive basis, their rights of communication to the public, which include the rights of making content available online, by: i) negotiating rates and terms of use; ii) granting licenses to commercial users; iii) monitoring the exploitation of rights and pursuing infringers; iv) collecting royalties and redistributing these revenues to right-holders.¹⁹⁹ A CMO is generally based in a certain Member State where it offers a bundle of rights for its own repertoire as well as for repertoires of its associated CMOs operating in other territories (multi-repertoire licensing).²⁰⁰ In other words, they grant licenses for exploiting the rights of both national and foreign right-holders in the territory of the Member State where they are established. The licensing of other repertoires is based on a network of reciprocal representation agreements. In principle, a national collecting society can also grant multi-territorial licenses for its own repertoire (provided that the authors' mandate is not limited to one country). In practice, each collecting society usually grants licenses for all the repertoires in its own country (mono-territorial licensing), at least as regards offline exploitations that require a reasonably high monitoring capacity on a certain territory of operation.²⁰¹ More recently, some collective management societies have created regional hubs where online

¹⁹⁹ JURI Committee (2010), *Copyright Territoriality, Collective Management and Remuneration*, Working Document, European Parliament 15 September 2010.

²⁰⁰ In some Member States several CMOs coexist and represent different right-holders (e.g. authors, publishers) and, in some cases, different rights (European Commission (2012), *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*, SWD(2012)2014 final).

²⁰¹ The main reason for this territorial partition is rooted in the need to physically monitor and enforce rights in the 'offline' environment (see C-351/12 OSA v. *Lecebne lazne Marianske Lazne*).

commercial users can obtain multi-territorial licenses for the repertoire of the member societies.²⁰²

CMOs from continental-European (i.e. *droit d'auteur* or author's right systems) Member States are generally entitled to manage also the reproduction rights for copyrighted musical works of the authors they represent. Nonetheless, this specific right is usually co-owned by music publishers, as a result of the contractual arrangements with composers and lyricists.²⁰³ Interestingly, due to a different contractual tradition and a different way the mechanical rights were exploited in the pre-digital era, reproduction rights for Anglo-American repertoires are entirely owned by publishing companies rather than owned or co-owned by authors, in a way that these rights have been exploited by entities entirely controlled by publishers (Mazziotti, 2011). As a result, whereas collecting societies from 'author's right' systems like France's and Germany's generally manage mechanical rights also for publishers,²⁰⁴ **major publishers of Anglo-American repertoires**, which originally managed these rights by themselves (either individually or through their own collective rights management organisations), in response to the European Commission's initiatives in the area of collective management of online music rights, **have progressively transferred their reproduction rights from their collecting societies to specialised and mono-repertoire rights management organisations whose sole purpose is the multi-territorial or pan-European licensing of these specific rights.**²⁰⁵

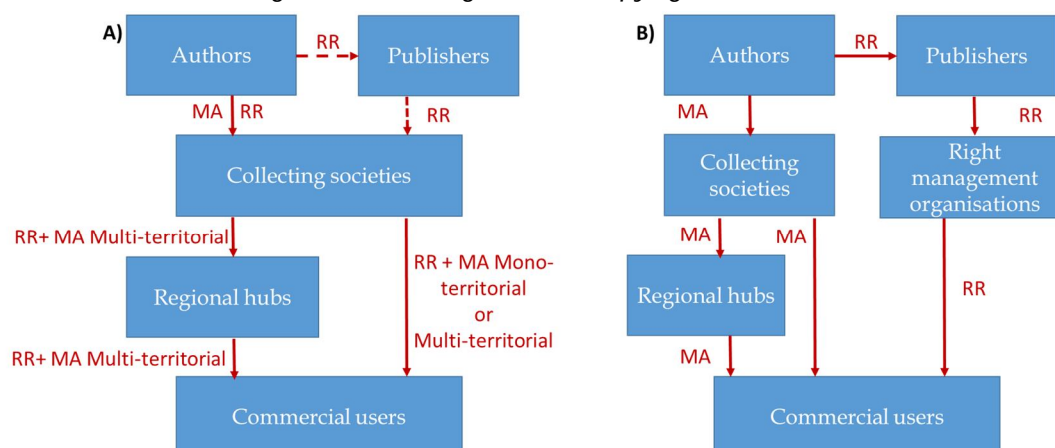
²⁰² ARMONIA and the Nordisk Copyright Bureau are two examples of regional hubs. ARMONIA is the first pan-European hub for the licensing of online services and was founded in 2013 by the SIAE (Italy), SGAE (Spain) and SACEM (France). Recently joined by ARTISJUS (Hungary), SABAM (Belgium) and SUISA (Switzerland), among others, it represents 5.5 million aggregated works and aims at improving the identification of musical works and more accurately claiming authors' rights. In particular, it seeks to improve processing speed of sales reports and better value the documentation and invoicing tools to simplify relationships with Digital Services Providers through the creation of a one-stop shop for sales reports for Digital Services Providers and the mutualisation of common activities of analysis and validation of sales reports. ARMONIA has signed a series of agreements with Beatport, Google, Deezer and YouTube for access to the repertoires of the member societies as well as those of UMPI, SONY ATV Latino and SPA. The Nordisk Copyright Bureau is the joint-collecting society owned by the Nordic performing rights societies such as KODA in Denmark, STEF in Iceland, STIM in Sweden, TEOSTO in Finland and TONO in Norway. Apart from administering the recording and copying rights on behalf of their owner societies, the Nordisk Copyright Bureau also administers these rights for the Baltic performing rights societies: AKKA-LAA in Latvia, EAÜ in Estonia and LATGA-A in Lithuania. The Nordisk Copyright Bureau also holds 50% of the shares in the Network of Music Partners (NMP), a joint venture company owned by NCB and PRS for Music that provides back-office services to the music copyright administration industry (Mazziotti, 2011).

²⁰³ Music publishers are generally distinct from recording companies. They usually manage and promote authors' compositions in exchange of part of the authors' rights or a share of authors' royalties. Music publishers are not considered copyright owners by law: they become right-holders as a result of the transfer of rights from authors (Charles River Associates, 2014; KEA & VRIJE Universiteit Brussels, 2012).

²⁰⁴ In some Member States, publishers' rights and authors' rights are managed by different collecting societies (see note 200).

²⁰⁵ Mono-territorial reproduction rights of publishing companies are still managed by national collecting societies, also for Anglo-American repertoire (Mazziotti, 2011; Mazziotti, 2013).

Figure 4. Licensing chain for copyright in the music sector



Note:

A) Mono-territorial licensing for all repertoires and multi-territorial licensing of Continental repertoire;

B) Multi-territorial licensing of Anglo-American repertoire.

Sources: Authors' own elaboration on KEA & Vrije Universiteit Brussel (2012) and Charles River Associates (2014).

In light of the above, as regards copyright of musical works, **online commercial users have to deal with different licensing procedures depending on two main dimensions: i) the territorial scope of their offer; ii) the repertoire they intend to provide** (see Figure 4).

- For mono-territorial license of both Continental and Anglo-American repertoire, they have to clear both reproduction and making available rights with national CMOs.²⁰⁶
- For multi-territorial license of Continental European repertoire they have to deal either with national collecting societies in all the Member States they intend to serve or, if any, with regional hubs grouping several collecting societies.
- Finally, for multi-territorial license of Anglo-American repertoire, online commercial users have to negotiate with right management organisations for reproduction rights and with national CMOs or regional hubs for making available rights.

As a result, the fragmentation of copyright and related rights, right-holders, and repertoires as well as the territorial scope of licenses granted by traditional collecting societies force online commercial users to conduct numerous parallel negotiations in each Member State. This inflates transaction costs and creates substantial obstacles to the provision of pan-European online music services as well as other online services requiring the clearance of music copyright and related rights, such as audiovisual services.²⁰⁷ According to a study published by KEA & VRIJE Universiteit Brussels, commercial users

²⁰⁶ In those Member States where several CMOs representing multiple authors or rights are active, also mono-territorial licensing may require multiple licenses. In this circumstance, a layer of complexity is added by the so-called 'split-copyright' issue. In other words, as many musical works are co-written by several authors and each author may have transferred his/her rights to a different national collecting society, the clearing of rights might be particularly complex for the very same musical work.

²⁰⁷ See European Commission (2012), 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, SWD(2012)2014 final.

that provide services in more than one country and offer more than one million titles face transaction costs up to €260,000 per year and need about six employees to deal with licensing issues; in particular, the identification of relevant right-holders may require up to six months and negotiations to clear rights may last up to two years (KEA & VRIJE Universiteit Brussels, 2012).

As explained above, additional reasons may impinge on multi-territorial licensing in the music sector. Similarly to the film sector, to some extent cultural and linguistic diversities may also pose an obstacle to the proper functioning of the Internal Market. The success of several national repertoires is mainly limited to the territory of a certain Member State. EU music works that have a market beyond national barriers usually follow patterns that are set by cultural and linguistic proximity. Only Anglo-American repertoires are truly able to meet a pan-European demand by benefiting from the widespread use of English and the diffusion of the Anglo-American culture throughout Europe.²⁰⁸ In addition, especially for online advertisement-funded music service, territorial fragmentation may also result from commercial decisions and not only from the territorial scope of copyright and related rights.

Given the current EU copyright framework and the contractual freedom left to right-holders and commercial users, also in the music sector geo-blocking is lawful and even necessary to avoid copyright infringement and breach of license terms in the absence of pan-European licenses. While geo-blocking seems detrimental for consumers, it protects them from infringing copyright by exploiting online content in territories not covered by the license they have purchased.

Box 2. Virtual Private Networks (VPN)

"A virtual private network (VPN) extends a private network across a public network, such as the Internet. It enables a computer or network-enabled device to send and receive data across shared or public networks as if it were directly connected to the private network, while benefiting from the functionality, security and management policies of the private network".²⁰⁹ VPNs offer a higher level of privacy and security against any kind of cyber-attack, intrusion or eavesdropping. Two main types of VPN are increasingly used to privatise the exchange of data over the public Internet: 'site-to-site VPN' allows multiple offices in fixed locations to establish secure connections with each other; and 'remote access VPN' which offers individual users secure connections with a remote computer network (Hussein FCMI & Abdul Hadi Qais, 2013).

VPN providers set their own prices based on their geographic coverage and the quality of services they would guarantee (see Table 3). Generally, the most expensive offers would cover a broader geographic zone and guarantee a higher level of privacy protection as well as of bandwidth. Commercial services providers are constantly developing network innovations and new techniques to circumvent any VPN-blocking or throttling systems. The most expensive services usually provide additional so-called 'socks' to hide the user's IP address and ensure higher levels of anonymity while surfing the web, to circumvent restrictions on

²⁰⁸ See European Parliament (2009), *Collecting Societies and Cultural Diversity in the Music Sector*, Directorate-General for Internal Policies.

²⁰⁹ See Virtual Private Network, Wikipedia (http://en.wikipedia.org/wiki/Virtual_private_network#cite_ref-1.)

websites and quickly change the geographic location by switching the user's IP address with one belonging to the service provider's proxy server.²¹⁰ There are also free VPN services that usually are not able to guarantee the quality of loading or the safety of transmitted data.

Using VPN or any other methods to encrypt or circumvent public routes online raises many questions of legality. So far, using a VPN is generally lawful, however, problems of legality are posed as regards the practices enabled by the use of such technology, largely depending on activities pursued through the private network. When it comes to copyright, VPN is a powerful tool to circumvent geo-blocking and access to online copyrighted content licensed in a certain Member State from another EU or extra-EU country, thus bypassing both existing obstacles to cross-border portability and cross-border trade of digital works. It is worth stressing that activities enabled by geo-blocking circumvention constitutes copyright infringement as well as breach of licensing contracts. In this respect, the lawfulness of VPNs should be assessed also under the lens of Article 6(2) of the InfoSoc Directive, which obliges Member States to provide legal protection against the provision of services that "have only a limited commercially significant purpose or use other than to circumvent any effective technological protection measure".

Table 3. Sample of commercial VPN service providers

Provider	IP Addresses	Locations	P2P	Monthly fee
HideMyAss	116,607	311 Servers 193 Countries	No	\$6.55
VyprVPN	200,000	52 Servers 43 Countries	Yes	\$5.00
PureVPN	77,000	125 Servers 100 Countries	Some	\$4.16
Private Internet Access	3,000	23 Servers 15 Countries	Yes	\$3.33
SaferVPN	5,000	30 Servers 22 Countries	No	\$5.99
IP Vanish	25,000	76 Servers 60 Countries	Yes	\$6.49
Invisible Browsing VPN	2,000	62 Servers 39 Countries	Yes	\$3.08
Express VPN	10,000	97 Servers 78 Countries	Yes	\$8.32
Hotspot Shield	n.a.	6 Countries	n.a.	\$2.49
EarthVPN	3,000	150 Servers 32 Countries	Some	\$3.33
IronSocket	n.a.	50 Servers 36 Countries	Yes	\$4.16
StrongVPN	n.a.	44 Servers 22 Countries	Yes	\$4.58
Proxify	n.a.	1290 Servers 78 Countries	n.a.	\$10.00
NordVPN	633	20 Countries	Yes	\$4.00

²¹⁰ See TheSafety.US website at <http://thesafety.us/en>.

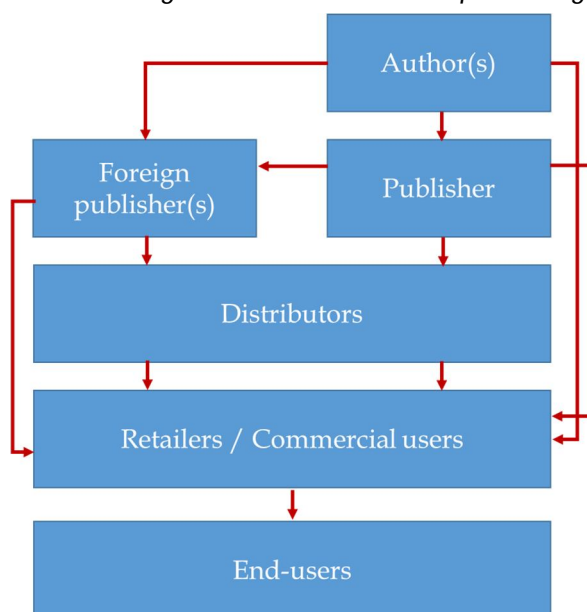
TheSafety.us	200	23 Servers 20 Countries	n.a.	\$30.00
Tunnel Bear	n.a.	12 Countries	n.a.	\$4.16

2.2.3 The book publishing sector

The licensing value chain of the book publishing sector includes three main typologies of actors: i) the authors of literary content; ii) the publishers; and iii) the distributors (see Figure 5). Authors are the content creators who materially draft manuscripts. Publishers select or commission literary works and add value to them by hiring, *inter alia*, editors, designers, illustrators, indexers in order to package a book edition. In addition, publishers make marketing and sales efforts to increase demand for their publications. By virtue of a distribution agreement, in the offline world distributors play the role of intermediaries between publishers and retailers such as bookstores. Nonetheless, the boundaries that traditionally divided publishers and distributors are progressively fading out. For instance, several large publishing companies have also their own distribution networks as well as bookstores. In the digital world, publishers can directly deal with online retailers and also smaller publishing companies may directly reach consumers via their own web-store and/or by adopting new alternative distribution mechanisms such as print-on-demand.²¹¹ More recently, some large retailers, such as Amazon, started to move upward along the value chain and provide publishing services, thus directly acquiring exploitation rights from authors.

²¹¹ Print-on-demand is a technology and innovative business process through which copies of a book or any press document are printed singly and entirely in a pre-defined quantity, once an order has been received. Therefore, it offers advantages such as quicker technical set-up for offset printing as well as reduced storage, handling and inventory costs.

Figure 5. Licensing value chain in the book publishing sector



Source: Authors' own elaboration.

Licensing schemes in the book publishing sector hardly fit in a pre-defined model as they are usually based on private negotiations between authors/writers of manuscripts²¹² and publishers.²¹³ The outcomes of these negotiations are affected by national laws regulating the form and content of licensing agreements as well as rights and obligations of the parties and the termination of the contracts.²¹⁴ A preliminary distinction can be made between the cases in which an author assigns his/her copyright to a certain publisher²¹⁵ and the cases in

²¹² Authors/writers of manuscripts are the first owner of copyright as they are the creators of literary content. In some circumstances and under some national law provisions, the publisher can be considered the first owner of copyright. This is the case, for instance, of projects such as dictionaries or encyclopaedias or copyrighted materials created by employees during their work hours (WIPO, *Managing Intellectual Property in the Book Publishing Industry*, Creative Industries – Booklet No. 1). It is worth stressing that the identification of the author of a literary work can become particularly complex and subject to national rules when the creators produce content as part of their employment duties or when the work is created by several creators working together (the so-called 'collaborative works') or when creators are directed by a principal (the so-called 'collective works') (JURI Committee (2010), *Copyright and Digitisation of Books*, Working Document, European Parliament 18 March 2010).

²¹³ Please note that a published book may also include drawings, paintings or photographs. Therefore, the publisher needs to clear the relevant rights held respectively by illustrators, painters or photographers. For the sake of simplicity, what follows will focus exclusively on the rights held by authors of literary content.

²¹⁴ For instance, in some Member States, such as France and Germany, publishing contracts are subject to specific interpretation rules; in some other Member States, such as UK, general contract rules apply (DG INFSO & DG MARKT (2009), *Creating Content in a European Digital Single Market: Challenges for the Future*, A Reflection Document).

²¹⁵ In some countries this option is precluded by law (WIPO, *Managing Intellectual Property in the Book Publishing Industry*, Creative Industries – Booklet No. 1).

which only certain rights are transferred to a publisher via a licensing agreement (the so-called 'publishing contract' or 'head contract'). The former arrangement transforms the publisher in a single licensing entity comparable to the producers of audiovisual work. In other words, the publisher is fully entitled to exploit and enforce all the economic rights connected with a certain literary work. A comparable result is achieved when publishing contracts transfer to a publisher all the economic rights connected to a literary work on an exclusive basis (Clark & Philips, 2014). Against this background, the publisher is certainly able to distribute digital copies of a book, online on a pan-European basis.

The picture is less clear when authors transfer only some of the commercially relevant rights. In principle, publishing contracts may vary in relation to three dimensions: i) the rights transferred; ii) the territorial scope of the rights transferred; and iii) the duration of the agreement. As for the first dimension, the minimum bundle of rights allowing the publisher to publish a literary work includes reproduction and distribution rights. In general, the contract may specify in what formats the book will be published as well as in what languages and countries. While territorial limitations are lawful but not frequent in the book publishing sector, authors may still decide to reserve for themselves the right of translating and publishing the work in other languages. These rights will be potentially included by authors in publishing contracts with foreign publishers. Authors may also retain the right of making available the work to the public that is necessary for allowing electronic publication. Interestingly, publishing contracts drafted before the digital era (especially in those countries where law provisions prevent the inclusion in these agreements of non-existing/future mode of exploitation)²¹⁶ do not include the making available right; hence, electronic publishing still requires the written authorisation of authors. In more recent 'head contracts', this right is usually transferred to publishers (Strong, 2003).

Also, 'subsidiary rights' can be an additional source of conflict while negotiating a licensing agreement. A few examples can be mentioned: i) the digest rights required to publish an abridgement; ii) the serial rights required to serialise the work in newspapers or magazines; iii) the dramatisation and documentary rights as well as the film rights required for the adaptation of the work for the screen; iv) the merchandising rights. In general, few authors have enough bargaining power to carve out commercially-relevant rights from a standard licensing agreement, especially when they deal with large publishing companies. Nonetheless, 'head contracts' with small publishers, in particular when the author is assisted by professional agents, can lead to a fragmentation of rights between the publisher and the original copyright owner. In addition, in some jurisdictions the licensing agreement has to include a maximum duration.²¹⁷ When duration is not included in the agreement, the contract may still include termination clauses such as the option to revert the rights to the author when the publication goes out of the print and the publisher is not interested in reprinting it. The issue of the duration can potentially lead to a fragmentation of the rights over the time.

It is worth stressing that collective management societies also play a role in the book publishing sector when it comes to managing reproduction rights. The so-called reproduction rights organisations (RROs) are authorised by right-holders (either authors or

²¹⁶ See WIPO, *Managing Intellectual Property in the Book Publishing Industry*, Creative Industries – Booklet No. 1).

²¹⁷ Ibid.

publishers) to exercise the exclusive right of reproduction of literary works.²¹⁸ Traditionally these organisations, which operate on a strictly territorial basis and are linked by bilateral agreements similar to those in force in the music sector, have been mandated to manage reprographic reproduction of copyrighted publications by granting authorisation to copy only a portion of a work, in a limited number of copies (Rudolph, 2005). Recently, several RROs deal also with reproduction of parts of literary works in the digital environment;²¹⁹ this should affect only marginally digital publishing as long as right-holders still reserve for themselves the reproduction rights (for the entire publication) required for distributing their works over the Internet. It is worth stressing that, in the book publishing sector, the issue of printing and copying a whole digital publication can be effectively tackled via digital right management tools and TPMs.

In conclusion, in spite of the potential fragmentation of commercially-relevant rights between publishers and authors as well as the validity of the principle of territoriality also for digital publishing of literary works, **in practice copyright territoriality does not represent the main obstacle to the Internal Market integration.** It is to some extent a minor issue when compared to the linguistic fragmentation experienced within the EU. And in fact, it is customary not to attach any territorial restriction to a book published in a given language.²²⁰ Nonetheless, in the markets for eBooks some licenses are being territorial restricted.²²¹

Box 3. Identification of right-holders

The identification of right-holders of copyright and related rights can be a burdensome task. The legislative discussions on collective rights management and orphan works shed light on the difficulties related to rights clearance processes and on the issue of 'split-copyright' that refers to the fragmentation of rights among original copyright owner(s) and other parties involved in the licensing chain. For instance, as mentioned earlier, artistic works may be co-created, co-written or/and co-produced. In addition, right-holders may have mandated different collecting societies to manage their rights, and may have transferred their reproduction, communication, and making available rights to third parties (e.g. publishers and distributors), using different contractual agreements. Due to the complex and disparate management systems of copyright and related rights across the EU, rights clearance for one specific work might require identifying and dealing with several organisations and licensing schemes at Member State level. The identification of right-holders is made even more complex by the uncertainty created by the increasing phenomenon of UGC and related claims of right as well as by those works whose authors may not be identifiable nor locatable.

First, difficulties in identifying right-holders may increase transaction costs for commercial users

²¹⁸ In some countries right-holders can decide to exercise this right themselves; in some other countries reproduction right organisations are entitled by law to also manage the rights of non-represented right-holders.

²¹⁹ See WIPO, *Managing Intellectual Property in the Book Publishing Industry*, Creative Industries – Booklet No. 1).

²²⁰ JURI Committee (2010), *Copyright and Digitisation of Books*, Working Document, European Parliament 18 March 2010.

²²¹ See European Commission (2014), *Report on the responses to the Public Consultation on the Review of the EU Copyright Rules*, available at: http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/contributions/consultation-report_en.pdf.

and in turn increase costs for end-users or limit the available offer of copyrighted works, especially when transaction costs create barriers to cross-border content provision. Second, this issue remains a critical problem also for potential new creators insofar as derivative works and transformative uses require the explicit consent of the author of a pre-existing work. Consequently, improving the availability and accessibility of rights-related information is key for the EU creative industry, future potential creators and end-users. Besides identifying original right-holders, many questions are relevant: whether right-holders manage their rights individually or collectively; how rights are managed and which company is in charge of this task; whether the work is still available on the market or rather 'out-of-commerce' or 'out-of print'; whether it constitutes an orphan work or belongs to the public domain. So far, the challenge lies in centralising this information that, to some extent, is already held by private actors such as production companies, collective right organisations or various public institutions (such as libraries, archives, museums, educational establishments, and public services broadcasters), but hardly available to commercial users (especially new entrants) and the broader public. In response to this problem, central databases and common identification systems are essential in facilitating access to information and improving the overall process of DRM.

The European Commission funded several initiatives to support the use and interoperability of identifiers and ensure better access to right-holders and works-related information. The first attempt to create an Internet portal providing fast access to information on rights holders' organisations in Europe was the 'Open Right System'. More recently, the 'Linked Content Coalition' (LCC)²²² and the 'Right Data Integration' (RDI)²²³ aimed to develop a standardised and interoperable architecture that would allow right users to access a central information and transformation hub. Specific to the music sector, the 'Global Repertoire Database' is an attempt to create a one-stop shop for copyright management, meaning a single global and authoritative source of multi-territory information about the ownership or control of the musical repertoires. Additionally, the Accessible Registries of Rights Information and Orphan Works towards Europeana (ARROW) aims also at facilitating the management of rights and keep track records of diligent searches²²⁴ related to orphan works, through an automated system that meets the needs of digital libraries for enhanced legal certainty and that supports the preservation and the dissemination of European cultural heritage.

²²² LCC is a non-profit global consortium of standards bodies and registries aiming to facilitate and expand the legitimate use of content in the digital network through the effective use of interoperable identifiers and metadata. LCC members are organisations that create and manage data standards associated with content of one or more types, particularly for identifiers, metadata and messaging through a common 'Rights Reference Model'; see <http://www.linkedcontentcoalition.org>.

²²³ The RDI project aims at addressing the need for better solutions for discovering, licensing and delegating intellectual property rights, and providing users with access to information and enabling creators and right-holders to be properly rewarded; see <http://www.rdi-project.org>.

²²⁴ The Directive on certain permitted uses of orphan works lays down basic requirements constituting a diligent search and entrusts the Office for Harmonization in the Internal Market to establish and manage a European database containing the information related to orphan works and records of diligent searches across the European Union, in coordination with relevant national authorities.

2.3 The market fragmentation effects of copyright exceptions and limitations

2.3.1 Exception and limitations at EU and Member State level

2.3.1.1 The EU legal framework

As explained in more detail in Section II.1.2.5 above, the system of exceptions and limitations²²⁵ provided by the InfoSoc Directive determined the emergence of the following situation.

- **First, Member States are free to choose which exceptions and limitations to adopt in their national legislation as well as, to some extent, to tailor the content of the exceptions and limitations taken from the EU closed list.** In addition, national courts may provide divergent interpretations of some exceptions. Interestingly, while in some Member States the three-step test is recognised either explicitly (in France) or implicitly (in Germany) as an instrument in judicial revisions of the copyright law, in other Member States such as the UK the test is addressed to the legislator only and cannot be used by courts.²²⁶ Hence, some uses may be lawful in certain Member States and not lawful in others.
- **Second, Member States are responsible for finding the right balance between copyright exceptions and limitations and TPM and they have a large margin of discretion in pursuing this objective;** hence, some uses may be technically possible in certain Member States and not possible in others.

In what follows, the potential Internal Market fragmentation effects stemming from Articles 5 and 6 of the InfoSoc Directive are discussed. In particular, **the following copyright exceptions and limitations, which are deemed to have the most relevant impact on the Internal Market in the digital era, are carefully assessed**²²⁷:

- The mandatory exception for transient and incidental copies (Article 5(1));
- The exceptions for the benefit of libraries, educational establishments, archives, and museums (Article 5(2)(c) and 5(3)(n));
- The exception for the purpose of teaching or scientific research (Article 5(3)(a));
- The exception for the purpose of reporting of current events (Article 5(3)(c));
- The exception for quotations (Article 5(3)(d));
- The parody exception (Article 5(3)(k));
- The freedom of panorama exception (Article 5(3)(h));

²²⁵ The term ‘exceptions’ is used in this Section interchangeably with the term ‘limitations’.

²²⁶ The three-step test has not been implemented in the national legislation of all Member States, despite in principle its application is mandatory (see Annex A for further details).

²²⁷ See European Commission (2007), Report to the Council, the European Parliament, and the Economic and Social Committee on the Application of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, Commission Staff Working Document, SEC(2007)1556; and European Commission (2013), Public Consultation on the Review of the EU Copyright Rules, Consultation Document available at: http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/consultation-document_en.pdf.

- The ‘private copying’ exception (Article 5(2)b)).

The national implementation of the exceptions and limitations listed above are assessed in a sample of Member States comprising **France, Germany, Ireland, Italy, Poland and the UK**. Selected countries represent about 70% of the total gross domestic product (GDP) generated by copyright-intensive industries at the EU level in 2010 (approximately €366 billion out of €535 billion) and about 65% of the total workforce directly employed in the same sectors (approximately 4.5 million out of 7 million).²²⁸ In particular, France, Germany, the UK and Italy are the top four EU Member States contributing to copyright intensive industries in terms of both GDP and employment. Similarly, Poland tops the list of Central Eastern European Member States for both dimensions. The inclusion in the sample of the UK and Ireland enables a comparison between civil law and common law countries. Interestingly, Ireland is also the EU country with the highest GDP share (8.1%) ascribable to copyright-intensive industries.

Annex A at the end of this Study contains detailed comparison tables for all exceptions listed above, and for each of the six selected Member States.

2.3.2 *Transient and incidental copies*

Article 5(1) of the InfoSoc Directive includes the only mandatory copyright limitation which exempts: i) certain temporary acts (e.g. caching, reproduction on Internet routers) enabling transmission of digital copyrighted content in a network between third parties by an intermediary (e.g. an ISP); ii) certain temporary and lawful acts which are carried out by end-users and have no independent economic significance (e.g. browsing, caching, copies created in a Random Access Memory of a computer) (Mazziotti, 2008). According to Recital 33 of the InfoSoc Directive a use is lawful when authorised by the right-holder or not restricted by law.

While in the Netherlands this limitation was deemed to define the scope of the reproduction right, **in all the other Member States it was implemented by reflecting carefully the text of the InfoSoc Directive** (Queen Mary Intellectual Property Research Institute, 2007; see Annex A for further details). Notwithstanding the literal transposition, this provision can still lead to issues of **market fragmentation due to diverging interpretation by national courts**, especially when it comes to new uses and new technologies.²²⁹

²²⁸ See European Patent Office and Office for Harmonization in the Internal Market (2013), *Intellectual property rights intensive industries: contribution to economic performance and employment in the European Union*; absolute values have been computed on Eurostat data for GDP and employment.

²²⁹ For instance, a Belgian court (*Google v. Copiepresse*, Brussels Court of First Instance (TGI), 13 February 2007) did not apply this limitation to the copy of a web page stored in Google’s servers and accessible through a link available on the Google search website. In addition, a Swedish court (*Danske Dagblades Forening v. Infopaq Sverige AB*, District Court Stockholm, 14 August 2014) decided that this limitation does not apply to scanning technologies. The jury is still out when it comes to the application of Article 5(1) to text and data mining.

2.3.3 *Exceptions for the benefit of libraries, educational establishments, archives and museums*

Libraries, educational establishments, archives and museums²³⁰ are covered by two exceptions under Article 5 of the InfoSoc Directive.²³¹ Article 5(2)(c) provides an exception to the reproduction right for **specific acts of reproduction made by these institutions, provided that no direct or indirect economic or commercial advantage results from such acts.** Interestingly, the provision does not specify the acts that are exempted, it does not cover the making available on the Internet of copies of copyrighted works (cf. Recital 40) and does not contain any indication on ‘format shifting’ (e.g. the digitisation of books via scanning technologies) or the number of copies that can be made. In compliance with the three-step test, this exception has been interpreted to allow only certain special acts of reproduction that are usually identified with preservation and archiving purposes.

In **France** this exception does not apply to educational establishments and covers also on-site consultation of copyrighted works. The **Italian law** exempts only reprographic reproductions and explicitly excludes digital copying from the scope of application of this exception (in other words, ‘format shifting’ is not permitted); when the copy is made by libraries, a levy scheme applies. In **Poland** the exception, which does not apply to museums, is not explicitly restricted to non-commercial purposes and enables both preservation and making available to the public ‘free of charge’; reproduction rights are granted, under certain conditions, also to research centres and information and documentation centres. In **the UK**, libraries, archives and museums are entitled to make copies of all types of works included in their collections in order to preserve or replace those works and also to supply them to other privileged institutions to replace discarded, lost or destroyed works; this exception is subject to several conditions and is shielded from any contractual restriction. In **Ireland and Germany**, there is no specific implementation of Article 5(2)(c) of the InfoSoc Directive. In Ireland, libraries and archives (museums are excluded) can make copies for preservation purposes or to replace lost works, which cannot be purchased, in other libraries and archives; several additional exceptions apply to reproduction within educational establishments, libraries and archives. In Germany, reproduction acts by libraries and archives are generally constrained; these institutions are only entitled, under the private copying exception, to make copies, on paper or similar medium, for inclusion into ‘own’ archives (provided that these archives are not accessible by third parties and not intended for direct or indirect commercial purposes) (see Annex A).

In principle, this exception has no cross-border effects, as the acts of reproduction for preservation and archiving purposes are made by privileged institutions within the territory of the State where they are located and on copyrighted works available in the their collections.²³² Nonetheless, **in the digital era some acts of reproduction might become crucial when it comes to mass digitisation**, i.e. the activity of digitising, in full or partially,

²³⁰ According to Recital 40 of the InfoSoc Directive, these exceptions apply to ‘non-profit’ institutions such as publicly accessible libraries.

²³¹ Please note that an optional public lending exception is formulated in Article 6 of the Rental and Lending Directive (Directive 2006/115/EC).

²³² Some issues linked to the principle of territoriality may arise when libraries and other institutions decide to outsource the acts of reproduction to companies that are based in a different State (De Wolf & Partners, 2013).

collections held by certain institutions, such as libraries and archives, with the purpose of preservation. These digitised works are then, usually, made available to the public.²³³ The provision included under Article 5(2)(c) of the InfoSoc Directive can potentially exempt from right-holders' authorisation reproduction acts requiring 'format-shifting' (e.g. scanning of books), thus accelerating the digitisation of library and archive collections. Nonetheless, according to a recent decision of the CJEU, this exception would not allow the digitisation of an entire collection held by privileged institutions (cf. *Technische Universität Darmstadt*). At this stage, the scope of this exception is still shaped to a large extent by national transposition as well as by national courts' interpretations, especially when it comes to 'format shifting'. As a result, **institutions based in certain EU Member States may have a 'competitive' advantage in mass digitisation activities as well as in providing copyrighted contents for transnational projects such as Europeana.**²³⁴ On this issue, the Commission intervened in 2006 with a Recommendation and advised Member States to improve conditions for digitisation of, and online accessibility to, cultural material and to establish national strategies for the long-term preservation of (and access to) digital material, in compliance with copyright law.²³⁵ Specifically, the Commission recommended enacting provisions that enable multiple copying and migration of digital cultural material by public institutions for preservation purposes, in full respect of both EU and international copyright legislation. It is worth remarking that at any rate the exception formulated in Article 5(2)(c) does not cover the making available to the public of digitised, copyrighted works.

In this respect, Article 5(3)(n) provides **an additional exception enabling communication or making available of copyrighted works and other subject matter included in the collections of the aforementioned institutions**, via dedicated terminals on their premises, to the benefit of individual members of the public and for the purpose of research or private study. Interestingly, off-premises access to the collections of these establishments as well as public lending and 'e-lending' are not covered by this exception. In addition, the exception has not been shielded from contractual arrangements that may prohibit or limit on-site consultation.

In **France**, this provision is included to some extent in the one covering reproduction for preservation purposes; a specific on-site consultation exception applies to establishments in charge of the legal deposit of copyrighted works (e.g. the National Library) and only to 'authorised' researchers. In **Ireland** the exception concerns only copying and does not include making available on dedicated terminals; at any rate, right-holders are entitled to establish a licensing scheme and claim for compensation. In **Italy, Germany, Poland and the UK** the formulation is to a large extent similar to the text of the InfoSoc Directive. Nonetheless, in Germany two caveats apply: i) right-holders may claim reasonable compensation administered by collecting societies; ii) the number of copies made simultaneously available cannot exceed the copies owned by the privileged institutions.

²³³ See European Commission (2013), *Public Consultation on the Review of the EU Copyright Rules*, Consultation Document available at:

http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/consultation-document_en.pdf.

²³⁴ Europeana is an Internet portal acting as an interface to millions of books, paintings, films, museum objects and archival records that have been digitised throughout Europe.

²³⁵ See European Commission (2006), Commission Recommendation of 24 August 2006 on the Digitisation and Online Accessibility of Cultural Material and Digital Preservation, (2006/685/EC).

Interestingly, in Poland the exception covers also work subject to purchase or licensing terms for these uses (cf. Annex A).

At this stage, given the limited spatial (on the premises of the privileged institutions) and technical (via dedicated terminals) scope of application, this exception has no impact on the functioning of the Internal Market (De Wolf & Partners, 2013). Nonetheless, according to the CJEU this exception incorporates an ‘ancillary right of dissemination’ that would allow the digitisation of copyrighted works included in the collections of the privileged institutions in order to enable on-site consultation (cf. *Technische Universität Darmstadt*). As a result, **Article 5(3)(n) might become key to facilitating a mass digitisation project**. It is worth stressing that for those publications that are largely available in digital format, such as academic publications in peer reviewed journals, many libraries and educational establishments have entered into licensing agreements with right-holders (i.e. publishers) in order to provide remote consultation²³⁶ to part of their collections. These arrangements are less frequent for non-born-digital content such as books and journals printed in the pre-digital era.

2.3.4 Teaching or scientific research

Article 5(3)(a) of the InfoSoc Directive gives the option to Member States to implement **exceptions and limitations allowing uses of copyrighted works for the sole purpose of illustration for teaching or scientific research without commercial purposes**. Such uses require, whenever possible, the indication of the source and the author’s name. According to the text of the InfoSoc Directive, the requirement of illustration applies only to teaching rather than to scientific research. Recital 42 includes distance learning (e.g. e-learning) in the scope of application of this exception. In principle, the formulation of Article 5(3)(a) is quite open, thus leaving room for diverging implementation at Member State level.²³⁷

In **France**, this exception allows communication or reproduction of excerpts of copyrighted works and is subject to sectoral agreements as well as to additional conditions. For instance: i) works made for educational purposes, sheet music and works made for a digital edition of literary works are excluded; ii) the public can include only pupils, students, teachers or researchers; iii) right-holders are entitled to fair compensation; iv) the purpose of illustration is mandatory also for research. In **Poland**, disseminated works (in original or in translation) can be used by research and educational institutions for teaching and research activities; there is no mention of the illustration purpose nor of non-commercial purposes. The recent implementation in **the UK** is limited to non-commercial purposes, requires sufficient acknowledgements of the right-holders and covers: i) the uses of copyrighted works for the sole purpose of illustration for instruction (these uses are shielded from contractual restrictions and licensing agreements); ii) the recording and communication of a broadcast, provided that no licensing agreement is available; iii) the copying of extracts of works, provided that no licensing agreement is available. **Germany, Ireland and Italy** did not

²³⁶ Remote consultation usually includes ‘on campus’ access via the university network and, with increasing frequency, ‘online’ access via proxy servers or virtual private networks.

²³⁷ European Commission (2013), *Public Consultation on the Review of the EU Copyright Rules*, Consultation Document available at: http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/consultation-document_en.pdf.

implement this provision. In Germany, a similar exception existed before the enactment of the InfoSoc Directive; this exception, similarly to the case of France, is limited to small parts of works, requires a public composed of a limited number of students or scientists, and entitles right-holders to receive fair compensation; in line with the formulation of the InfoSoc Directive, the illustration purpose is not mandatory for scientific research. In Ireland, the exception is partially covered by exceptions and limitations for libraries, educational establishments, archives and museums and for research or private study. In Italy, the quotation exception deals also with illustration for teaching and for scientific research; the purpose of illustrations is mandatory also for scientific research and the making available on the Internet is permitted only for certain types of works (music works and pictures at low resolution or low quality) (see Annex A).

The exception under Article 5(3)(a) of the InfoSoc Directive may hinder the functioning of the Internal Market for what concerns distance learning that may include a cross-border dimension. In particular, by virtue of the principle of territoriality, in e-learning services the copyright law of both the State where the university/educational establishment is located and the State where the student is accessing the course apply.²³⁸ Whenever students follow classes or get access to copyrighted materials in a Member State other than the country where the university is based, copyright infringement may result from the diverging transposition of Article 5(3)(a) between Member States or by different interpretations given by national courts. In principle, a certain university or practitioner that intends to provide a multi-territorial e-learning service is required to seek legal advice in each concerned Member State in order to avoid being liable for copyright infringement. Another problem arises from the introduction in some countries of fair remuneration requirements; in particular, in cross-border cases the jury is still out when it comes to the determination of the party liable as well as the territory where the payment is due (De Wolf & Partners, 2013). Against this background, **the current fragmentation at the EU level may potentially discourage the provision of e-learning beyond national borders and the creation of an Internal Market for distance education.**²³⁹

Similarly, discrepancies in **the application of this exception to research activities might impinge on the dissemination of research results within the EU as well as on cross-border cooperation in research activities.** Paradoxically, copyright law might constitute a barrier to the functioning of the European Research Area (which is defined by the Commission as “a unified area open to the world, in which scientific knowledge, technology, and researchers

²³⁸ Distance learning activities can be categorised in four groups: i) supplementary e-learning, when supplementary materials are provided online to students enrolled in a ‘standard’ course; ii) e-learning courses provided by a certain university, where an entire course or a substantial part of it is taught online to students who can follow classes via the Internet; iii) massive open online courses (MOOC), which aim at unlimited participation and open access via the web; iv) e-learning courses provided in the context of transnational collaborations between universities, which are cross-border by their very nature. The cross-border dimension is increasingly important going from category i) to category iv) (De Wolf & Partners, 2013).

²³⁹ This issue is particularly significant when considering that the education market is estimated to be worth some \$4.2 trillion worldwide, i.e. treble the size of the media and entertainment market, and over the next ten years the e-learning market is expected to represent 30% of the total education market (Edxus Group, 2013).

circulate freely”.)²⁴⁰ as long as researchers based in different Member States can benefit from a different bundle of exceptions and limitations to copyright and related rights.

2.3.5 Reporting of current events

Article 5(3)(c) includes **two exceptions for the reporting of current events**. The first part of the provision allows reproduction by the press, communication, or making available of published articles, broadcast works or other subject-matter on current economic, political or religious topics. These uses are permitted only if they are not expressly reserved. The second part of the article allows uses of copyrighted works or other subject matter to report current events to the extent justified by informative purposes. At any rate, both exceptions require, if possible, the acknowledgment of the source as well as the author’s name.

In France, Ireland and the UK there is no specific implementation of this provision. In Ireland and the UK, reporting of current events is generally covered by quotations for purposes of criticism and review and is subject to a case-by-case analysis. In France, press reviews as well as partial or full reproduction for informational purposes of a work of graphical, plastic or architectural art are permitted. **In Germany, Italy and Poland, this exception has been implemented by echoing the twofold structure of Article 5(3)(c);** nonetheless, some divergences are apparent in terms of type of uses that are allowed, addressees of the exception, and fair remuneration. For instance, in Germany authors are entitled to a fair remuneration to be administered by collecting societies when the reproduction goes beyond a short part of the article; in Poland, fair remuneration is due only to authors of certain specific works; in Italy there is no reference to right-holders remuneration. In Germany the main beneficiaries of the reproduction act are newspapers while for the communication to the public the privileges are extended to everyone; in Italy the exception only applies with respect to uses in other magazines or newspapers or news broadcast programmes, and therefore is limited to media providers; in Poland press, radio and television are beneficiaries (see Annex A).

The exceptions provided under Article 5(3)(c) have relevant cross-border effects in connection to the online provision of news via web. Also in this circumstance, according to the principle of territoriality, the national copyright law of both the country where the reporting of current events is made and the country where the news is received do matter. Diverging national implementations as well as discrepant interpretations by national courts may generate legal uncertainty and increase the risk for media providers to infringe copyright in certain Member States. **This may discourage (or increase the cost of) both pan-European media services as well as the provision of news targeted to a national audience via the web to citizens based in different Member States.** Obstacles generated by copyright law are proportionally more burdensome for private individuals (e.g. bloggers) and small and medium enterprises that can invest a limited amount of resources to be acquainted with 28 different national copyright regimes. This aspect is particularly worrisome as in some Member States, such as Italy, only professional media providers are beneficiaries of this exception.

²⁴⁰ See the European Research Area web-page at: http://ec.europa.eu/research/era/index_en.htm.

2.3.6 Quotations

According to Article 5(3)(d) of the InfoSoc Directive, Member State may allow **quotations for purposes 'such as' criticism and review**. It is apparent that criticism and review are listed by way of example, thus leaving room to additional justifications for quotations. Four cumulative conditions apply: i) the quotation relates to a work or subject matter made lawfully available to the public; ii) the source and the author are indicated whenever possible; iii) the use complies with fair practice; and iv) the quotation is no longer than what is required by the specific purpose. Interestingly, the CJEU interpreted this exception as not precluding Member States to allow quotations also when they are not made in a subsequent copyrighted work, but for instance in a mere press report.²⁴¹

The national implementation of this exception is quite uniform and only minor differences exist. For instance, in France short quotations cannot involve works of visual art; in Germany quotations of musical works should be limited to a few passages; in Poland minor works can be quoted in full in independent works; in the UK any contract term which prevents or restricts exempted quotations is unenforceable (see Annex A).

For what concerns the proper functioning of the Internal Market, **this exception may affect the media market, scientific research as well as derivative works and UGC with fragmenting effects comparable to those stemming from exceptions for: the reporting of current events (see above); teaching or scientific research (see above); parody, caricature and pastiche (see below).** In practice, the impacts on the functioning of the Internal Market are expected to be limited, as no major divergences are experienced in national transpositions. Nonetheless, some problems might still arise from the interpretation of what actually qualifies as a quotation, especially in the audiovisual sector and for UGC.

2.3.7 Parody, caricature and pastiche

Article 5(3)(k) enables Member States to exempt **uses for the purpose of caricature, parody or pastiche**. Absent a uniform definition under EU law, a parody is defined by the CJEU as a work whose essential elements are the evocation of an existing work in a noticeably different manner as well as the expression of humour or mockery.²⁴²

In Ireland, Italy and Poland this exception has not been implemented; concerned uses are partially covered by the quotation exception. **In Germany**, parody and caricatures are possible as long as they do not constitute reproductions or adaptations of the original work. **In the UK** contract terms aiming at restricting works for the purposes of caricature, parody or pastiche are void (see Annex A). **In France** parody, caricature and pastiche are generally permitted.

Interestingly, in several Member States, such as Italy, this exception has not been implemented as **the relevant uses are considered covered by the freedom of expression**. This is not surprising both because exceptions listed under Articles 5(2) and 5(3) of the InfoSoc Directive are optional and because in several other cases explicit exceptions coexist with implicit exceptions conferred under constitutional principles, legal doctrine and/or case law. Nonetheless, **in the digital era where options to create derivative works have**

²⁴¹ See C-145/10 *Eva-Maria Painer v. Standard Verlags and Others* (2011).

²⁴² See Case C-201/13 *Johan Deckmyn v. Helena Vandersteen and Others*.

multiplied and are available at low cost also to private individuals, the absence of a well-defined exception has the effect of increasing legal uncertainty. This can potentially hinder creative activities based on transformative uses of copyrighted works. In particular, private individuals may incur disproportionate costs to understand which acts are lawful and which instead constitute copyright infringements when a proper license has not been granted by relevant right-holders (De Wolf & Partners, 2013).

2.3.8 Freedom of panorama

Member States are allowed, under Article 5(3)(h) of the InfoSoc Directive, to **introduce an exception, also known as ‘freedom of panorama’, for the use of works, such as works of architecture or sculpture, which are made to be located permanently in public places. The implementation of this provision largely varies among Member States.** In France and Italy, this exception has not been implemented. In Germany the reproduction of works permanently placed in public places is permitted as well as the distribution and/or making available to the public of the resulting copies. Also in Poland ‘freedom of panorama’ applies and, whenever possible, requires the acknowledgment of the full name of the author and of the source. In Ireland and the UK exceptions similar to the one provided in Article 5(3)(h) are in force; nonetheless, reproductions of graphic works and text are not exempted (see Annex A).

This exception is central in the modern digital age when both pictures and videos are posted on websites and platforms making these contents immediately available on a cross-border basis. **In light of national implementations, sharing pictures and videos of copyrighted works permanently placed in public spaces may be classified as a copyright infringement in many EU jurisdictions and lead to heavy penalties.**²⁴³

2.3.9 Private copying

Article 5(2)(b) of the InfoSoc Directive provides Member States with the option to enact **an exception for reproduction on any medium made by natural persons for private uses and for purposes that are neither directly or indirectly commercial.** Right-holders are entitled to receive **fair compensation** for such non-authorized private copying activities. Compensation schemes have to take into account TPMs to the extent that they may restrict or control private copies made by end-users (for further details on the legal aspects of this exception see Section II.1.5.2). It is worth stressing that the InfoSoc Directive does not provide for a right to private copying.²⁴⁴

²⁴³ The authors Labert *et al.* mention the case of Claes Oldenburg and Coosje van Bruggen, two sculptors who claimed a copyright infringement under the US law and obliged the Wikimedia Foundation to take down from Wikipedia the pictures of their sculptures, although these sculptures were permanently placed in public spaces in several countries (Labert *et al.*, 2015).

²⁴⁴ Both the Brussels Court of Appeal (Belgium) and the *Cour de Cassation* (France) stated that the private copying exception does not constitute an enforceable right for private users. See European Commission (2007), Report to the Council, the European Parliament, and the Economic and Social Committee on the *Application of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society*, Commission Staff Working Document, SEC(2007)1556.

All Member States implemented the private copying exception under Article 5(2)(b) of the InfoSoc Directive. The only deviation is represented by Ireland where a narrow exception applies only to copies of broadcasts for the purpose of time shifting (i.e. later viewing) that are made by natural persons or certain establishments and to copies of performances made by natural persons for private and domestic uses. **National transposition considerably varies among Member States** (see Annex A). **In France**, copies are allowed for strictly private purposes; this exception applies only to natural persons and does not cover file-sharing. **In Germany**, private copying comprises domestic and personal purposes as well as other 'own' uses beyond the private sphere such as scientific purposes, 'own' archive and information about current events. While in the private sphere copies can be made only by natural persons or by third parties on behalf of the privileged person, copies for 'own' uses can be made also by legal entities. The German exception allows both digital and analogue copies as long as they come from a lawful source and are not used for sharing files on the Internet. **In Italy**, the private copying exception covers only copies of phonograms and videograms²⁴⁵ made by natural persons for personal uses and without commercial purposes and can be restricted by contractual arrangements; these copies cannot be made by third parties and have to come from a legal source. **In Poland**, private uses (which include but are not limited to single copies) are permitted to a larger group of beneficiaries, including circles of persons having personal relationships (e.g. consanguinity), affinity or social relationships. The exception under Article 5(2)(b) has been recently introduced also **in the UK**²⁴⁶ where personal copies of copyrighted works are currently permitted, provided that the concerned work is lawfully owned by the privileged person and copies are made for private use and for ends that are neither directly nor indirectly commercial; interestingly, 'format shifting' is explicitly permitted and contract terms aiming at preventing or restricting private copying are unenforceable.

As regards the fair remuneration condition expressly introduced by the InfoSoc Directive, both the UK and Ireland do not have any compensation scheme in force and remuneration for certain private uses is left to collective licensing agreements between right-holders and end-users. Interestingly, **the UK is the only European country where the private copying exception is not accompanied by a right to fair remuneration, in stark contrast to the InfoSoc Directive**²⁴⁷. The other surveyed countries have introduced levy schemes for private copying which aim at compensating right-holders for the harm suffered when copyrighted works and other subject matter are copied without their authorisation (see Annex A). **Levies are generally applied to blank carriers, devices with storage capacity and recording equipment and are paid by manufacturers and importers**²⁴⁸ **and collected by one or more national collecting societies**. Exports are either exempted ex ante or subject to an ex post

²⁴⁵ Copies on paper or a similar medium are included in the reprographic exception even when made for personal use.

²⁴⁶ Up to the reform introduced in 2014, in the UK a narrow exception covered recording of broadcasts for purposes of time shifting.

²⁴⁷ Interestingly, a UK court stated the UK government erred in law when introduced a new private copying exception without a compensation scheme ensuring fair remuneration to right-holders. For further details see: Press Association (2015), "Music groups win court battle over private copying of CDs", The Guardian, Friday 19 June (www.theguardian.com/business/2015/jun/19/music-groups-win-court-battle-private-copying-cds).

²⁴⁸ Levies for reprographic copying are usually also paid by copy centres and libraries.

reimbursement scheme for paid levies. Generally levies do not apply to blank carriers and devices purchased for professional uses; accordingly, professionals may either benefit from an upfront exemption or apply for refunds. In Italy and Poland, methods of application and calculation are determined by a decree of the Minister of Culture; in France by a commission of stakeholders (including consumers' organisations); in Germany by national collecting societies after negotiating with associations of manufacturers and importers. As a result, there are considerable differences across the EU in terms of level of remuneration, products subject to levies, and overall revenues (see Table 4).

Table 4. Levies on selected blank carriers and devices and revenues in a sample of Member States (2012)

	France	Germany	Ireland	Italy	Poland (% of the sale price)	UK
CD-R (700MB)	€0.35	€0.06	€0	€0.15	1.72%	€0
DVD-RW (4.7Gb)	€0.90	€0.27	€0	€0.41	2.95%	€0
USB Key (16Gb)	€1.60	€1.56	€0	€1.44	0.47%	€0
External Hard Disk (500Gb)	€11	€7	€0	€5	1%	€0
Mobile (16Gb)	€8	€36	€0	€0.90	n.a.	€0
PC with CD/DVD writer	€0	€17	€0	€2.40	3.28%	€0
Revenues (2012)	€173,877,725	n.a.	€0	€71,738,387	€1,668,677	€0
Revenues per capita (2012)	€2.65	n.a.	€0	€1.18	€0.04	€0

Note: Due to national lawsuits, data on overall revenues for Germany are not available.

Source: Authors' own elaboration on WIPO 2013.

In all the surveyed countries, in principle revenues and restrictions stemming from TPM should be taken into account when determining levies; in France individual licensing schemes should also be considered (see Section 1.5.2.4). Collected revenues are distributed, via collecting societies, to different categories of right-holders (e.g. authors, performers, producers, publishers) based on proportions that considerably vary among Member States (see Annex A). In some countries, such as France, Italy and Poland, a share of the revenues are allocated by law or according to the statutes of relevant collecting societies to social and cultural purposes.

According to the report resulting from the mediation on private copying and reprographic levies drafted by Mr Antonio Vitorino,²⁴⁹ the existing discrepancies among national levy schemes are a source of frictions hindering the proper functioning of the Internal Market. In this respect, **three major problems can be identified: i) double payments in cross-border transaction of levied products; ii) undue payments of levies by professional users; iii) uncertainty in the determination of the amount of levies as well as of media and equipment concerned.** Mr Vitorino argued that, to some extent, solutions to these Internal

²⁴⁹ Vitorino, A. (2013), Recommendations Resulting from the Mediation on Private Copying and Reprographic Levies, available at: http://ec.europa.eu/internal_market/copyright/docs/levy_reform/130131_levies-vitorino-recommendations_en.pdf.

Market issues have been provided by the case law of the CJEU. In the *Padawan* case,²⁵⁰ the CJEU stated that all media, equipment and devices capable of making copies of copyrighted content can be subject to levies, provided that they are used by natural persons for private uses. In addition, the CJEU explained that fair compensation has to be computed on the basis of the actual 'harm' caused to right-holders by the introduction of the private copying exception. In the *Opus* case,²⁵¹ the CJEU concluded that the 'harm' to be compensated via a levy scheme always occurs in the Member State where the final private user resides; hence levies should be collected only in the State where the end-user is based.

On paper, the majority of Member States have introduced ex ante exemptions or reimbursement mechanisms to avoid or mitigate both double payments in cross-border transactions and undue payments for professional uses. Nonetheless, these mechanisms are deemed very burdensome (e.g. reimbursement generate substantial administrative burdens and may take months or years) and/or non-functioning at all.²⁵² As a result, levies can still constitute a financial obstacle to cross-border trade of products subject to levies as well as unduly increase business costs of certain professional users. Interestingly, according to the CJEU, reimbursement mechanisms applied by Member States are a lawful alternative to ex ante exemptions, both for exports and for private uses, on condition that they are effective and do not make it excessively difficult to get refunded.²⁵³

Also, processes setting the levies are deemed cumbersome and, especially when it comes to new products, are able to paralyse the functioning of the market for devices and media in some Member States.²⁵⁴ In several EU countries, stakeholders have initiated lawsuits that resulted in the adoption of provisional levies or in the introduction of levies with retroactive effects on certain categories of products. On the one hand, legal uncertainty increases commercial risks for manufacturers and importers that miss information on a significant component of the final price of the products they sell. On the other hand, long disputes to avoid or postpone payments also affect right-holders as the collection and in turn the distribution of levies can be substantially delayed.

2.3.10 Relationship between technological protection measures and copyright exceptions and limitations

Article 6(4) of the InfoSoc Directive intends to **safeguard some of the exceptions and limitations**²⁵⁵ **from restrictions imposed by TPM** (for the legal aspects of TPM see Section

²⁵⁰ See C-467/08, *Padawan SL v. SGAE* (2010).

²⁵¹ See C-462/09 *Stichting de Thuiskopie v. Opus Supplies Deutschland* (2011).

²⁵² See Vitorino A. (2013), Recommendations Resulting from the Mediation on Private Copying and Reprographic Levies, available at: http://ec.europa.eu/internal_market/copyright/docs/levy_reform/130131_levies-vitorino-recommendations_en.pdf.

²⁵³ See Case C-521/11, *Amazon v. Austro Mechana* (2013), and C-463/12 *Copydan Bandkopi*.

²⁵⁴ See Vitorino A. (2013), Recommendations Resulting from the Mediation on Private Copying and Reprographic Levies, available at: http://ec.europa.eu/internal_market/copyright/docs/levy_reform/130131_levies-vitorino-recommendations_en.pdf.

²⁵⁵ In a nutshell, Article 6(4) of the InfoSoc Directive aims at ensuring that right-holders make available to users the following exceptions and limitations: i) reprographic copying; ii) archiving made by publicly accessible libraries, educational establishments, museums or archives; iii) ephemeral recordings; iv) reproduction of broadcasts made by social institutions; v) quotations for teaching or

II.1.3). Specifically, this provision obliges Member States to: i) promote the adoption of 'voluntary measures' by right-holders; ii) monitor and evaluate whether such 'voluntary measures' are taken and how they work; iii) intervene with 'appropriate measures' when right-holders do not enable users that have legal access to the work to engage in acts allowed under the relevant exceptions and limitations. **Interestingly, when it comes to copyrighted digital content, the safeguard provision introduced by Article 6(4) does not apply to on-demand online services; therefore, in the online world technological measures can override to a large extent all the exceptions and limitations provided by national laws** (Mazziotti, 2008). In this respect, the CJEU has recently intervened by arguing that the legal protection granted under Article 6 of the InfoSoc Directive should not go beyond the purpose of restricting uses that require authorisation by right-holders.²⁵⁶

While in Poland this provision has not been implemented, in the other Member States included in this survey the implementation considerably varies at least along three dimensions: i) the list of exceptions safeguarded; ii) the possibility for right-holders to ask for a license fee; and iii) the mechanisms available to end-users to benefit from exceptions. For instance, as regards the last dimension, in Germany and Ireland it is necessary to have recourse to courts; in France, Italy and the UK the conflict between exceptions and TPM is ruled instead by administrative bodies (see Annex A). More generally, the national transposition of the InfoSoc Directive has not resulted in the creation of a uniform balance between TPM and exempted uses of copyrighted works.

As for the Internal Market aspects, the relationship between technological measures and exceptions and limitations may be relevant, especially on the supply side. For online uses, technological protections are not subject to safeguard measures; hence commercial users are able to tailor the scope of copyright for digital content made available to the public on the Internet. Conversely, for tangible copyrighted goods (e.g. DVDs, CDs), the same technological protection measure might be lawful in certain Member States and unlawful in others, thus potentially requiring national adaptations (in principle a music CD sold in Germany can prohibit private copying for domestic purposes; selling the same CD in Italy would potentially lead to a dispute resolution before an administrative body to safeguard the private copying exception). The issue is particularly thorny as the lawfulness of certain technological measures is quite difficult to assess *ex ante* and this increases uncertainty both for distributors of copyrighted products and for end-users. Paradoxically, **in the online market where the principle of exhaustion does not apply, copyright territoriality is a potential source of Internal Market fragmentation; in the market for tangible copies, where instead the principle of exhaustion is an effective measure to create a pan-European market, the adaptation of TPM to the extent required by each Member State may still hamper the free movement of tangible copyrighted goods within the Internal Market.**

scientific research purposes; vi) uses for the benefit of people with a disability; and vii) uses for the purposes of public security. Member States may also optionally safeguard the 'private copying' exception.

²⁵⁶ See Case C-355-12 *Nintendo v. PC Box*.

3. Industry aspects of copyright enforcement in the digital environment

As already recalled in Part I of this Study, the original rationale behind the Information Society (InfoSoc) Directive was to ensure low-cost enforcement of copyright in the digital environment mainly by means of TPM embodied in DRM systems. The scenario envisaged was that most copyrighted material would circulate by means of TPM-protected files and the bulk of enforcement would be automatically ensured.

To this aim, very strong provisions were introduced in the Directive mandating Member States to protect these systems against any act of circumvention or facilitating circumvention, including for uses deemed otherwise legitimate (see Section II.1.3). A very broad horizontal norm – Article 8(3) – has then been included to fill the residual gaps and ensure that right-holders could in any remaining unforeseen circumstance act against intermediaries, whose services are used by a third party to infringe a copyright or related right, by means of the ordinary (and more costly) judicial injunctions.

However, **contrary to expectations and because of technological developments over the Internet, copyright enforcement by means of TPMs has remained residual and strongly sector-based (e.g. video games, e-books, etc.) both in terms of market share and recourse to anti-circumvention provisions in courts (Derclaye, 2009).**²⁵⁷ In fact, it appears that most digital copyright infringement takes place over the Internet in already decrypted files by means of file-sharing and other open modalities of access, rather than by willing acts of TPM circumvention. When TPMs have been successful in allowing effective enforcement of copyrights, they have usually been based on closed proprietary standards operating in physically separate devices which has raised parallel issues of interoperability and concerns about the potential market distortive effects of related lock-in strategies (so called ‘walled gardens’).

Actually, due to the possibility allowed by the InfoSoc Directive to circumvent by means of TPM-based standardised contractual arrangements the traditional copyright exceptions granted at the national level, **online content providers have indeed developed the practice of licensing the use of copyrighted material in the context of TPM-protected systems in much more restrictive terms than what copyright law would normally permit.** At that time a study carried out for the Commission correlated the impact of these restrictions on users accustomed to the traditional copyright models with the spectacular rise of the open source and open content movements, and proposed that one could have contributed as a partial cause for the other (IVIR, 2007).

While the initial intention of the InfoSoc Directive legislator has seemingly been to encourage economic players to move towards a more finely tuned and individualised form of rights management in the online environment, it is doubtful whether the purely contractual-based approach actually put in place by the Directive has been evenly responsive to the interests of all parties involved.²⁵⁸

²⁵⁷ There are therefore few industries where recourse to TPM remains notable and has also given rise to substantial litigation in court on the scope of related provisions, see for instance the Case C-355/12 *Nintendo v. PC Box*.

²⁵⁸ A Dutch web firm that sells second-hand e-books has recently complained to the country's competition authorities that it is being boycotted by three of the largest Dutch publishers that have blocked it from selling their new e-books through its website, allegedly to block further sales of

In fact, after only a few years following its adoption, the Commission itself already conceded that:²⁵⁹

At the same time, in their present status of implementation, DRMs do not present a policy solution for ensuring the appropriate balance between the interests involved, be they the interests of the authors and other right-holders or those of legitimate users, consumers and other third parties involved (libraries, service providers, content creators...) as DRM systems are not in themselves an alternative to copyright policy in setting the parameters either in respect of copyright protection or the exceptions and limitations that are traditionally applied by the legislature.

As a result of that and somehow unexpectedly, **the bulk of whatever copyright enforcement activities in the digital environment is carried out by means of the InfoSoc Directive has therefore taken place through Article 8(3), that in theory would give right-holders a very broad and unbounded right to apply for judicial injunction not only against other commercially motivated third parties, but also against infringing final consumers, an area that should have been originally covered under the TPM provisions.**

Since Article 8(3) was not conceived to be a mainstream remedy to redress mass-scale infringements, **a number of policy issues have been raised over time concerning:**

1. the resulting **coordination** and **coherence** of the InfoSoc Directive with the provisions of other EU Directives and the contents of the EU Charter of Fundamental Rights;
2. its actual concrete **effectiveness** and **efficiency** in curbing infringing behaviour when unexpectedly used as a deterrent, and also as a result of that;
3. the overall **expediency** of the current enforcement framework to deal with copyright infringement over the Internet as a mass phenomenon.

In particular, **the structure of the current copyright enforcement framework in the digital environment has resulted in a set of potentially conflicting, very broad provisions whose concrete scope of action has had to be slowly clarified by means of case law by the CJEU over time.**²⁶⁰ This lack of clarity has represented a strong incentive for industry to revert to self-regulation and codes of conduct (Hugenholz, 2012).

Coherence and coordination issues have arisen, for instance, on the need to limit the costs right owners could impose on intermediaries through the very broad language of Article 8(3) by means of the general mitigating reasonableness and proportionality principles stated in

second-hand licenses. According to standard terms and conditions for digital media, when people 'buy' e-books, they only really purchase a license to use that product, and do not have a right to resell it. But when the retailer opened its virtual doors in mid-2014, it justified its business model with a 2012 ruling by the CJEU in the case of *Oracle v. UsedSoft*, in which the court ruled that a software license could in fact be resold. Other national courts, however, have ruled differently (see Section II.Part II.2.1.3). A German court decided in 2013 that the Oracle case could only be cited in software-related cases.

²⁵⁹ European Commission, Communication from the Commission, *The Management of Copyright and Related Rights in the Internal Market*, COM(2004)261 final, Brussels, 16.04.2004, p. 10.

²⁶⁰ See in particular C- 275/06, *Promusicae v. Telefonica*; C-70/10, *Scarlet Extended v. SABAM*; C-360/10, *SABAM v. Netlog*, and more recently C-314/12 *UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH* (2014).

Article 3 of IPRED. Most important, issues have been raised on how the right to information stated in IPRED Article 8 could actually be enforced in the digital world.

Finally, major coordination issues have arisen with the conflicting principles stated in the Electronic Commerce Directive, in particular Article 15, banning general obligations on online intermediaries to monitor the content they store or transmit, and Article 12, defining the conditions of 'mere conduit' under which an ISP cannot be considered liable for the information transmitted.

Moreover, the ECJ has made it clear several times that the enforcement of the very broad rights of injunction envisaged under Article 8 of the InfoSoc Directive should consider the basic principles of the Charter of Fundamental Rights, although these often appear to be restatements of norms already stated elsewhere.

3.1 Suitability of IPRED for use in the digital environment

Recourse to judicial enforcement of copyrights by means of the civil injunctions envisaged under IPRED (Article 11) and the InfoSoc Directive (Article 8(3)) nowadays plays a relatively marginal role in the enforcement of digital copyrights in many large EU Member States, with the possible notable exception of Germany and therefore leaves largely unaffected a sizeable share of the EU consumer market. This is because of a combination of efficiency and effectiveness factors.

As far as their efficiency is concerned, civil injunctions have been generally replaced by extra-judiciary means such as recourse to procedures codified in voluntary codes of conduct (e.g. BREIN in the Netherlands) or *ad hoc* administrative-based mechanisms (e.g. HADOPI in France, the OFCOM-managed Digital Enforcement Act (DEA) in the UK, AGCOM in Italy, *Ley Sinde* and *Ley Lassalle* in Spain) that are much speedier and less burdensome to implement than the ordinary judicial mechanism of Courts.

Then, civil actions aimed at large-scale commercially-motivated infringers have been hindered either by their being not sufficiently dissuasive (*ad hoc* sanctions to infringing websites in Spain can reach as high as €300,000 or even double that amount for advertisers), or by the difficulties faced in their implementation when it comes to the identification of infringers (in the Netherlands, for only one in five of the sites that are suspected of infringement can the actual infringer be traced²⁶¹) and have been replaced by criminal proceedings where support can be received from police forces in the identification of transgressors.

Finally, the possibility of acting by means of civil injunctions – at least at the consumer level – has been hindered in a number of Member States by difficulties in the identification of infringers and the lack of compatibility between the right to information envisaged in IPRED with national privacy laws, which made recourse to other mechanisms almost inevitable.

As also reported in the public hearing on the challenges posed to Directive 2004/48 (IPRED) in the digital environment, this has created a situation where most copyrights online are either privately or administratively enforced by means of mechanisms not necessarily

²⁶¹ The BREIN Foundation is the joint anti-piracy programme of authors, artists, publishers, producers and distributors of music, film, games, interactive software and books; available at: <http://anti-piracy.nl/english.php>.

envisaged in the Directive or are being dealt with as criminal cases with fines and other types of sanctions to dissuade infringers and restore right owners.²⁶²

Member States have then chosen a different mix of the possible policy approaches and have varied in the emphasis given to action aimed at the final users vs. that targeted against commercially motivated infringers, as well as to recourse to alternative administrative, criminal or code of conduct-based tools. In all cases, however, the instruments have been tailored as much as possible to their intended use.

Conversely, the implementation of the IPRED provisions online has suffered from the lack of a clear distinction between infringements related to operations carried out on a commercial scale and for commercial purposes, and infringements at the individual subscriber level. The Commission has finally started tackling this key definition as recently as autumn 2014 by setting up a workshop on the subject.²⁶³

In fact, concepts of ‘commercial scale’ and ‘commercial purpose’ are extensively used in the IPRED Directive to qualify enforcement provisions, but no justification for the use of the concept or formal definition has been provided in the text of the Directive. This has led to substantial differences in interpretation between jurisdictions. However, while in Commission staff working papers at that time it was clearly stated that the Directive was not aimed at consumers, the prevailing interpretation of commercial purposes in Recital 14 of IPRED seems to go so far as to cover almost any infringement by referring to a “*direct or indirect economic or commercial advantage*” and carve out only consumers acting in good faith. It is therefore of little use in fine-tuning provisions aimed at different target groups.

The lack of a clear distinction in the legal framework between these two possible types of infringement has also contributed to conflicting opinions on the appropriateness of the damage and legal cost mechanisms envisaged by IPRED Articles 13 and 14 in the Digital Environment.

On one hand, there are concerns that when addressed to the final users the current mechanism of legal costs reimbursement under Article 14 would lead itself to be abused in forms of vexatious litigation (so called ‘copyright trolling’) (Hargreaves & Hugenholtz, 2013). On the other hand, the lack of provisions on statutory damages or the difficulties courts often have in recognising *unjust enrichment* would make the damage mechanisms under Article 13 insufficiently dissuasive towards large-scale commercial operations, and conversely too little of an incentive for right owners to take action.

In particular, although the European Parliament and the Council rejected at that time the Commission’s original proposal and refrained from implementing any kind of punitive statutory damages as envisaged in the **US law, the principle has remained that judicial authorities should order an infringer to pay the right owner damages in reparation of the total loss incurred (including the total court costs, lawyers’ fees and any other expenses incurred by the successful party) to the extent that these costs are reasonable and proportional.** For some countries, this means that a higher recovery of legal costs is possible

²⁶² See European Commission, MARKT/ZH D(2011), Public Hearing on Directive 2004/48/EC and the challenges posed by the digital environment, Brussels, 07.06.2011 (http://ec.europa.eu/internal_market/iprenforcement/docs/conference20110607/hearing-report_en.pdf).

²⁶³ Workshop on the concepts of ‘commercial scale’ and ‘commercial purpose’ in the context of infringements of intellectual property.

while litigating with consumers in online copyright infringement cases than in other civil cases. The size of this potential liability can then be used as an improper incentive to induce alleged infringers to refrain from their right to a fair trial and force them to settle cases out of court.

While most instances of vexatious litigation have thus far concerned the US, where statutory damages are enforced and a market for 'trolls' has actually been created, Germany, where the mechanisms of civil injunctions has been particularly efficient and therefore widely used, has also felt the need to approve legislation limiting the amount of damages paid at the consumer level to some €1,000²⁶⁴ (i.e. €155.30 in damages plus forfeit legal expenses) instead of the €10,000 and more that could be allowed by the courts when legal expenses are fully considered. It did that by amending the copyright act and introducing a clear distinction in the liquidation of damages between commercially-motivated and other infringements. On the other hand, when faced with operations on a commercial scale, right owners often have difficulties in proving the exact scope of infringement and courts in some Member States do not easily award the profit generated by the infringer (unjust enrichment). So the relatively low damages awarded in cases involving a significant profit for the infringers (again some €10,000-15,000 or so in some Member States) and a lack of clarity about unjust enrichment also act as a disincentive for right owners to act and receive effective remedy.

The CJEU itself has left the Member States and national courts substantial room for manoeuvre in defining the boundaries within which IPRED enforcement principles can be implemented in the digital environment. This is, first and foremost, the case of the so-called preliminary 'right to information' about the identity of alleged infringers. Article 8(1) of the IPRED Directive foresees the possibility of securing from intermediaries "disclosure of information on the origins and distribution networks of infringing goods or services in response to a duly justified and proportionate request".

In other words, copyright owners would have a right to receive information from ISPs on the identities of alleged infringers. This measure represents a preliminary necessary step for right-holders in order to allow them to take further action, and therefore represents a key cornerstone in enforcing copyrights online by means of civil injunctions against final users. In the Commission's original intentions, this right was always deemed compatible with both the Directive on the Protection of Personal Data and the provisions of the e-Commerce Directive and should have given rise to a harmonised implementation EU-wide (Mazziotti, 2013).

However, the CJEU, in its watershed *Promusicae* interpretation of the Directive,²⁶⁵ has given Member States and national courts significant room for manoeuvre in substantiating this right, which has resulted in major differences in implementation across the EU. In fact, the Court found that the competent judicial authorities are not obliged by the Directive itself to release injunctions along these lines, but retain a margin of discretion and *may or may not* order that the information be provided.

²⁶⁴ See Act against dubious business practices – what changes in copyright law? (www.mucportal.de/2013/07/01/gesetz-gegen-unseriose-geschäftspraktiken-was-andert-sich-im-urheberrecht/).

²⁶⁵ See Case C-275/06 *Productores de Música de España (Promusicae) v. Telefónica de España SAU*, judgment of 29 January 2008 Protection of intellectual property rights – data (http://ec.europa.eu/dgs/legal_service/arrets/06c275_en.pdf).

According to the Court, this is also tantamount to the lack of any legal obligation requiring the Member States to lay down in their national legislation transposing the Directive provisions to communicate personal data in the context of civil proceedings. So, when obligations are there, they are considered lawful, and when they are not there, the refusal to do so is also considered lawful. Needless to say, this has created a very fragmented patchwork between countries where in practice the right to information is very easy to obtain because it is automatically foreseen in the law, and others where this is very difficult and complicated to enforce.

Finally, it has been also noted (Mazziotti, 2013) that a notable limitation of IPRED in the digital environment would concern the limited possibility of blocking payments addressed to copyright infringers on a commercial scale. While IPRED explicitly mentions the possibility of issuing judicial orders aimed at blocking bank accounts and other assets of the alleged infringers as a possible enforcement measure, there is no reference whatsoever in the Directive to provisions that would allow the possibility of blocking online payments addressed to accounts of alleged infringers. This, in fact, cannot be construed under Article 11 of IPRED, because in this case infringers use the payment services to receive the financial gains coming from an illegal activity and not to commit the infringement itself.

3.2 Coherence issues between IPRED and the InfoSoc Directive

Coherence and coordination issues between IPRED and the InfoSoc Directive have materialised in a widely fragmented enforcement framework across Europe as concerns the scope of the obligations and related costs that can be imposed on intermediaries under Article 11 of IPRED and Article 8(3) of the InfoSoc Directive. The resulting variety of practices and behaviours has been slowly harmonised by the CJEU by means of case law, but substantial differences remain in the way enforcement of online copyrights is actually managed across the Member States.²⁶⁶

On the negative side, this fragmentation has also meant that many national courts have been reluctant to implement injunctions released by other courts in the EU, especially when these were based on a different understanding of the scope of injunctive relief or on mechanisms deemed unknown or unreasonable in the local prevailing practice.

The starting point is that Article 8(3) of the InfoSoc Directive, stating the very general principle that Member States shall ensure that right-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 rights, and based on the assumption that ISP are always in a position to ensure this at the lowest possible cost, has been deemed not sufficiently typified by national courts and the CJEU alike. Therefore, Article 8(3) has been made subject to various limitations in the light of concurrent proportionality and reasonableness principles envisaged under Article 3 of IPRED.

These generic principles have been variously understood in the past, but the underlying rationale is that contrary to the InfoSoc line of reasoning there are limits to the costs that

²⁶⁶ This does not apply to copyright only, but is a more general problem with the implementation of IPRED injunctions in the different legal systems. See European Observatory on Counterfeiting and Piracy, *Injunctions in Intellectual Property Rights*, available at http://ec.europa.eu/internal_market/iprenforcement/docs/injunctions_en.pdf.

intermediaries must bear to ensure copyright enforcement on behalf of right owners, i.e. to the social cost that enforcement implies.

The CJEU position over time has systematically considered disproportionate and excessively costly any injunction requiring an intermediary to actively monitor and filter all the data of each of its identified customers in order to prevent any future infringement. But apart from that reasonableness and proportionality criteria have been left undetermined and therefore a considerable element of risk in running a business.

So, for instance, the Court has recently allowed a very stringent interpretation of the obligation to terminate access to a website deemed 'structurally infringing', by means of whatever measure could be requested to this aim, and left technical reasonableness considerations to the discretion of the national judge.²⁶⁷ Moreover, courts in different Member States have also given different interpretations of the ISPs' obligation to collaborate with right owners in carrying out investigations on the identity of infringers and bear related costs.

As mentioned above, **this lack of legal certainty and the need to decrease business risks has been one of the driving forces towards the establishment of private codes of conduct as forms of industry self-regulation to avoid unnecessary and disruptive litigation along the value chain.** This recourse to self-regulation has had several pros including flexibility and the possibility of quickly adapting to technological developments, but has also further contributed to creating a quite fragmented picture at the EU level, where not only copyrights but also the way they are concretely privately enforced based on the national practices differs.

Also on the negative side, it is sometimes unclear to what extent codes of conduct and other forms of agreement are binding on non-signatories and can be used to discriminate enforcement behaviour between agents. Needless to say, codes of conduct are not necessarily representative of the interests of all stakeholders but only of the signatory parties (Hugenholtz, 2012).

3.3 Interaction between copyright enforcement and the e-Commerce Directive

Cost considerations have also driven the difficult interaction between online copyright enforcement and the e-Commerce Directive. The TPM-based model could no longer realistically serve as a tool to ensure low-cost machine-based enforcement of copyright and doubts have been increasingly cast in a number of Member States on the effectiveness and feasibility of purely Article 8-based deterrent strategies. **Hence, there has been growing support from content owners to replace both methods with filter-based mechanisms implemented at the ISP level that – being also machine-based²⁶⁸ – would allegedly allow a similarly low cost enforcement environment** (see also Section II.1.6.1).

²⁶⁷ See C-314/12 *UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH* (2014).

²⁶⁸ On the request to have copyrights enforced through a machine-based mechanism see also: http://ec.europa.eu/internal_market/iprenforcement/docs/conference20110607/hearing-report_en.pdf.

However, the various attempts that have been made at imposing filtering at the ISP level by means of the InfoSoc provisions have met an insurmountable resistance in the conflicting principles of the e-Commerce Directive, which have been judged worthy of a greater protection. So far the CJEU has firmly based all its rulings on the cornerstone of the prevailing right, embodied in Article 15, that national courts or legislators cannot impose general obligations on online intermediaries to monitor the content they store or transmit.

Copyright injunctions should rather limit themselves to well-defined specific instances of ‘notice and take down’, or – in well substantiated cases – to termination of structurally infringing sites. Injunctions aimed at terminating access to ‘structurally infringing’ websites remains therefore the strongest remedy possible under the current legal framework. However, this is subject to substantial burden of proof limitations and very different risks of paying related damages if the claim is deemed not sufficiently substantiated in the different legal systems, which leaves websites in very different competitive positions as concerns their potential business risks and liabilities.²⁶⁹ Most important, services can easily be moved to other countries and the ban circumvented through other means (e.g. VPNs).²⁷⁰

One option entails reconsidering the level of protection offered to online intermediaries, which exempt them from an active duty to monitor, and checking whether the conditions for such exemption of responsibility under Article 12 of the e-Commerce Directive apply.

To invoke the exemption, the service provider should not play any role in initiating communication, or cannot select the receiver of the information, or cannot select or modify the information provided (a principle that the CJEU has recently interpreted in very broad potential terms, for instance, in the case of e-Commerce on *e-Bay v. L’Oreal*).

So while article 15 exemption generally fully applies to ISPs operating as telecom companies, most social networks and other internet services cannot be deemed as necessarily protected under article 12 and could then be liable to full responsibility for the contents they transmit, including for copyright infringement. The burden of the proof that the mere conduit conditions spelled in article 12 are not met lie on the right-holders. At the same time, right-holders may also be subject to counter-requests for damages if access to a website is terminated – possibly on a provisional ground – and eventually the mere conduit protection is found to apply in successive steps of the claim. The burden of proof and the risk of counter-damages have also represented strong driving factors towards establishing codes of conduct and for resorting to criminal proceedings, where is the public authority itself ‘shutting down’ a website.

²⁶⁹ Martin Husovec Injunctions against Innocent Third Parties: The Case of Website Blocking, 2013 (www.jipitec.eu/issues/jipitec-4-2-2013/3745/husovec.pdf).

²⁷⁰ Stakeholders have also raised concerns that notice-and-takedown regimes merely displace hosting activity to other countries and civil injunction remedies would have some chance to apply cross-border only if the infringing sites are hosted within another Member State. However, to cope with the erratic behaviour of courts, in this case criminal proceedings seem to be the preferred option (see, for instance, the well-known Pirate Bay case).

3.4 Interaction between copyright enforcement and the Charter of Fundamental Rights

The CJEU has stated several times that the very broad right owners' right of injunction envisaged in the InfoSoc Directive should be interpreted and implemented by legislators and national courts in a way that strikes a fair balance with the various other fundamental rights protected under the Charter of Fundamental Rights. This argument has therefore been used to further strengthen the provisions on the need to ensure compliance with the general principles of proportionality already envisaged under Article 3 of the IPRED Directive (for further details on the interaction between copyright law and fundamental rights see Section II.1.6.3).

In particular, the Court has found that the fundamental rights to protection of property and to an effective redress underlying Article 8 of the InfoSoc Directive should be balanced on the one hand with the parallel fundamental right to respect for private life as foreseen in Articles 7 and 8 of the Charter,²⁷¹ and on the other hand with the freedom to run a business²⁷² as envisaged under Article 16 of the Charter.

According to some commentators, reference to the Charter of Fundamental Rights would represent an insurmountable boundary not only to any future reform of these provisions at the EU level but also to private regulation of enforcement, and would inform the contents of codes of conduct. However, this remains unclear and in practice some private codes of conduct do include provisions (such as filtering) that the Court has deemed in breach of the Charter (Hugenholtz, 2013).

In practice, reference to balanced protection of these concurrent fundamental rights has had little practical impact on industry and been used to further strengthen the rationale behind limiting the scope of Article 8 InfoSoc injunctions; and namely:

- the **right to have a private life and to protect personal data** has been used to reinforce the interpretation given to Article 8 of the IPRED Directive concerning the right to get information about infringers. This in practice has been left to the interpretation of national authorities;
- the **freedom to run a business** had been used to protect intermediaries from injunctions that are too complicated and costly to implement as already envisaged under Article 3 of the IPRED, which boils down to a stronger ban on any future attempt at circumventing the principles of Article 15 of the e-Commerce Directive.

²⁷¹ In the landmark *Promusicae* case the CJEU added consideration of two further fundamental rights, namely the right that guarantees protection of personal data and hence the right that guarantees protection of private life as laid down in Article 7 of the Charter and Article 8 of the European Convention on Human Rights.

²⁷² In the judgment on *Scarlet Extended v. SABAM* the CJEU 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.

3.5 The complementary enforcement provisions of the EU Action Plan on Counterfeiting and Piracy

The recently released Commission Action Plan on the enforcement of intellectual property rights contains no specific provisions on the enforcement of copyright in the digital environment. It refrains from supporting enforcement strategies at the final consumer level based on civil injunctions and generally endorses the '*follow the money approach*' targeting intellectual property rights infringement on a 'commercial scale' by means of self-regulatory instruments aimed at advertisers and payment providers.²⁷³ It represents, therefore, one more example of the Commission's general positive attitude towards self-regulation by means of Codes of Conduct in the digital environment.

The approach has already materialised in a Memorandum of Understanding²⁷⁴ on counterfeited goods online and aims at depriving intellectual property infringers of their revenue streams by fostering contractual cooperation agreements between right owners and payment services and by promoting the development of related codes of conduct. This is in line with Article 17 of the IPRED provision that Member States should encourage the development of codes of conduct by trade associations or organisations, aimed at contributing to the enforcement of intellectual property rights.

The protection of creative content online is expected to follow the same approach, although here the business model of copyright infringers is usually based on advertisement and malware dissemination.

A study commissioned by the Digital Citizen Alliance²⁷⁵ shows that 60% of copyright infringing websites finance themselves by disseminating various forms of malware, but as high as 30% provide links to primary brands and another 40% to so-called 'secondary' ones (legitimate gaming, online gambling and content aggregation sites).

The advertising industry has long, independently, taken steps to address the concerns around advertising misplacement by means of self-regulation, in particular, through the Digital Trading Standards Group (DTSG) and compliance with the related provisions. In December 2013 the DTSG, representing brands, media agencies, intermediaries and ad companies, published its latest voluntary code of Good Practice Principles to be independently verified by a third party.

The code, although a strong reputational deterrent for advertisers themselves, has, however, remained a purely voluntary initiative with limited links and interaction with content owners and other public enforcement bodies.

²⁷³ For a review of the rationale and concrete experiences so far, see Manara (2012).

²⁷⁴ The Commission intends to establish new Stakeholder Dialogues in 2014 and 2015, involving advertising service providers, payment services and shippers, with the objective of achieving in 2015 further Memoranda of Understanding that would help keep intellectual property-infringing products off the Internet.

²⁷⁵ See Digital Citizen Alliance '*Good Money Gone Bad*' (<http://media.digitalcitizensactionalliance.org/314A5A5A9ABBBBC5E3BD824CF47C46EF4B9D3A76/4af7db7f-03e7-49cb-aeb8-ad0671a4e1c7.pdf>).

3.5.1 The 'follow the money' approach

The so-called '*follow the money*' approach is an approach aimed at complementing the purely voluntary standards above with Memoranda of Understanding or administrative provisions aimed at also involving other stakeholders, and namely the right owners, into the identification of infringers for advertisement banning purposes, thereby moving from a tool to correct misplacements to a more active instrument of copyright enforcement. A key problem here is the lack of any conclusive definition or guidance that explains what an 'infringing website' actually is, its operating modalities or the features through which it can be identified. The lack of a credible and authoritative definition on which the industry can rely upon has therefore represented an obstacle in making informed decisions and cooperative agreements intended to bridge this gap.

This is an alternative approach to the possibility of adding a new legislative provision to the InfoSoc Directive or IPRED extending the 'notice-and-takedown' mechanism from ISP to other online operators (e.g. payment system operators, advertisers, etc.). In its Communication accompanying the action plan, the Commission does not rule out the possibility of moving to a legislative proposal, once the results of self-enforcement are better known and if they should prove insufficiently effective. **The *follow the money* approach is still at an embryonic stage in Europe and various models are being attempted in Member States.** Member States' experience with actions aimed at commercial exploitation by targeting advertisers is therefore limited and so far hardly based on spontaneous cooperation with content owners only.

For instance **the UK** has launched the experimental programme 'Operation Creative', with apparently positive results in the period when it was monitored (-12% illegal traffic),²⁷⁶ but the Infringing Website List compiled by right owners and industry sources was overseen in cooperation with the City Police of London. Moreover, Operation Creative had to rely on an external provider for the assessment of the degree of online intellectual property infringement risk. **Italy** has also begun to engage in its own '*follow the money*' initiatives where the advertising industry and the content industry have recently entered into a Memorandum of Understanding. The agreement lays the foundation for a self-regulatory mechanism that aims to block advertising on pirate sites in a similar way to Operation Creative in the UK, but without police oversight. Right-holders are to report to a joint committee, which will then communicate with agents and advertisers. Similar initiatives are also underway in **Germany and Finland**. **Spain**, conversely, has opted for including action aimed at advertisers in *ad hoc* legal provisions administered under the *Ley Lassalle*.

The expert group on the enforcement of intellectual property rights set up to strengthen cooperation between Member States and facilitate the exchange of regulatory experience and good practices between Member States still has little to draw lessons from when it comes to assessing the impact and effectiveness of the various *follow the money* approaches and creating a EU-wide consensus on their feasibility or, conversely, moving from a self-regulatory approach to hard legislation, as already happened elsewhere in similar instances (for instance, the US first tried payment services self-regulation of revenue flows to illegal poker services online, before taking legislative action).

²⁷⁶ See 'Follow The Money: Financial Options To Assist In The Battle Against Online IP Piracy', Discussion Paper by Mike Weatherley, MP, Intellectual Property Adviser to the Prime Minister, 2014.

There are two main concerns that have been voiced on this kind of initiative. First, **targeted websites would be offered few remedies for improper or erroneous action or not be given a right to a fair trial. Second, concerted action from advertisers or payment services can be construed as discriminating behaviour in antitrust proceedings against them.** This is the reason why similar initiatives being attempted elsewhere in the world have also sought preliminary approval from regulators (e.g. Australia). On the positive side the approach – if successful – could make copyright enforcement in the digital environment even smoother and much more flexible in adapting to technological developments.

Box 4. Complementary enforcement provisions of the Strategy for Enforcing Intellectual Property rights in Third Countries

The EU Strategy for Enforcing Intellectual Property Rights in Third Countries recognises that forcing ISPs to act against infringing sites in third countries lacking appropriate legislation and/or willingness to take action is especially problematic. Actually, migration of websites to such countries often represents a last resort defence against enforcement action at the EU level and requests to shut down 'structurally infringing' sites.²⁷⁷ Since the Anti-Counterfeiting Trade Agreement has not been ratified, the measures envisaged in the strategy (negotiation of intellectual property rights in bilateral trade agreements and recourse to dispute settlement mechanisms at the international level) are generic in scope and not necessarily focused on civil enforcement of copyright in the digital environment, but eventually more on criminal enforcement aspects.

The Agreement on Trade-Related Aspects of Intellectual Property Rights plus clauses generally included in the Free Trade Agreement negotiated since 2006 or in the Eastern Partnership Treaties with Georgia and Moldova have mainly focused on other intellectual property rights enforcement aspects, because it is relatively easy for infringers to move from one host country to another. Past evaluations of the strategy have also highlighted how lack of harmonisation within the EU itself affected the credibility of the messages addressed to third countries and how the lack of reliable and comprehensive data on sources of infringements online made it difficult to prioritise redressing policies through diplomatic action as the US extensively does.²⁷⁸

However, in a notable alignment between its external strategy and the internal action plan, the Commission has endorsed in its latest version of the strategy – in addition to traditional public policy measures in its relations with third countries – support for voluntary industry-led soft law initiatives such as codes of practice for Internet operators and enhanced collaboration with right

²⁷⁷ Again for a review of the most egregious cases of website migrations to avoid prosecution, reference can be made to the US Out-of-cycle Review of Notorious Market.

²⁷⁸ Ade (2010), *Evaluation of the Intellectual Property Rights Enforcement Strategy in Third Countries*, Final Report, Volume I, November, at: http://trade.ec.europa.eu/doclib/docs/2010/november/tradoc_147053.pdf.

owners through Memoranda of Understanding. It has to be noted that in a couple of notable cases courts in third countries have ruled against action taken by payment service providers.²⁷⁹

3.6 Effect of the current provisions on the level of infringements

Since in many Member States the EU legal framework on copyright enforcement has been transposed with substantial delay and related implementation reports were far from detailed, there are little public updated data to draw detailed conclusions on their level of implementation and impact.²⁸⁰

However, already back in 2010, based on the findings reported in the Staff Working Paper accompanying the Commission Report on the Application of the IPRED, **the Commission had concluded that the legislative and non-legislative instruments in place could not be considered powerful enough to combat online infringements of intellectual property rights effectively.**²⁸¹

This overall assessment has also been confirmed by the Commission's latest preferred policy approach, which consists in focusing policy initiatives on criminal instruments and promoting Codes of Conduct and the 'follow the money' approach as the first line of defence to deal with the problem and leave civil injunctions as a second-best residual remedy.

Most of the more recent quantitative evidence available at the EU level comes from the statistics of the 2012 public consultation on civil enforcement of intellectual property rights: efficiency of proceedings and accessibility of measures, and hardly any pan-European

²⁷⁹ See for instance Steadman, I. (2013), 'Icelandic court declares WikiLeaks donation ban "unlawful"', *Wired*, available at: www.wired.co.uk/news/archive/2013-04/26/wikileaks-wins-visa-case; and with reference to the 2006 AllOfMP3 case, see *Russian Pirates get Visa in Court* <http://eng.cnews.ru/news/top/indexEn.shtml?2007/07/13/258719>.

²⁸⁰ Few Member States transposed the Enforcement Directive on time, i.e. by the agreed deadline only five Member States (Denmark, Hungary, Italy, Slovenia and the UK) were compliant. Most Member States were late. As a result, 20 infringement procedures for non-communications had to be started, namely against Austria, Belgium, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Ireland, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovak Republic, Spain and Sweden. A referral to the CJEU was made for Germany, Luxembourg, Sweden, France and Portugal. The last Member States to implement the Directive were Germany (July 2008), Sweden (April 2009) and Luxembourg (June 2009), after a decision confirming an infringement had been taken by the CJEU. When the Commission in 2010 reported about status of transposal Greece seemed not to have implemented the Directive in its entirety, but only in respect of copyright and related rights. Source: Commission Staff Working Document, *Analysis of the application of Directive 2004/48/EC of the European Parliament and the Council of 29 April 2004 on the enforcement of intellectual property rights in the Member States*. However, as late as end-2010 details on concrete implementation at the national level were often missing or provided with very limited details so that the Commission could not reach a conclusion on the implications the Directive had on the development of the information society particularly in Cyprus, France, Luxembourg, Malta, the Slovak Republic and the UK. No further reports on implementation were envisaged.

²⁸¹ See Staff Working Paper accompanying the Commission Report on Application of Directive 2004/48/EC of the European Parliament and the Council of 29 April 2004 on the enforcement of intellectual property rights SEC(2010) 1589

comparative study has been specifically dedicated to the topic of copyright enforcement online.²⁸²

Anecdotal evidence on operations targeting major infringers is available from the US Government 2014 Out-of-Cycle Review of Notorious Markets Report, but its data seem to confirm that most enforcement is actually carried out by means of criminal proceedings, whereas civil injunctions play a relatively minor role in enforcing copyrights online across the EU, possibly with some notable exceptions. But since the data presented in the US Report are not systematic it is difficult to draw strong conclusions.

In many EU Member States where monitoring of online copyright enforcement takes place, it usually refers to activities carried out outside the scope of the InfoSoc Directive and IPRED, as these are deemed residual and scarcely relevant compared to other means of enforcement in the countries concerned. As a result, regular statistics are available on HADOPI operations in France, or on AGCOM-managed activities in Italy, or on the special operations of the *Ley Lassalle* in Spain.

Much in the same vein, the Netherlands keeps regular track of notice and take down procedures and injunctions managed within the framework of the BREIN Code of Conduct. This is the only policy instrument the country has long relied upon, as infringement at the subscriber level was not deemed actionable until recently.

The UK used to have a comprehensive monitoring scheme in place in the form of quarterly surveys, but this was subsequently discontinued due to lack of funding. In the UK, due to delays in transposition, InfoSoc provisions have become actionable since 2011 and right-holders have been relatively active at targeting the supply-side through court injunctions which to date have required ISPs to block subscriber access to around 100 infringing websites. But there are reports that the country is also moving towards code of conduct-based approaches to simplify procedures and make them more expedient and user-friendly. Accordingly, the UK has also felt the need to streamline the blocking of infringing websites by other extrajudicial means than Section 97A of the Copyright Designs and Patents Act.

Whenever governments are not involved with a supervisory function, there is patchy information available about the coverage and level of activity of private Memoranda of Understanding or codes of conduct. To fill this gap, the European Observatory on Infringements of Intellectual Property Rights is reportedly planning a study on voluntary collaboration practices in the online enforcement of intellectual property rights, but they are at a very early stage and it is unclear what degree of focus the study will have on quantitative analysis.

The proposals tabled so far envisage both a mapping of existing voluntary collaboration practices and the analysis of several selected cases. OHIM has also presented a proposal for a study that would focus on a detailed analysis of the functioning, funding and popularity of copyright-infringing websites with a focus on commercial-scale copyright infringements only.

The limited effectiveness of current InfoSoc provisions is proven by the fact that **many countries have felt the need to encourage extrajudicial procedures, not only to decrease**

²⁸² The notable exception is represented by the UK Intellectual Property Office (2015), *International report on the Comparison of Approaches to Online Copyright Infringement*, from which most of the information reported in this Section is drawn on.

costs but to speed up implementation. This has led to the emergence of codes of conduct or administrative-based notice and take down procedures, which have proven to be rather quick (e.g. 2-5 days in the Netherlands; 12 to 35 days in Italy as managed by AGCOM, 15 days in Spain) **and relatively inexpensive** – in contrast with existing legal options to pursue offenders through the courts.

In addition to quicker action, the lower cost (a HADOPI administrative notification would cost around €1 plus an additional €2 for the ISP, although these data are controversial²⁸³) and increased simplicity for rights owners means that even small and medium enterprises can engage with the process in some countries, e.g. Italy, where this was reported not to be the case in the past because of the complexity of getting injunctions from courts.

In the EU, there are few studies on the effectiveness of civil injunctions in curbing infringement at the consumer level. To the contrary, in the US a substantial amount of economic literature has been made available about the theoretical assumptions under which an action undertaken upon an anticipated loss could be justified with a view to its expected deterrent effect (Litman, 2005; Hughes, 2005). The industry decision of moving to Memoranda of Understanding with ISPs as soon as these became possible and refraining from taking further civil injunctions seems to indicate that undertaking a loss-generating civil injunction was considered a second-best strategy by right-holders themselves.²⁸⁴

3.7 The difficulties in estimating online infringements

Any empirical assessment of the effect of these provisions in working as a deterrent and actually curbing copyright infringement online is made difficult by the lack of reliable data to quantify the level of infringement in the first place. The Hargreaves (2011) report noted, already back in 2011, that the evidence available for a clear picture of the scale and dynamics of online copyright infringement is surprisingly thin, and that most surveys on the subject are not statistically robust due to the illegal nature of the activities themselves. Moreover, the extent to which illegal access to content online actually amounts to lost sales is a highly contentious issue in making these estimates because it implies counterfactual considerations of what consumers would have done otherwise.

The Commission has acknowledged this state of affairs and commissioned an *ad hoc* innovative methodology to assess real levels of intellectual property rights infringements (RAND, 2012), based on the relationship between ‘physical’ indicators of infringement and unexpected differences between firms’ revenue forecasts and actual sales. This raised concerns among copyright owners that criticised the proposed approach as inadequate to the media industry on both theoretical and practical grounds. While theoretical arguments did not seem insurmountable, the methodology when proposed could not be pilot tested in the online environment, because industry objected to the reliability of their own estimates and the fact that these would already somehow incorporate anticipated infringements so as to make the proposed methodology circular.

²⁸³ HADOPI, «Réponse graduée – Les chiffres clés», June 2014 (www.hadopi.fr/sites/default/files/ChiffresRGjuin14.pdf).

²⁸⁴ See on the subject M. Masnick (2010), ‘RIAA Spent \$17.6 Million in Lawsuits ... To Get \$391,000 in Settlements?’, *Techdirt* (www.techdirt.com/articles/20100713/17400810200.shtml).

On the contrary, industry insisted on relying on its own calculations consisting of multiplying the total number of infringements by the number of lost sales per infringement (the so-called 'substitution rate') in order to derive the overall impact of illegally downloaded files on its sales. This, however, creates some critical issues as regards the neutrality of the monitoring techniques used to estimate infringements and the very controversial substitution rate between illegally accessed contents and sales lost. Therefore, proponents of the innovative methodology did not change their minds as to the validity of their proposed approach.

Point 10 of the Commission action plan actually envisages the publication starting from 2014 of a biennial report on *Intellectual Property in the EU economy* for more effective monitoring of the impact of the EU's intellectual property enforcement policy that should be based on the proposed methodology and incorporate online copyright as well, if industry cooperates in the assessment and makes available its ex ante estimates. Still, the first such report has not materialised yet but is expected soon.

On top of these methodological disagreements, it is worth recalling that the physical metrics of infringing behaviour remain controversial. In response to the Hargreaves report the UK OFCOM commissioned more robust surveys (5,000 respondents) based on best practice self-reporting approaches (Mazziotti, 2013) to this aim, but monitoring was then discontinued and few conclusions can therefore be drawn on underlying trends. The intrinsic limitation of survey data stems from the fact that respondents are unlikely to truthfully report purchases of pirated goods. As happened in the UK case randomised response design techniques can help overcome some of these concerns, but cannot fully address the possible lack of awareness of consumers when committing an infringement. Therefore, these types of survey are deemed more reliable as a measure of the variation in the geographical and sectoral scope of unauthorised access, as well as of trends over time rather than of the exact quantities. They also offer valuable information on consumer attitudes to and degree of awareness of the phenomena, as well as on distribution channels.

Given the difficulties in assessing the levels of infringement and their evolution over time, it goes without saying that any assessment of the impact of enforcement in curbing these very same levels represents a real challenge. If two opposite approaches are assessed – the Dutch one where illegal downloading was not prosecuted, and the French one which thoroughly attempted to fight illegal downloading – some impacts have been demonstrated in both cases. At the same time, the assessments suffer from the usual methodological limitations (the metrics used, the substitution rate, availability of panel data over time and space, the weight attributed to other context factors) and face difficulties in quantifying infringing behaviours as a judgment criterion.

The French, for instance, refer to the number of HADOPI notifications as a success criterion, which tends to overlook the problem of possible consumer changes in illegal content fruition modalities. It would be a matter worth further investigation whether there is a trade-off between propensity to act at the Internet subscriber level and recourse to civil injunctions towards commercial scale infringers, as France reports a total of two such commercially-oriented injunctions in the period.

In other countries, such as the Netherlands, some interesting and quite rigorous one-off studies have been undertaken of the illegal online consumption of cultural products and related determinants, but none of them uses a repeatable methodology on a longitudinal basis to allow comparisons between different points in time.

A recent empirical study carried out in the Netherlands (Poort & Leenheer, 2012), would suggest that the short-term impact of website-blocking injunctions in copyright cases, and thus the overall effectiveness of injunctions that underlie its justification, might be in the region of some 5% of total infringement. In fact, according to the study, only 5.5% of all customers (approximately 20% of all infringing customers) of affected Internet access providers downloaded less, or stopped downloading altogether, due to the blocking of The Pirate Bay in the Netherlands. In comparative terms, if data were confirmed, this would make the ‘follow the money’ approach experiment in the UK (-12%) a big success.

However, from the point of view of enforcement measured in terms of output, the Dutch research suggests that targeting the suppliers of infringing content is certainly more difficult than identifying and notifying individual users. So while France can point to millions of email notifications and several hundred thousand registered delivered letters sent to individual subscribers, as mentioned before in the Netherlands only concerning one in five of the sites that are suspected of infringement could the actual infringer be traced. Similarly, Spain was only able to clear 30 disputes in the first year of operations of its scheme out of the 213 requests that were received in just the first month. Moreover, website blocking would come at a cost of some €5,000 each, plus another €100 for any subsequent notification (Husovec, 2012).

Finally, and possibly most important, it is extremely hard to disentangle analysis of effectiveness and efficiency of enforcement provisions from other broader context factors.

For instance, there is a growing body of studies²⁸⁵ – admittedly not always from independent sources – showing that as legal online alternatives become known and available in the Member States and consumer satisfaction with their quality and reduced transaction costs improves, demand for illegal services decreases. HADOPI statistics in France would seem to confirm this. Awareness of the legal offer in music is quite high among French Internet users (68%) and is also considered easy to find (77% of users). In comparison, legal offers of TV series and films have slightly lower awareness (64% for both) and are also equally considered harder to find. These are also the two cultural product categories that are most likely to be consumed illegally, with 30% of users stating that they consume them via means that infringe copyright as compared to 23% for digital cultural products overall.

3.8 Concluding remarks

There are several elements that no longer make IPRED fit for purpose in the digital environment. These largely pertain to the lack of a clear distinction between commercial operations and infringement at the consumer level and the problems this creates in the

²⁸⁵ Spotify, for instance, has published their own ‘Spotify’s impact on piracy’ research, which reviews a small number of country studies that suggests that legal streaming services are turning the tide against piracy, with previously illegal users migrating to legal consumption (Spotify, 2013, <https://www.spotifyartists.com/spotify-explained/#spotify-s-impact-on-piracy>). Other studies that look at the levels of traffic to individual legal services compared with traffic to sites known to contain very high levels of copyright infringing content suggest similar conclusions. For instance, a 2012 Sandvine report covering North America reported that Netflix represented 24.4% of total Internet traffic volume in North America over one 24-hour period, well ahead of BitTorrent, at 14.2%. See: <https://www.sandvine.com>.

management and quantification of damages and legal expenses that can be considered prone to abusive, strategic litigation or insufficiently dissuasive.

The sheer recourse to the instrument of civil injunctions has made implementation very heterogeneous across Europe. This is not a specific issue of copyright enforcement in the digital environment, but extends to intellectual property rights in general. What makes the situation peculiar in the digital environment is that this creates an uneven competitive field in terms of business risks and potential liability across Europe and creates incentive for regulatory shopping.

In a number of cases the implementation of IPRED in the online environment at the consumer level has been made impossible by different national interpretations of privacy law, and the CJEU has substantially endorsed this *cujus regio eius religio* regime by giving EU Charter of Human Rights protection to the different national understandings of prevailing provisions, which has in turn fostered the creation of a number of administrative regimes replacing enforcement of IPRED and the InfoSoc Directive online with *ad hoc* provisions.

Likewise, to ensure a right balance between the conflicting needs of enforcing copyright online and protecting the specificity of the Internet's architecture as foreseen in the e-Commerce Directive, the Commission is called on to manage a correct interpretation of the Directive's liability exemptions. 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 ISPs with general obligations to monitor online content, but that no obstacle should be created by national courts on other types of injunctions that do not conflict with the aforementioned principle irrespective of ISP liability considerations, including website blocking orders.** Filtering apart, this leaves open the issue of what can technically be done, as technology rapidly evolves, who should bear related costs, and whether these are reasonably proportionate to the value of the rights being enforced.

As a result, the concrete modalities this exoneration applies as well as the modalities through which costs can be imposed on ISPs in the other cases have been so poorly defined that codes of conduct have been produced to reduce legal uncertainty. This has further contributed to a very fragmented enforcement scenario across Europe.

For different reasons the impact of IPRED and the InfoSoc Directive on copyright enforcement in the online environment can therefore be deemed residual when compared to other instruments available at the Member State level and related provisions are being increasingly replaced by administrative and criminal instruments and codes and conduct including the recently appearing 'follow the money' approaches.

These developments create the parallel problem of ensuring an equal right to access and uniformity in the requirements Member States follow in allowing simple and informal notices (i.e. not through judicial orders) and on how to ensure a right to a fair trial before a judicial authority to parties that might be affected by abusive or mistaken notices and content removals in the context of code of conduct-based proceedings.

Very limited data are available on the actual impact of the various provisions and strategies in curbing copyright infringement online, and comparisons between different approaches face notable methodological limitations, not least because of still unsolved underlying uncertainties and disagreements on how to measure the economic value of online copyright infringement itself. This difficulty in making comparisons is compounded by the fact that stakeholders' enforcement choices seem to be influenced by the features of the

administrative and legal systems they operate in and the implicit subsidies they provide. As a result, no clearly preferable approach has appeared. The conduct of operators themselves and the ongoing debate seem to show that there are great expectations of the potential effectiveness of the newly introduced 'follow the money' approaches, which however remain relatively untested. And instances of expectations not met by results have already been experienced in the field of online copyright enforcement in the past.

Most important, preliminary evidence shows that contextual factors and the availability of high quality legal content online appear to be even more important than enforcement in influencing the level of infringement.

4. Remuneration and compensation of authors and performers

4.1 Economic analysis of legal provisions on remuneration and compensation

The EU *acquis* on copyright is broadly silent concerning the issue of an ‘adequate remuneration or compensation’ for authors and performers, with some exceptions that will be discussed below. Generally speaking, on the one hand Member States are free to set norms affecting remuneration and compensation that go beyond the EU *acquis*; on the other hand, remunerations and compensations for authors and performers are, in most cases, left to market equilibria.

This is not to say the EU policymaking and *acquis* are not concerned with authors and performers’ remuneration and compensation. In several policy documents, the Commission acknowledges that “authors and other creators expect a fair return for the use of their work” and that “it is often the case that performers, including professional ones, are not duly recognised and rewarded for their creative input to an artistic work”.²⁸⁶ At the same time, the Commission Work Programme for 2014, where the review of the copyright regime was included among the incoming legislative initiatives, lists the effective remuneration of right-holders among the regulatory objectives.²⁸⁷ Still, the Commission falls short of identifying specific legal means through which to achieve these objectives, apart from the general consideration that a more solid copyright framework would be beneficial for authors and performers, as well as to every right-holder. Interestingly, the Commission suggests that improving the Single Market for creative content is one way to increase authors’ and performers’ revenues, if not the only one.²⁸⁸ In a nutshell, **the Commission’s attitude towards remuneration and compensation can be grossly summarised as acknowledging the issue, though adopting a ‘market-knows-best’ approach.**

In terms of legal provisions, the InfoSoc Directive acknowledges that the copyright legal framework *per se* provides the legal and economic basis for ensuring a remuneration or compensation of creative work. This is enshrined in Recital 10, where it is stated that:

[i]f authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work...Adequate legal protection of intellectual property rights is necessary in order to guarantee the availability of such a reward...

Besides, Recital 31 of the InfoSoc Directive calls for the safeguarding of a “fair balance of rights and interests between the different categories of right-holders” as well as between users and right-holders. **However, it is fair to state that, with the exception of the issue of**

²⁸⁶ Communication from the Commission, A Single Market for intellectual property rights, COM(2011)287.

²⁸⁷ Annexes to the Communication from the Commission, Commission Work Programme 2014, COM(2013) 739 final.

²⁸⁸ For instance, in the Impact Assessment accompanying the document ‘Proposal for a Directive of the European Parliament and of the Council on the collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the Internal Market’, SWD(2012)204. Cf. also European Commission, *Green Paper on the only distribution of audiovisual works in the European Union: opportunities and challenges*, COM(2011)427.

fair remuneration, the Directive does not provide for any actionable legal means to pursue these principle claims.

Indeed, the InfoSoc Directive does not directly address the issues of authors and performers' remuneration and compensation. Equilibrium prices for remunerations or compensations are largely determined by i) market mechanisms, and ii) national legal contexts. The mix between these two drivers depend on Member States, i.e. on the specific choices that have been made at national level on this subject. **The InfoSoc approach to authors' and performers' remuneration and compensation can be defined as 'hands-off'.**

Obviously, it is to be mentioned that in one case the InfoSoc Directive does regulate the remuneration or compensation of right-holders, including authors and performers. It does so when, in Article 5, it mandates 'fair compensation' against certain exceptions and limitations to the rights of reproduction, communication and distribution. The following considerations apply:

1. As discussed in Section II.1.2.5 above, most of exceptions and limitations are optional for the Member States.²⁸⁹
2. Hence, Member States shall determine what exceptions should be granted to the rights of reproduction, communication and distribution, and *only then* shall determine when fair compensation is due.
3. For some exceptions, fair compensation is mandatory, namely:
 - a. reprography (par. 2, lett. (a));
 - b. private copying (par. 2 lett. (b));
 - c. reproductions of broadcasts made by social institutions for non-commercial purposes (par. 2 lett. (e)).

In legal terms, the rationale for introducing fair compensation mechanisms seems to be the need to protect specific categories of users or certain users' prerogatives, because an excessively strict interpretation of the copyright would otherwise prevent the full enjoyment of the good (Helberger & Hugenholtz, 2007). In economic analysis terms, the rationale for the introduction of fair compensation seems related to the need to avoid transaction costs, rather than equitable compensation (Hadke & Towse, 2007). Indeed, fair compensation also applies to non-meritorious and non-protected activities, such as reprography or caricature. However, in this case fair compensation is deemed efficient because it would be too costly – read: impossible – for the right-holder or the collecting society to track every single use. Hence, a sort of per-use tax, or levy, compensates for the impossibility of measuring uses.

Fair compensation is not economically negligible in some cases. For instance, in the period 2004-09 between €400 million and €600 million accrued to right-holders in the EU only thanks to the fair compensation levy for private copying (Kretschmer, 2011). Where data is available at national level, it represented between 4% and 9% of total collecting society revenues. WIPO (2013) reports that the trend is now decreasing: its 2012 data, which cover

²⁸⁹ The only exemption from this principle is the exception for transient and incidental reproductions which are an integral part of a technological process whose purpose is to enable a transmission of content in a network for lawful use and with no independent economic significance. For transient and incidental reproductions, the exception from the reproduction right is mandatory. Cf. Article 4.1 of the InfoSoc Directive.

most EU Member States, show revenues from private copying falling to slightly more than €300 million.²⁹⁰

Private copying levies, as well as other remuneration rights, are an important support for authors' and performers' income, particularly for the latter. Data show that private copying rights represent about 5% of the collection of remuneration rights by collective management societies, and 35% for performers (AEPO-ARTIS, 2009). In more detail, distribution of private copying remuneration, which is largely collected by collective management societies, is based on a scheme determined either by right-holders' organisations or public regulation. Private copying levies are usually split between audio-related and video-related levies. Authors enjoy about 43% of the former and 32% of the latter, while performers get about one-quarter for both audio- and video-private copying levies. It is finally to be noted that in many Member States part of these levies are redistributed for cultural purposes, up to 50% of the total (WIPO, 2009).

However, while private copying represents a large share of performers' remuneration rights, and a more limited one for authors, it is difficult to gauge the absolute weight over total remuneration and compensation. From an economic viewpoint, authors' and performers' remuneration and compensation also includes lump-sum payments (possibly annualised) received in exchange for copyright bundles, and the fees and salaries for, e.g. performance and provision of services. Taking into account these additional revenue streams for authors and performers, it is not possible to assess the weight of private copying remuneration out of the total remuneration rights. In one instance, it is claimed by Younison (2010), a European platform of music artists, that private copying levies currently represent less than 1% of total authors' revenues, and hence do not substantially increase their remuneration levels. Similar conclusions are reached by an Oxera report (2011) for a manufacturing company, Nokia, where it is claimed that authors' and performers' incentives are only marginally affected by the private copying levy.

All in all, **fair compensation concerns only unauthorised but legitimate – in some loose sense – uses of an author's or performer's creative content. It is not aimed at ensuring a 'fair' distribution of revenues along the value chain for legitimate uses of creative content, uses which generate the bulk of the revenues. This is why we consider the InfoSoc Directive largely neutral with respect to adequacy of authors' and performers' remuneration and compensation, even taking into account the provisions on fair compensation.**

The InfoSoc 'hands-off' approach is not the only one known by the EU copyright framework concerning authors' and performers' remuneration and compensation. Other EU provisions aim at directly interfering with market equilibria. This is the case of **Directive 2011/77/EC, which trades off an extension of the copyright terms with the earmarking of 20% of the revenues originating from this extension as a supplementary royalty to certain categories of performers.**²⁹¹

²⁹⁰ As confirmed by other sources (e.g. SAA, 2015).

²⁹¹ See the Impact Assessment accompanying the Proposal for a Council Directive amending Council Directive 2006/116/EC as regards the terms of protection of copyright and related rights, SEC(2008)2287. Cf. also European Parliament, Committee on Legal Affairs, Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States, Study, January 2014.

Directive 2011/77/EC does not intervene ex ante in the market by changing the parties' balance of power. It creates an ex-post redistribution mechanism to protect the weakest party, in this specific case performers, regardless of the market equilibrium. **This still differs from the case of the Rental Directive, where a 'paternalistic' approach is adopted, meaning that the norms intervene to prevent certain undesired market equilibria, which would otherwise be determined by the free contractual relations among the parties.**

The Rental Directive stipulates certain mandatory rights to equitable remuneration. In particular, Article 5 mandates an "unwaivable right to equitable remuneration" for authors and performers that have transferred or assigned a rental right. Article 6 stipulates an exception for public lending, provided that some compensation is granted. Paragraph 2 of Article 8 provides again for the same right to performers concerning the wireless communication of phonograms. One could correctly argue that the economic significance of these rights in the whole copyright framework is, again, limited. However, in principle, this represents an alternative interventionist and paternalistic approach, in which parties cannot trade and waive their rights based only on their freedom to contract.

Before going further with the comparison of the hands-off and paternalistic approaches, it is useful to discuss what the specific economic value of this right is, i.e. when a remuneration can be considered equitable under the Rental Directive. This issue was tackled by the CJEU in the 'SENA' case.²⁹² At paragraphs 23-25, the Court states that the concept of equitable remuneration is an autonomous provision of Community law, which is to be interpreted uniformly in all Member States. However, in paragraph 34 it also states that the EU *acquis* does not prescribe any method to determine *what* constitutes uniform equitable remuneration nor the parameters on which it is based. **The uniform interpretation of equitable remuneration implies that Member States should ensure a proper balance between the interests of performers and other right-holders, in relation with the economic value of the use under consideration.** Hence, a general determination of when remuneration can be considered equitable does not strictly follow from the principle of equitable remuneration.

After discussing the two possible approaches, this Section is concluded by assessing whether either of the two legal options – hands-off vs. paternalistic – is, from a theoretical perspective, superior to the other in terms of securing an adequate remuneration and compensation for authors and performers. Our conclusion is that both the hands-off and paternalistic approaches are likely to result in substantially similar market outcomes, once market mechanisms are factored in. Even when, under the paternalistic approach, authors and performers are granted unwaivable rights to equitable remuneration, the law does not determine when remuneration is equitable, except for excluding extreme – i.e. zero or near-zero – revenues. As long as an EU or national provision does not stipulate what 'adequate' means, the revenue share accruing to authors and performers for their unwaivable rights is still left to individual or collective contract negotiations, i.e. to individual or collective market power.

In a nutshell, market power, rather than the provisions of waivable versus unwaivable rights, remains the key determining factor of the remuneration and compensation of authors and performers. The norms regulating contractual mechanisms for authors and

²⁹² Judgment of the Court (Sixth Chamber) of 6 February 2003. Case C-245/00 *Stichting ter Exploitatie van Naburige Rechten (SENA) v. Nederlandse Omroep Stichting (NOS)*.

performers matter much more than the approach subsumed in the EU copyright framework. However, contractual mechanisms fall currently under national competence (in addition, they border labour regulation in some cases).²⁹³ Further to that, a uniform effectiveness of adequate remuneration and compensation provisions for all authors and performers is also prevented by the diversity in arrangements and parties' market power across different value chains.²⁹⁴

Finally, it is worth discussing that several contributions²⁹⁵ seem to link the concept of equitable remuneration to some kind of compensation-per-use, as opposed to lump-sum payments in exchange for authors and performers waiving (most of) their rights. This indeed ensures that best-selling authors and performers do enjoy a fairer share of their success, even if at the moment of concluding the contract they were in a weaker position. However, less-than-successful authors may not benefit, or indeed lose, from such a remuneration scheme. Further to the distribution of revenues between best-selling and other authors and performers, it is to be mentioned that compensation-per-use schemes also have drawbacks. First, compensation-per-use schemes shift the entrepreneurial risk from the publisher/producer to the author/performer, who may not want to bear this risk. For instance, it is often quoted that authors and performers having signed a contract in the non-digital age are not fairly remunerated for the online use of the content. However, online distribution has been a positive demand shock that authors and performers have not benefited from; at the same time, lump-sum contracts also shield them from negative shocks. Secondly, pay-per-use schemes entail more transaction costs, in some cases significantly more, than lump-sum payments. Additional transaction costs represent an efficiency loss that needs to be distributed among the contracting parties. Especially in the online environment, monitoring uses can be costly and imply trust issues. Finally, adding an unwaivable right to per-use remuneration *on top* of buy-out clauses would unavoidably decrease the market value of such clauses, and it is not clear whether authors and performers, and which ones among them, would end up with a higher share of the creative content revenues.

4.2 Literature review on market structure and revenue allocation in the creative content markets

In this sub-Section, the focus shifts from the analysis of legal provisions to a literature review concerning the online creative content value chains and how resources are allocated therein.

²⁹³ This is also acknowledged by the authors' contribution to the Public Consultation on the Review of the copyright framework. The German system is quoted as a positive example in this respect. It states that remuneration is adequate if it corresponds to what is customary and fair in business relations and, possibly most important, adequacy is presumed if remuneration is in line with collective agreements. Cf. European Commission, Report on the responses to the Public Consultation on the Review of the EU Copyright Rules, July 2014; European Parliament study, *supra* note 291. Cf. also the 2011 *Green Paper*, *supra* note 288; European Parliament, Committee on Legal Affairs, Working Group on Copyright, Working Document: Copyright in the Music and Audiovisual Sectors, 29.06.2011.

²⁹⁴ As acknowledged in European Parliament, Committee on Legal Affairs, Working Group on Copyright Territoriality, Collective Management and Remuneration, 15.09.2010.

²⁹⁵ See European Commission, Report on the responses to the Public Consultation on the Review of the EU Copyright Rules, July 2014.

We try to report data and specific information that can be found in the available material, rather than interested parties' claims. However, the evidence on revenue allocation remains scant and anecdotal.²⁹⁶

Any study on revenue allocation would have to overcome two challenges. The first is the **lack of transparency concerning intra-value chain transactions** – something which is shared with most other value chains outside the creative content markets. Secondly, **data concerning revenue allocations must be differentiated by both type of product** – because though market participants are somewhat similar, the relative market power may very well not be comparable – and by Member State. The latter distinction is particularly relevant in the context of this ex post evaluation because national **contexts do not only determine different market conditions (e.g. in cultural production, demand for cultural goods, Internet access), but also different legal frameworks, causing differences in distribution of market power among operators.**

A very good example is a study on copyright revenue streams in creative industries in Finland (Koskinen-Olsson & Mulkku, 2014). While it only covers the Finnish creative industries, and is thus an excessively thin basis for generalising about the whole Single Market,²⁹⁷ it includes novel data and a comprehensive approach. For each creative industry including press and literature, music, audiovisual, radio, TV, software, video games, photography, visual arts and advertising, the authors estimate the overall revenue stream. Then, from public sources and interviews with stakeholders, they estimate the amount of revenues (or the share of revenues) that accrue to the right-holders, including royalties, fees, salaries, and rights collected by CMOs. While the results are underpinned by several assumptions, to fill data gaps, the analysis is comprehensive and the methodology transparent. According to these estimates, in 2012 direct copyright revenue streams in Finland amount to €2.9 billion, up from €2 billion in 2008. If such an exercise had to be replicated at EU level. Indeed, in each country primary information from stakeholders and secondary information from national-specific secondary sources should be retrieved to assess the allocation of revenues along the various value chains. As discussed, allocation of revenues depends on the national legal framework – since authors and performers' remuneration and compensation are almost not regulated by EU-wide acts - and on parties' market power, which in turns derives from country-specific factor, such as the negotiation mechanism or market demand features.

Here below, we discuss three of the main creative content value chains in the online environment – audiovisual, music and books – to better understand the type and nature of market operators, their relationships and transactions. Secondly, we discuss online platforms and advertisers as new operators in the online markets for creative content. Finally, we present data on revenues per value chain.

²⁹⁶ For this reason, the European Commission has recently awarded two service contracts concerning research on this subject. The first is on the remuneration of authors and performers for the use of their works and the fixations of their performances; the second is on the remuneration of authors of books and scientific journals, translators, journalists and visual artists for the use of their works. Both contracts were awarded to European Economic Research, the former in February 2014 and the latter in November 2014.

²⁹⁷ Based on Eurostat data, Finland represents only 1.5% of the Single Market GDP.

4.2.1 *Audiovisual products*

In the online environment, several business models for the ‘sale’ of audiovisual products (e.g. movies, TV series) exist. Business models differ along two main dimensions: revenue generation and access conditions.

Concerning revenue generation, audiovisual content providers may be:

1. publicly funded, such as public broadcasters or some European movie productions;
2. subscription-based, such as satellite broadcasters or Netflix;
3. advertisement-based, such as private TV broadcasters;
4. supported via pay-per-view systems (i.e. payments of single accesses/downloads to media content), such as movie theatres or Apple’s iTunes;
5. cross-subsidised, for example when public or commercial broadcasters also offer part of their content online.

An audiovisual platform may also finance itself through a mix of the above-mentioned strategies.

Online audiovisual platforms may also opt for different access regimes. There are Internet platforms with direct and free access (e.g. Google’s YouTube) and closed platforms, both based on a pay-per-view system (e.g. Apple’s iTunes) or on subscription-based access (e.g. Netflix). The CRA (2013a) report distinguishes between two categories of online on-demand audiovisual services:

1. interactive services that offer a catalogue of titles based on subscription or pay-per-view system, termed video on-demand services; and
2. services consisting of the time-delayed extension of existing linear TV broadcasters, termed on-demand television services.

Video on demand services in Europe are growing quickly, though they represent only a small share of the market. According to the European Audiovisual Observatory (2014), in 2013 video on-demand services generated €800 million in revenue. Audiovisual digital retail, rental and subscriptions generated €1.2 billion, overtaking video on-demand for the first time. Albeit from a small base, annual growth for audiovisual digital retail and rental has been in the double digits for the last three years; audiovisual digital subscriptions have recorded three-digit annual growth rates since 2010.

A possible online audiovisual value chain consists of the following operators (for further details on the licensing value chain see Section II.2.2.1):

1. Authors and performers, who create the audiovisual content under the producer’s management. The definition of who should be considered authors of a complex creative product, such as a movie, varies across national legal regimes.
2. Production societies, which develop the project, organise the shooting, take care of pre-financing and financing, and purchase the necessary rights from authors and performers.
3. Distributors, which deliver the audiovisual product to the final user and/or to the online platform, possibly through a content aggregator when they are small.
4. Online platforms, which provide the content to the final user (CRA, 2013a).

The value chain is more compact when the distributor is also the producer of the creative content, such as when broadcasters or online platforms produce their own TV series.

4.2.2 Music

Online music services may belong to two large categories: those offering music downloads (e.g. Apple's iTunes) and those offering music streaming (e.g. Spotify). Business models can also encompass features of both families. Similarly, revenue generating strategies are either based on song (or album) purchases, as in the old brick and mortar environment, or on subscription fees. Streaming services are typically subscription-based (CRA, 2013a). Advertising also plays a role in financing music services, though a minor one compared to the audiovisual sector, because of the more limited attention that the consumer of music products pays at the screen.

The music value chain is split into two main segments (for further details on the licensing value chain see Section II.2.2.2):

1. artists and repertoire activities, focusing on discovery, development and promotion of artists and music recordings;
2. distribution and commercial exploitation, including distribution of sound recordings to wholesalers and retailers (Leurdijk & Nieuwenhuis, 2012).

In general, large music publishers (the so-called 'majors') do both activities; smaller labels tend to focus on artists and repertoire, while outsourcing distribution and commercial exploitation to third parties.

Analogous to other creative content value chains, the music industry is characterised by high upfront investment, low marginal costs (even lower in the online environment) and high risk, in terms of sorting out successes from failures. The market structure is dominated by a small number of vertically-integrated record companies, which operate from authors to final users or online platforms, and a large number of small and medium enterprises (Leurdijk & Nieuwenhuis, 2012).

Internet platforms mostly act as online distributors and hence function like new distribution channels, rather than additional steps in the value chain. Authors enter into contact, and contract, with the companies, or company divisions, carrying out artistic and repertoire activities.²⁹⁸

4.2.3 Books

The book market is the only one, among media and entertainment markets, where EU companies are still in the lead. In 2009, the EU market accounted for 40% of the global market for books, a share larger than that of the US. However, the US has a larger share of the e-book market, with 57% of global revenues in 2010. Furthermore, the largest player, Amazon, indeed an American company, controls about two-thirds of the e-book market. In any case, e-books still represent a minor share of the publishing market, i.e. 9% of total revenues in the EU's five largest Member States (Simon & de Prato, 2012).

The structure of the book and e-book online value chain is very similar to that found in the music industry. The main operators in the value chain follow (for further details on the licensing value chain see Section II.2.2.3):

²⁹⁸ Cf. Decision of the European Commission, CASE COMP/M.6456 Universal Music Group/EMI Music.

1. Authors (e.g. writers, artists, illustrators).
2. Publishers, which select authors and organise the production of books and e-books. Publishers can obtain the creative work directly from authors or via an agent.
3. Distributors, which include both wholesalers and retailers.

Publishers are the main operator of the value chain. They perform several activities, such as aggregation of supply, presentation of creative content, pricing, marketing, and dealing with support technical activities. They also bear the entrepreneurial risks and the upfront costs (Simon & de Prato, 2012). Online platforms play the role of mass retailers (CRA, 2013b), as well as venturing into the publishers' turf by directly contracting authors.

Unlike the music industry, the most common revenue generating strategies consist of a pay-per-access strategy, i.e. book sales. Recently, subscription-based models have also been introduced, such as Amazon's Kindle Unlimited, but they still play a more limited role compared to other media industries. As far as authors' remuneration and compensation are concerned, bestsellers receive an advance payment in exchange for their copyright, and once the advance is covered by sale revenue, the author receives additional royalties (e.g. per-unit of content sold) (Simon & de Prato, 2012). This does not apply to minor authors, who may only receive a per-unit payment, i.e. no advance; they may even have to bear upfront costs. Amazon adopts a revenue system, so that authors receive between 30-35% of revenues from any e-book sold on its platform, regardless of sales performance, without bearing any upfront cost and receiving no support in terms of, e.g. marketing. The higher share of revenue that Amazon grants depends on the stiff reduction of publishers' costs (e.g. logistics, production costs, scouting).²⁹⁹

4.2.4 Online platforms

Online platforms is the new category of players across all online creative content markets.

They mostly act as intermediaries between final consumers and the 'old' creative industries. In some cases, they cut out old parts of the creative industry, mostly by substituting brick and mortar retailers, but also by acting as publishers, record labels or news aggregators. In the latter, less common, case, online platforms put consumers and authors directly into contact.

These platforms have very different features and span industries and business models. It is interesting to compare them to the old creative industry players. Some platforms, such as Amazon or Apple's iTunes, are similar to very big retailers. However, successful online platforms often combine both an online catalogue and dedicated hardware for content enjoyment, such as Amazon's Kindle or Apple's iPod, thus being 'walled gardens', within which the whole consumer experience takes place. YouTube has a different origin, having been born as a free platform for sharing UGC; it then transformed into a platform for sharing copyrighted content, before becoming a legitimate player, where copyright norms are enforced to a significant extent. Rather than an online shop, its revenue generating strategy resembles that of a classic broadcaster: advertisers pay for consumers' attention. Other more recent platforms, such as Spotify's streaming service, function as a subscription-based radio; by contrast, Netflix's business model is similar to that of the old video rental companies, and

²⁹⁹ Cf. 'Take Control with Self-Publishing', available at: <http://www.amazon.com/gp/seller-account/mm-summary-page.html?topic=200260520>, last accessed on June 2015.

indeed was born as a distance-based DVD rental service, well before broadband connectivity allowed for a satisfactory quality of video streaming.

What all these platforms have in common:

1. **Being online rather than brick and mortar businesses, they are affected to a more limited extent by physical constraints, such as logistics, location, rental,** etc. Hence, they enjoy very large economies of scale in distribution of creative content.
2. **Being Internet-based, they potentially face a global market, even though the creative content industry is still segmented at national level for many product segments.** For this reason, online platforms largely adopt a global strategy. Again, this triggers very large economies of scale.
3. **Being user interfaces,** they are best-positioned for knowing and exploiting demand features. Most important, they know consumers to an unprecedented extent, thanks to the amount of personal data that they collect, process and store whenever an individual buys a product or just visits their website.

All in all, these online operators have further globalised creative content markets, and displaced other operators' activities, thus compressing their share of revenues. While obviously acknowledging the innovation and gains for consumers brought about by these platforms, they most probably represent the single most important reason why all other players on the value chain lament the reduction of revenues and profit margins. Revenues have indeed shifted, to a variable extent, from the creative industry to these new forms of global mass distributors.

4.2.5 Advertisers

As discussed above, online platforms capture both consumer attention and personal data. This makes them perfect candidates to run ad-based business models.

When consumers interact with online intermediaries, they release, voluntarily or not, a flow of personal information. This information is collected, processed and used to 'profile' consumers. Profiling can be very simple, such as in the case of retargeting ads, where consumers who have looked in the past for a certain product are retargeted with ads of the same product. In other cases, profiling can be more complex and try to infer future purchase paths from consumers' past history. Profiling and connecting users with the 'right' ad, and thus with the right product, can either be done by the platform itself, that is through 'first-party advertising', or be outsourced to specialised firms, such as ad networks, through 'third party advertising' (Luchetta, 2013).

Advertisers thus buy the right to deliver an ad to a certain class of profiled users. The ad can be bought based on two pricing schemes: cost per impression or cost per click. The former scheme, analogous to the case of old media, requires advertisers to pay a fixed price per quantity of viewers (usually expressed as 'cost-per-million'). The latter scheme, born in the online environment where consumer behaviours can be tracked, provides for the advertisers to pay a sum each time a viewer clicks on the ad – the so-called 'cost-per-click' (Ratliff & Rubinfeld 2010). This is disruptively innovative, because for the first time the advertiser can know which consumers are attracted by what ad. In the offline world,

companies “waste half of the money spent in advertising, but do not know which half”.³⁰⁰ In the online world, companies know the effectiveness of every single euro they spend on ads.

In 2013, expenditures on online advertisement in the EU reached €22 billion, which is coming closer to expenditures on TV ads (€26.3 billion). In 2009, online and TV ads generated, respectively, €13 billion and €26.7 billion: while online ads revenues have doubled in four years, TV ads have slightly decreased. Today, online ads represent about 27% of total ad expenditures in the EU, a share higher than that of ads on newspapers, magazines, radio, cinema and outdoor advertising (European Audiovisual Observatory, 2014).

4.2.6 Data on revenues

While data on the allocation of revenues across the value chain are scant, data on the economic value of the creative content industry and of the copyright revenue streams could be identified.

First of all, defining creative industries and the activities included therein is not easy. WIPO (2002) defines creative industries, or copyright-based industries, as those “wholly engaged in creation, production and manufacturing, performance, broadcast, communication and exhibition, or distribution and sales of works and other protected subject matter”. In addition to this definition, it is also appropriate to include ‘digital delivery’ as a separate phase, given the subsequent market developments (Koskinen-Olsson & Mulku, 2014).

Creative industries – though the exact definition varies from study to study – represent a significant part of EU GDP. In 2012, Ernst & Young (2014) reports that they generate over €500 billion in revenues, or 4.2% of the EU economy. The largest segments are visual arts, advertising and television. At the same time, these industries employ more than 7 million people, the largest segments being performing arts, visual arts and music. According to SAA (2015), the European audiovisual industry generates €122 billion in revenues, €90 billion of which are generated by TV broadcasters (data refer to 2013). In the same year, box office revenues amounted to €6.3 billion, and the number of European movies reached about 1,550 units, collecting about a quarter of box office revenues.

The total collection of authors’ rights royalties in 2013 amounted to €4.7 billion, 83% of which was for the musical repertoire. The audiovisual repertoire triggered a revenue collection of €431 million, or 9.1% of the total copyright revenue. For the audiovisual industry, including TV broadcasting, authors’ right royalties represented about 0.4% of its total revenues. In 2009, the digital sector accounted for 1.6% of total collections for all the repertoires combined (Simon, 2012).

These aggregate data do not show how much each value chain part gains (Simon, 2012). The same is true for the scant data reflecting individual and aggregate authors’ revenues (such as Kretschmer, 2005), which are far from sufficient to paint any kind of picture of their share of profits over total revenues. Unsurprisingly, as in any value chain, each party claims that their slice of the cake is too small. This is not to say that authors and performers’ claims for a larger share of the profit are not reasonable. It is just to highlight how there is hardly any independent evidence that may justify any claim in a way that can justify an evidence-based policy cycle.

³⁰⁰ Attributed to John Wanamaker, quoted in Picker (2009).

The reason why there is such little evidence is not peculiar to the creative content markets. **In all value chains, one of the most important industrial secrets is how much value each counterpart is able to extract from other operators. And indeed, most copyright contracts do include non-disclosure clauses.** Since most value chains are non-transparent concerning contractual conditions, prices, and thus market power, the case for granting special treatment to copyright holders seems thin. Of course, the need to protect cultural creation may be a solid ground to invoke reinforced protection. The issue would then become whether transparency provides authors and performers with a stronger or weaker market position. In economics, it is known that information flows have an unclear effect on market conditions: on the one hand, they may be used to limit competition, and facilitate collusion, while on the other a very transparent market can also be very competitive. Therefore, depending on which counterparts become more or less competitive, authors and performers may either benefit or lose from any additional transparency provision.

4.3 Techno-economic analysis

In the digital environment, and even more in a both digital and globalised market for creative content, two natural laws work at an unprecedented scale: the Power Law and the Law (Taleb, 2007) of the Fat Tails (Anderson, 2006).

'Success', i.e. the number of copies of creative content sold, increasingly approximates a Power Law distribution. It means that the market will feature a very small number of extremely successful authors, who 'absorb' most of the market, and increasingly numerous cohorts of 'small' authors selling a limited number of copies. In the words of Taleb (2007), authors will be a population with "a very small number of giants and a huge number of dwarves". The Power Law depends on the fact that authors and performers work in a scalable environment. Scalability is induced by the 'winner-takes-all' nature of success in larger and larger digital markets for creative content, combined with self-reinforcing trends, in a feedback loop. Scalability creates a small league of global viral phenomena, whether R.J. Rowling's Harry Potter or Psy's 'Gangnam style', that can arise at any point on the global market. Scalability also implies a very unequal environment, where one single author can have a disproportionately high share of the market. While comprehensive data are not available, a recent media report claims that 1% of authors generate about 77% of global artist revenues.³⁰¹

However, the Law of the Fat Tails compensates, to some extent, the effect of the Power Law: even though minor authors become (relatively) more minor, they are not kicked out of the market, because the progressively lower significance of physical constraints, such as warehousing and shelf space, allow online platforms to maintain a very diverse and deep catalogue of works. In a nutshell, small niches, which would have been unprofitable in the brick and mortar economy, can now thrive and survive in the online environment (Anderson, 2006). This fosters protection of cultural and linguistic diversity.

While these two laws to some extent compensate for each other, by keeping the giants from kicking dwarves out of the market, at the same time they create a population of authors

³⁰¹ VICE News, 'Why Artists Don't Make Money - The Business of Life (Episode 3)', available at: <http://news.vice.com/video/the-value-of-creativity-the-business-of-life-episode-3>, last accessed on June 2015.

whose median remuneration or compensation is constantly decreasing. Indeed, even assuming for sake of simplicity that the increase in supply is matched with a corresponding increase in demand, in the online market for digital content the Power Law makes the rich richer, while the Law of the Fat Tails increases the number of minor authors. Hence, even assuming constant mean remuneration or compensation, a larger group of authors will enjoy lesser benefits and the very few will enjoy much greater ones. For example, the median income for a European screenwriter was €22,000 in 2012, while for UK screenwriters amounted to €11,000 (SAA, 2015). In the research team's opinion, this explains, possibly to a larger extent than that of the copyright legal framework, why a constantly higher number of authors feels their position is threatened to the point of not earning enough to live off their creative production.

The revolutions taking place in the digital and global market for creative content do not only affect authors and performers, but also the industrial players of the old value chains. The balance of power in the digital market for creative content is moving downstream, from authors and 'old' publishers to online platforms that have direct contact with consumers' eyeballs. Access to consumers seems to be the new key asset in the creative content industry, protected by brands, patents and trade secrecy rather than by copyright. To the contrary, the main asset of authors and legacy players' was, indeed, content. For this reason, legacy players are trying to get direct access to consumer markets (Simon, 2012a).

Indeed, content markets are facing both a disintermediation from old publishers, be they music labels, book publishers or newspapers, and a re-intermediation via new online distribution platforms (such as the big four, otherwise called GAFA: Google, Amazon, Facebook and Apple), that seem to become additional gravity centres of the industry, also in terms of value extraction. While in the old world, intermediation was necessary because each player performed a core activity and relied on other operators along the value chain, now activities intermingle and large players tend to occupy a large part of the value chain. At the same time, re-intermediation via these platforms is compelling because they possess the new key asset, that is, access to consumers and consumer data. This asset also gives online platforms a certain, though variable, degree of market power to impose revenue sharing conditions on legacy players (Simon, 2012b). To the contrary, fully disintermediated business models, in which authors and performers directly contact consumers, thus acquiring larger revenue shares, have so far remained marginal, especially relative to the big online platforms. Indeed, building and maintaining an audience requires investment, which only companies, be they online platforms or legacy intermediaries, can undertake (Leurdijk & Nieuwenhuis, 2012).

As anticipated in the previous sub-section, on the one hand these new platforms may disintermediate authors from publishers. As such, they are able to offer significantly better conditions to the large cohort of minor authors. By cutting the number of intermediaries, the shares for the bottom and top steps of the value chain increase. On the other hand, by working as retailers within the old value chain, online distributors, because of their size and their knowledge of consumers, can extract a larger share of revenues than brick and mortar retailers. Finally, they are able to create new streams of revenues from advertisers, and capture the old streams, thanks to their deep knowledge of consumer profiles (Oliver & Ohlbaum Associates, 2013). This has led to a progressive disintegration of the old vertically integrated big legacy players, and at the same time to a progressive disruption of copyright-based business models.

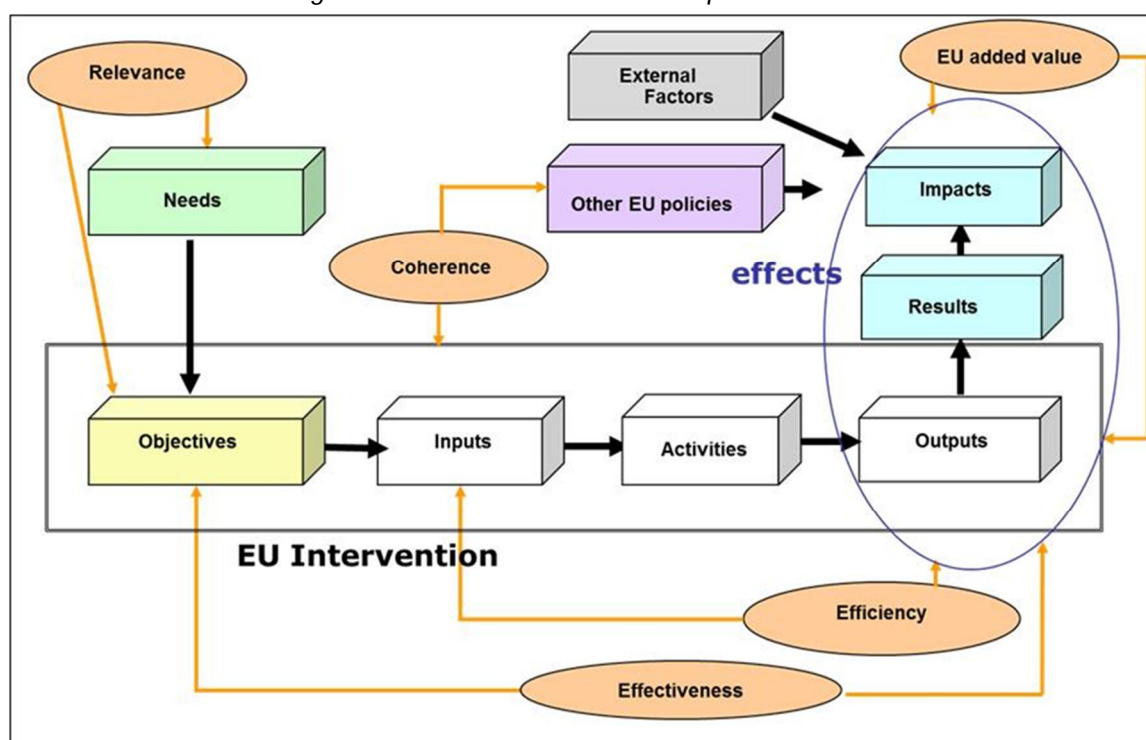
All in all, the current techno-economic situation is far from optimal, for both content creators and legacy entrepreneurs, such as newspapers, music companies or book publishers, which have been cut out of large revenue streams. Both content creators and content entrepreneurs are necessary for the copyright environment to flourish; at the same time, both are constrained by the new features of markets and technical contexts. Once these largely exogenous factors are taken into account, what is the role for the EU copyright framework in supporting a 'desirable' allocation of revenues along the copyright value chains? On the one hand, ensuring some form of fair distribution is a significant need for authors but a true challenge in a 'Power Law' environment. On the other hand, the 'Law of the Fat Tails' 'automatically' helps in achieving other objectives, such as the promotion of cultural and linguistic diversity. At the same time, protection of innovation, i.e. of publishers, needs to take place in a radically different, i.e. disintermediated and re-intermediated, market structure, where old legal tools can hardly deliver the desired outcomes.

Part III. General Ex-Post Evaluation

1. Introduction: The framework of our evaluation

In what follows, we provide the main findings of our evaluation exercise, with specific reference to the questions asked by the European Parliament in its tender specifications. The overall framework for evaluation is illustrated by Figure 6 below, which specifies the key criteria that should be adopted in order to evaluate a given piece of legislation, namely the effectiveness, efficiency, coherence and relevance of the rules under evaluation. An additional criterion, EU added value, is not considered here as required by the European Parliament.

Figure 6. Overall framework for ex-post evaluation



Source: European Commission's 2015 Better Regulation Guidelines - Toolkit.

More specifically, the four criteria relevant to the present Study are defined as follows:

- **Effectiveness** analysis considers how successful EU action has been in achieving or progressing towards its objectives. The EU better regulation guidelines clarify that the evaluation should form an opinion on the progress made to date and the role of the EU action in delivering the observed changes. If the objectives (general, specific, operational) have not been achieved or progress is not on track, an assessment should be made of the extent to which progress has fallen short of the target and what factors have influenced successes and failures. Consideration should also be given to whether the objectives can still be achieved on time or with what delay. The analysis should also try to identify if any unexpected or unintended effects have occurred.

Typical examples of effectiveness questions:

- To what extent have the objectives been achieved?
- What have been the (quantitative and qualitative) effects of the intervention?
- To what extent do the observed effects correspond to the objectives?

- To what extent can these changes/effects be credited to the intervention?
- What factors influenced the achievements observed?
- To what extent did different factors influence the achievements observed?
- **Efficiency** considers the relationship between the resources used by an intervention and the changes generated by the intervention (which may be positive or negative). Differences in the way an intervention is approached and conducted can have a significant influence on the effects, making it interesting to consider whether other choices (e.g. as demonstrated via different Member State interventions) achieved the same benefits at less cost (or greater benefits at the same cost). Efficiency analysis can differ depending on the type of intervention being evaluated. Typical examples of efficiency questions include:
 - To what extent has the intervention been cost effective?
 - To what extent are the costs involved justified, given the changes/effects that have been achieved?
 - To what extent are the costs proportionate to the benefits achieved? What factors are influencing any particular discrepancies?
 - What factors influenced the efficiency with which the achievements observed was attained?
 - How affordable were the costs borne by different stakeholder groups, given the benefits they received?
 - If there are significant differences in costs (or benefits) between Member States, what is causing them?
- **Relevance** looks at the relationship between the needs and problems in society and the objectives of the intervention. Things change over time – certain objectives may be met or superseded; needs and problems change, new ones arise. Relevance analysis is very important – because if an intervention does not help to address present needs or problems, then it does not matter how effective, efficient or coherent it is – it is no longer appropriate. This is why there is a strong link between relevance analysis and the criteria of EU added value – which assesses whether action continues to be justified at the EU level. Typical examples of relevance questions include:
 - To what extent is the intervention still relevant?
 - To what extent have the (original) objectives proven to have been appropriate for the intervention in question?
 - How well do the (original) objectives (still) correspond to the needs within the EU?
 - How well adapted is the intervention to subsequent technological or scientific advances?
 - How relevant is the EU intervention to EU citizens?
- **Coherence**. Checking *internal coherence* means looking at how the various internal components of an EU intervention operate together to achieve its objectives. Similar issues can arise externally at different levels: for example, between interventions within the same policy field (e.g. a specific intervention on drinking water and wider EU water policy) or in areas which may have to work together (e.g. water policy and chemicals policy, or chemicals and health and safety). At its widest, *external coherence* can look at compliance with international agreements/declarations. The focus on coherence may vary depending on the type of evaluation and is particularly important in Fitness Checks, where coherence analysis will look for evidence of synergies or inconsistencies between

actions in a related field which are expected to work together. Even when evaluating an individual intervention, it can be important to check coherence with (a limited number of) other interventions. Typical examples of coherence questions include the following:

- To what extent is this intervention coherent with other interventions that have similar objectives?
- To what extent is the intervention coherent internally?
- To what extent is the intervention coherent with wider EU policy?
- To what extent is the intervention coherent with international obligations?

Below, we apply these four main criteria to our evaluation of the InfoSoc Directive and related legislation.

2. Main evaluation questions

2.1 How effective is the current InfoSoc Directive?

As observed in Part I above, the InfoSoc Directive had the following major operational objectives:

- **To align EU legislation with international law**, especially after the 1996 WIPO Treaties that, *inter alia*, introduced the three-step test and addressed the issue of TPM.
- **To strengthen intellectual property protection in light of the emerging technological developments** that led to the emergence of the Internet as a major distribution channel for content.
- **To reduce the existing disparities** between national legal systems in terms of the basic definition of copyright, the scope of the rights to reproduction, communication, and distribution, the allowed exceptions and limitations, and the enforcement methods and practices.
- **To ensure an adequate level of remuneration and compensation of authors and performers.**

More than a decade down the road, it is fair to state that the first objective has largely been achieved, with the other objectives having only been partially achieved, and in some instances, arguably not achieved at all. The InfoSoc Directive managed to introduce, at least partially and not without exceptions,³⁰² the three-step test into the legal system of the EU Member States, and led to a very broad definition of intellectual property rights coupled with the effective endorsement of TPMs as a viable way to enforce copyright, at the same time enabling a system of copyright protection through the prosecution of actors that circumvent TPMs.

The same cannot be said for the other objectives, however. First, while rights were defined very broadly in the InfoSoc, this is by itself not a guarantee that protection will be stronger.

³⁰² For instance, whereas in some Member States the three-step test is recognised as an instrument in judicial revisions of the copyright law, in others it is addressed to the legislator only and cannot be used by courts. The adoption of the ‘new public’ criterion for hyperlinking by the CJEU in both the *Svensson* and *Bestwater International* cases represents another example of inconsistencies with international copyright law.

There are three essential elements to the protection of a property right: i) the scope of the protection; ii) the mode of protection (property rules, liability rules); and iii) the effectiveness of enforcement. **In the case of the InfoSoc Directive, the weak part of the protection system envisaged by the EU legislator was, without doubt enforcement, compounded by an excessive reliance on TPMs that in the end did not develop into the predominant approach for protecting online content**, contrary to expectations when the InfoSoc Directive was first enacted. This led to a situation in which the remaining enforcement option in the InfoSoc Directive was Article 8(3), which provides for the possibility of filing injunctions against online intermediaries for the takedown of infringing content from their networks. This remedy, however, ended up being inconsistent with the ‘mere conduit’ principle established in Articles 12-15 of the 2000 e-Commerce Directive, and was gradually marginalised in particular due to difficulties in access to justice and in identifying infringers. Member States have then gradually relied on other methods, including regulations based on administrative remedies (e.g. HADOPI) and codes of conduct (e.g. BREIN). All in all, the level of protection for copyright holders today cannot be considered high enough, which in turn leads to the conclusion that the overall objective to strengthen copyright protection was not achieved, and even less so if one looks at the original remedies envisaged by the InfoSoc Directive to protect copyright in the online world.

Likewise, it is possible to conclude that the objective of reducing fragmentation in the copyright regimes of the Member States was not fully achieved. This is due to a number of factors. First and foremost, as we already noted, despite the fact that the legal basis of the InfoSoc Directive was rooted in Article 114 TFEU (then Article 95 TEC), the Internal Market goal of the InfoSoc ended up being subordinated to the necessity of adapting EU legislation to reflect the WIPO treaties, and to strengthening copyright protection: as a result, the EU today is still characterised by 28 different copyright systems. To be sure, some progress was made in that exceptions and limitations were limited in number: however, most of them have remained optional, and fragmentation was only partly avoided by the decisions provided by the CJEU in recent years. As we have shown in Part II, Section 2 above, **the implementation and scope of exceptions and limitations in a selected number of Member States portrays a widely fragmented picture, which still harms both copyright holders and end-users.**

Finally, it is widely recognised that **the InfoSoc Directive was not successful in securing an adequate level of remuneration and compensation for the majority of authors and performers.** Not only was the Directive largely silent as regards possible means of achieving this goal; the re-intermediation observed in most content markets has led to the emergence of new, powerful online intermediaries, who represent necessary interlocutors for right-holders. The balance of power between authors and performers on the one hand and distributors on the other hand is such that reliance on market forces for the determination of a fair remuneration and compensation is likely to be a desirable choice only for those ‘happy few’ whose works enjoy a significant degree of success; the vast majority likely to be under-remunerated.

To sum up, only one out of the four initial objectives of the InfoSoc Directive can be considered achieved. A remaining issue is whether subsequent legislation has remedied this underachievement. Without any doubt, IPRED does not seem to have significantly contributed to the effectiveness of copyright protection online: if anything, its Article 3 has created a constraint for the application of aggressive injunctions and the imposition of filtering techniques to ISPs and other online intermediaries. Some of the recent legislation adopted a more ‘paternalistic’ approach, which aimed at securing that a minimum share of

the revenues be attributed to authors and performers, but this is only a small exception to the rule, i.e. reliance on market forces and freedom of contract in the determination of the remuneration and compensation of authors and performers. And while the CJEU has certainly played a major role in trying to promote the consistent interpretation of main rights and exceptions provided for by EU copyright legislation, its role has become very complex and controversial over time.

2.2 How efficient is the present EU copyright framework structure?

Concerning the efficiency of the intervention, there are serious doubts about cost-effectiveness, where the assessment is negative overall, since the level of effectiveness was found to be extremely low in the previous Section. Another important aspect is that the **InfoSoc Directive has not solved the problem of having to negotiate licences under 28 different legal regimes, and has created a situation in which costs borne by consumers for the remuneration and compensation of artists (e.g. through levies) are significantly diverging across Europe.** As already mentioned, a recent study estimated that commercial users that provide services in more than one country and offer more than one million titles face transaction costs of up to €260,000 per year and require about six employees to deal with licensing issues; in particular, the identification of relevant right-holders may require up to six months and negotiations to clear rights may take up to two years. This costly and bureaucratic process, in a context that is still dominated by micro-enterprises, might be considered as a serious shortfall on the legislative objectives of EU copyright law. Furthermore, **the failure of Member States to implement a consistent set of copyright exceptions and limitations, at least for those that have a significant impact on cross-border activities, has also led to a system that is inefficient for specific categories of users, affecting research and innovation in particular, namely the viability of new products and services that could target the whole EU Internal Market (e.g. social networks).**

But even more than the costs, it is the benefits side that deserves careful consideration. **The current *acquis* on copyright seems to have secured very few benefits for authors and performers and end-users,** for a variety of reasons (ineffectiveness of enforcement, absence of provisions on fair remuneration and compensation, technological development that deviated from the use of TPMs, availability of technical measures to circumvent copyright protection without incurring liability). This means that, **as things stand, the InfoSoc Directive and related legislation are, when taken together, limited in terms of their measurable general positive effect on industry and consumers, and lack overall efficiency** (see Section 2.5.2 below for more details).

2.3 On the effectiveness of monitoring and evaluation

2.3.1 *Have the existing implementation and monitoring tools been sufficient?*

Policymakers can learn from the evolution of the market if they make use of suitable monitoring and evaluation arrangements throughout the life of a given piece of legislation. **An emerging way of securing this type of 'maintenance' of the legal rules is to select adequate indicators for monitoring and evaluation already when the piece of legislation is being adopted, and selecting a suitable time frame for evaluation (typically four to five years from implementation).** This did not occur for the InfoSoc Directive, which was adopted before the European Commission started introducing these practices in its impact

assessments (introduced as of 1 January 2003). Another, increasingly used method of monitoring and evaluating the effectiveness, efficiency, relevance, coherence and EU added value of existing legislation, especially when it comes to enforcement, is **the setting up of specific cross-country groups or a dedicated agencies in charge of producing implementation reports** (e.g. in the case of e-communications, the creation of national regulatory authorities, the ERG and later BEREC has greatly facilitated the comparison of implementation practices in Member States). **But also in this case, this did not happen with the InfoSoc Directive.** In the case of copyright the European Commission has limited itself to the release of two implementation reports, in 2004 (but in this case without covering the InfoSoc Directive) and in 2007.

2.3.2 *Is the available evaluation work on the Copyright Directive sufficient?*

As a result, and as already observed, today there is a remarkable lack of data on a number of important aspects related to the effectiveness and efficiency of the InfoSoc Directive. These include data on the allocation of revenues along the value chain in different sectors, on the relative diffusion of legally consumed versus infringing content, on the effectiveness and diffusion of TPMs, and on many other aspects relevant to the effectiveness of the copyright *acquis*.

A lot of work has been done on the evaluation of the InfoSoc Directive. The European Commission has relied on a large number of studies dedicated to many aspects of the Directive. These, altogether, created a large information basis for the analysis of the impact of specific rules in Member States, including the impact of diverging implementation and interpretation of optional exceptions and limitations.

As a result, it is possible to observe that despite the relatively large amount of resources spent in collecting information on the implementation of the InfoSoc Directive, little has been done to collect data on the actual effects and impacts of the EU *acquis* on copyright. A few studies have focused on specific sectors, with a view to assessing transaction costs and other costs generated by the fragmentation of existing legislation, but all in all it is very difficult to explore the impact of re-intermediation on the redistribution of revenues along the value chain in a number of sectors. In this respect, the recently launched Fitness Check on the creative content sector (DG GROW) and the sectoral inquiry into the e-commerce sector (DG COMP) are likely to shed more light on the impact of this process on the sustainability of existing business models, as well as on incentives to engage in creative content creation in the years to come.

2.4 On implementation gaps

2.4.1 *'Internal' coherence: what are the main gaps and fragmentation in the application of the existing EU InfoSoc Directive and related broader framework?*

The 'internal coherence' criterion refers to the degree of coherence between the various legal instruments that compose the EU legal framework on copyright. This is different from "effectiveness", since it does not entail any assessment of the extent to which the legal rules achieve their intended objectives.

The major gaps that emerge from our analysis are related to:

- **absence of clarity** as regards the compatibility of the InfoSoc Directive and IPRED with other legislation, most notably on fundamental rights, data protection, e-commerce;
- **absence of a clear legal framework for the remuneration and compensation of authors and performers**, due to the absence of clear provisions in the InfoSoc Directive;
- **uncertainty as regards the responsibility of online intermediaries**, which have today become central in the distribution of content online, and who are increasingly able to monitor traffic flowing through their servers;
- **absence of clear rules on geo-blocking practices**, characterised by a sound distinction between practices that respond to a lawful and legitimate business need, and practices that should be considered as discriminatory and detrimental to end-users (e.g. the deliberate geo-blocking of service portability);
- **uncertainty over the applicability of private international law** such as on which criteria apply to the determination of the applicable law in the case of copyright infringements occurring online;³⁰³
- **uncertainty as regards the applicability of the exhaustion principle** to making content available on intangible media, in particular for what concerns borderline cases such as 'download-to-own' (see the *UsedSoft* decision and, to some extent, the *Premier League* decisions of the CJEU);
- **lack of flexibility and adaptability to new uses** (e.g. mass digitisation, text and data mining, e-lending, e-learning, UGC);
- **lack of clarity on the implementation of specific exceptions** (e.g. the exception covering parody, caricature, and pastiche, the exceptions for the purpose of libraries and similar institutions);
- **lack of clear rules on access to justice and collection of evidence** to be used in civil proceedings.

The main sources of fragmentation are summarised below.

- **Divergent definitions on key aspects of copyright law**, including the definition of originality (elaborated by EU case law and based on the 'author's intellectual creation standard'); the definition of derivative works/transformational uses (left to Member States' discretion and increasingly central in the digital environment); the authorship of copyrighted works (left to Member States' discretion and with potential impact on both the demand and supply side of the Internal Market).
- **Divergent implementation and interpretation of exceptions and limitations** across EU Member States, with some countries now even introducing new exceptions not originally envisaged by the InfoSoc Directive. For example, as far as text and data mining is concerned, UK law allows researchers to copy any copyrighted works for the purpose of computational analysis if they have already accessed the copyright work lawfully,

³⁰³ Interestingly, on the assumption that a copyright enforcement action can be brought in each Member State where the infringed work can be accessed, the 'accessibility' criterion recently selected by the CJEU paves the way for a multiplication of courts and applicable national rules.

without having to obtain additional permission to make the necessary copies from the copyright holder.

- **Limited consideration of the cross-border effects of specific exceptions.** These include *inter alia* the already-mentioned exceptions for private copying, but also the exceptions for teaching and scientific research, and also in relation to certain cases concerning the freedom of panorama exception.
- **Divergent enforcement practices in Member States**, with some countries relying on administrative procedures to counter infringing behaviour, and others relying on codes of conduct and other voluntary measures, and others relying on neither of the two.
- **Different approaches to the remuneration and compensation of authors through private copying levies.** As we already observed, the disparate national treatment of exceptions, as well as the related levy systems, have so far raised significant barriers to and created distortions of cross-border trade within the Internal Market.

2.4.2 **What are the economic and other quantified costs incurred by citizens, society and stakeholders due to these gaps and fragmentation?**

There are several sources of costs that can be identified in the case at hand.

- While authors often manage to reduce their transaction costs by relying on collective rights organisations, distributors face in some circumstances **direct costs in the form of substantive compliance costs and transaction costs** due to the need to negotiate licenses on a country-by-country basis with one or more counterparties. The absence of a one-stop shop for licensing in specific sectors is clearly an additional cost that can, over time, discourage creation and circulation of content.
- Against this background, **limited content availability** generated by the territoriality of copyright offerings generates costs (better, foregone opportunities) for end-users: the same applies for losses of consumer surplus generated by limitation of the portability of content access across borders. Portability issues may potentially affect about 5 million Europeans per day (Plum Consulting, 2012). In addition, in the audiovisual sector up to 120 million EU citizens are potentially interested in content available in another Member State, and long-term migrants (13 million European) generate a potential demand for subscription-based cross-border services of between €760 million to €1.61 billion per year (Plum Consulting, 2012). The limited cross-border availability of content can add **costs for end-users in the form of higher retail prices**. This form of market inefficiency limits price competition and as such leads to suboptimal quantities sold on the market.
- Another source of **direct costs is the existing uncertainty** about the rights and obligations of different types of industry players, as well as over-enforcement mechanisms.
- **Inefficiency is generated by a confusing and contradictory interpretation of certain exceptions and limitations, as well as by the interaction between the use of TPMs and available exceptions and limitations.** In particular, to the extent that the current situation leads to the impossibility for libraries to fully engage in e-lending, or for researchers to engage in productive data processing for research and teaching purposes, this will lead to foregone benefits for society as a whole.

- In the era of big data, data-driven innovation and new business models, the **absence of legal certainty on text and data mining can also be hugely detrimental** to the development of new offers and services, which in turn limits benefits to society through a direct negative impact on so-called dynamic efficiency (e.g. innovation and the development of new welfare-enhancing products and services).
- **Furthermore, the lack of a level playing field between 'traditional' distributors and online intermediaries** (especially in the audiovisual sector) can lead to insufficient incentives for the creation of content from the outset, which in turn would translate into a lack of dynamic efficiency. This problem can also account for a lack of adequate funding and exposure for 'niche' content.
- **The existence of dominant positions of specific players, if proven, could lead to unequal bargaining strength and consequently undesirable welfare losses** in the contracts concluded between authors and intermediaries.
- Finally, **the absence of a fully integrated Single Market for creative content dramatically reduces the value end-users derive from Internet access**. This is a direct corollary of the so-called 'Metcalfe's law', which postulates that in an end-to-end network, the value of the network increases exponentially as the number of end-users increases linearly. Likewise, the richer the amount of content that can be circulated among all users in the EU, the greater the value of the EU Digital Single Market as a whole.

It is difficult to estimate these costs in terms of GDP. However, available data sets show that a fully integrated Digital Single Market could contribute between €260 billion and €520 billion to European GDP (European Parliamentary Research Service, 2014)). The long term growth impact of the digital reform effort already undertaken has been estimated to be at above 1%, and further efforts in line with the Digital Agenda for Europe targets are expected to generate an additional 2.1% of GDP growth (Lorenzani & Varga, 2014).

2.4.3 What are the existing gaps that could be addressed through better application and implementation of the existing Directive and wider legislative framework?

Among the main gaps we identified in Section 2.4.1 above, only a narrow subset could be partly filled if the existing *acquis* were clarified and made more consistent both in terms of interpretation and implementation. This is perhaps the case for the compatibility of the InfoSoc and IPRED Directives with other legislation, most notably on fundamental rights, data protection and e-commerce, for which non-legislative documents and clarification efforts could probably address some outstanding problems without requiring legislative reform. Similarly, the lack of flexibility and adaptability of exceptions and limitations to new uses (mass digitisation, text and data mining, e-lending, e-learning, UGC) could be partly remedied if, for example, text and data mining were directly included in the scope of the mandatory exception for transient copies. And the lack of clarity on the implementation of specific exceptions (e.g. the exception covering parody, caricature and pastiche) could be remedied, at least partly, through more coordinated and consistent implementation.

That said, there are many gaps that would require legislative intervention. These include the absence of a clear legal framework for the remuneration and compensation of authors and performers, which is due to the absence of clear provisions in the InfoSoc Directive; *the*

existing uncertainty as regards the responsibility of online intermediaries; the lack of clear rules on geo-blocking practices; the uncertainty as regards private international law aspects such as the criteria to apply for the determination of the applicable law in case of copyright infringements occurring online; the partial uncertainty as regards the applicability of the exhaustion principle to the making available of 'download-to-own' content on intangible media; and the lack of clear rules on access to justice and collection of evidence to be used in civil proceedings. As apparent from the ongoing debate on copyright reform at the EU level, all these are issues that only legislative intervention could begin to remedy effectively.

2.5 Relevance

2.5.1 *To what extent has the EU legislative framework been able to keep up with technological developments, in particular with the digital transformation?*

As already clarified throughout this report, **the EU legislative framework, and in particular the InfoSoc Directive, can be considered increasingly out-dated in light of technological developments**: not only are the exceptions and limitations included in the closed list under Article 5 now increasingly misaligned with technological developments; they also potentially limit the development of welfare-enhancing uses of information. Moreover, enforcement mechanisms outlined in the InfoSoc and IPRED Directives have been largely overtaken by technology, and countries today hardly ever rely on civil litigation to enforce copyright laws.

Most notably, the lack of certainty over the application of a number of exceptions, including the one on text and data mining, represents an outstanding oversight of the EU *acquis* on copyright. For example, when it comes to libraries and similar institutions the current set of exceptions and limitations does not cover e-lending and hamper mass digitisation projects, let alone new options for the 'online' consultation of digitised content. Similarly, unevenly implemented exceptions for teaching and research potentially impinge on the provision of pan-European e-learning services as well as on the creation of a truly integrated European Research Area. The creation of UGC and more simply the sharing of pictures on social networks encounter substantial obstacles in the fragmentation and uncertainty of the current EU copyright framework.

Interestingly, a recent report for the European Commission clearly highlights that text and data mining "is useful to researchers of all kinds, from historians to medical experts, and its methods are relevant to organisations throughout the public and private sectors". In addition, text and data mining lowers research costs, and as such can lower barriers to entry in a number of markets for small and medium-sized enterprises and micro-enterprises. Europe's uncertain legal treatment of text and data mining is even more serious in light of the emerging automation of service industries (automation of thinking), as well as the widespread use of data-driven analytics in the Internet of Things and its industrial applications (Industry 4.0). The above-mentioned report confirms that European researchers "may be falling behind, especially with regard to researchers in the United States" in this field, and that such a lag "results, at least in part, from the nature of Europe's laws with regard to copyright, database protection and, perhaps increasingly, data privacy" (European Commission, 2014).

In summary, the relevance of the overall approach adopted by the InfoSoc Directive and its subsequent legislation deserves urgent and careful adaptation to address the problems and gaps identified in the scope of the rights and exceptions, the existing emphasis on

'copy' rights rather than authorship and also to address the insufficiencies concerning enforcement.

2.5.2 What are the likely efficiency losses associated with the current inadequacy of the InfoSoc Directive?

Section 2.2 above already identified a number of inefficiencies associated with the current inadequacy of the InfoSoc Directive. Generally speaking, such inefficiencies can be divided into the following categories:

- **Productive inefficiency.** Current legislation in the field of copyright increases costs for content producers and distributors, and also limits the availability of content for end-users. In particular, inefficient enforcement limits incentives to produce and distribute new valuable content for right-holders. In addition, current rules do not incentivise those users who would make use of such content to create UGC or to engage in text and data mining based activities. This means that the overall content production is hampered by an unnecessarily complex and restrictive *acquis*, and this might explain differences in the relative performance of the EU *vis-à-vis* its global competitors in specific areas (e.g. as reported by the recent Report on a Commission High Level Group, in the area of text and data mining, in which European researchers seem to be lagging behind their US counterparts, who reportedly benefited from the existence of the more flexible 'fair use' doctrine as opposed to the more rigid and still unevenly implemented set of exceptions and limitations existing in the EU-28). Although any attempt to quantify the relative weight of the InfoSoc Directive and related legislation on Europe's digital content production are necessarily doomed to inaccuracy, there are good reasons to believe that both the production of knowledge (e.g. through exceptions for teaching purposes and text and data mining) and its dissemination (e.g. through clearer and more future-proof rules on panorama exceptions, e-lending) would greatly benefit from the availability of more up-to-date rules, which would couple greater effectiveness in enforcement with more user-friendly rules on content consumption, reuse and transformation.
- **Allocative inefficiency.** This effect refers to the inefficient allocation of resources through the market mechanism. As already mentioned throughout the report, legal fragmentation and limits to the availability of content in the Internal Market fundamentally reduce the value of the Internet for European end-users, because the end-to-end design of the Internet (i.e., the ability of each user to communicate and exchange files with every other user) cannot be fully exploited to share and access all sorts of content. This is, to some extent, also a violation of basic users' rights as typically included in net neutrality legislation, normally aimed at preserving users' possibility to access any content, any time, through any device and anywhere (and thus also, inevitably, from any Member State). The untapped consumer and producer surplus brought on by the lack of availability of content and by widespread copyright infringement account for reductions in allocative efficiency that reverberate on the value of digital content available online, and hence also on the value of Internet access for end-users. Nevertheless, this does not necessarily lead to the conclusion that all price discrimination in the Single Market should be prohibited: as noted throughout this Study, there are several instances of price-discrimination, even those based on geo-blocking practices, which can be considered as welfare-enhancing, not welfare-reducing. The difficulty in the reform exercise consists precisely in singling out welfare-reducing practices and curbing them while treating pro-

competitive, welfare-enhancing forms of price discrimination as perfectly viable business solutions.

- **Dynamic inefficiency.** This type of inefficiency refers to the negative impact that an inadequate copyright *acquis* can exert on innovation and the production of new content. Again, typical examples are the dissuasive effects of piracy and ineffective enforcement, and also the impact of current uncertainty and existing legal constraints on fast growing new forms of content production such as UGC and text and data mining based activities. Crucially, the reduction in quantity and quality of content available to end-users can also lead to a reduction in the demand for improved Internet connectivity and bandwidth, and could thus also end up stifling incentives to deploy broadband networks due to a sustained slowdown in demand from end-users. As a matter of fact, greater incentives to deploy ultra-high speed broadband have been attributed by experts not only to a more favourable regulatory treatment (e.g. the absence of network access obligations for broadband networks that characterises the Federal Communications Commission regulatory approach since 2003), but also to greater user demand triggered by greater availability of content of interest for end-users.

Finally, and even more important, it is undeniable that, whatever the negative impact associated with the sources of inefficiency identified, it is only likely to increase over time as the Internet permeates a growing number of activities and carries an even larger share of copyrighted creative content. As already mentioned in the previous Sections, the growth of Internet content markets has been consistently stronger than that of traditional media markets in recent years, and the trend is likely to continue in the coming years. The advent of the Internet of Things and the growing deployment of ultra-fast broadband networks is expected to further boost this trend, leading Internet-based content dissemination, production and consumption to dominate the market in the years to come.

3. Summary table

The table below summarises the results of our ex post evaluation on the InfoSoc Directive and its related instruments and is based on four key criteria, namely effectiveness, efficiency, coherence and relevance. Table 5 provides a score from • (lowest) to ••••• (highest) to each evaluation criterion, while the cell on the right end of the table includes a brief illustration of the motivation behind the decision to attribute a specific score.

Table 5. Summary ex-post evaluation

Criterion	Score (1 to 5)	Motivation
Effectiveness	••	<p>Of the four main operational goals pursued by the InfoSoc, only one can be said to have been fully achieved (alignment with international legislation), and even in that case there are exceptions and divergences (e.g. on the three-step test, on the ‘new public’ criterion for hyperlinking).</p> <p>The goal to strengthen copyright and broaden its scope fell short of identifying a suitable enforcement framework, and ended up colliding with equally important policy principles.</p> <p>The specific goal to achieve a fully integrated Internal Market was not fully pursued by the InfoSoc, and this is reflected in the many</p>

Criterion	Score (1 to 5)	Motivation
		<p>areas of legislation in which no harmonisation was achieved, from the basic definition of the right (e.g. standard of originality) to the adoption and interpretation of exceptions and limitations.</p> <p>Competitiveness-related goals were hampered by the rigidity and uncertainty generated by the system, especially for what concerns exceptions on text and data mining and the overall framework for UGC.</p> <p>The goal of achieving a fair remuneration and compensation for authors and performers was stated but not actively pursued by any specific provision in the InfoSoc Directive and also in most related legislation.</p>
Efficiency	•	<p>Not only the copyright framework is inefficient because it does not achieve its goals in the first place (i.e. lack of intended benefits means very low cost-effectiveness). The framework generates costs that can exert an inhibiting factor for content production, distribution and creation. Specific sources of inefficiency include transaction costs (e.g. having to negotiate licences under 28 different legal regimes) and fragmentation costs (e.g. divergences in the scope of legislation and the failure to implement a consistent set of copyright exceptions and limitations, at least for those that have a significant impact on cross-border activities and create inefficiencies in particular in the case of teaching and research, but also for the viability of new products and services such as social networks, streaming services, 'online' libraries, etc.).</p> <p>More generally, inefficiency takes the form of:</p> <ul style="list-style-type: none"> - Productive inefficiency. Current legislation increases costs for content producers and distributors, and limits availability of content for end-users. Inefficient enforcement limits incentives to produce and distribute new valuable content. Current rules do not incentivise users who would make use of such content to create UGC or to engage in text and data mining based activities. - Allocative inefficiency. The foregone consumer and producer surplus generated by lack of availability of content and by widespread copyright infringement, respectively, constitute reductions of allocative efficiency that reverberate on the value of digital content available online, and hence also on the value of Internet access for end-users. - Dynamic inefficiency. Besides hampering production and consumption in the first place, the reduction in quantity and quality of content available to end-users reverberates on the competitiveness of Europe's Internet markets as a whole. For example, it can lead to lower demand for Internet connectivity, and could therefore end up stifling incentives to deploy broadband networks. <p>Some instruments, such as the Directives on Orphan Works and Collective Rights Management, are too recent to evaluate in full.</p>
Coherence	•••	While the InfoSoc has achieved an unprecedented level of coherence

Criterion	Score (1 to 5)	Motivation
		<p>in the European Union's legislation on copyright and has been complemented by additional instruments (e.g. Orphan Works and Collective Rights Management Directives), several problems remain. In terms of internal coherence, gaps and sources of fragmentation are numerous and range from the absence of common basic definitions to the wide variety of practices in the areas of exceptions and limitations, to the even wider variety of enforcement approaches. Problems have emerged over time also in terms of external coherence: the enforcement provisions contained in the InfoSoc Directive and IPRED have gradually collided with other, equally important EU legal provisions, e.g. the protection of fundamental rights (privacy, freedom to run a business) and the 'mere conduit' principles contained in the e-Commerce Directive.</p>
Relevance	••	<p>Despite its overall importance and relevance as a domain of legislation in the field of content and media, the EU copyright framework is increasingly outdated in light of technological developments. Exceptions and limitations are increasingly misaligned with technological developments, and potentially limit the development of welfare-enhancing uses of information. Enforcement modes foreseen in the InfoSoc Directive and IPRED have been largely surpassed by technology, and countries hardly rely on civil litigation today to enforce copyright laws. Most notably, the absence of certainty as regards a number of exceptions, including the one on text and data mining, is an important gap in the EU <i>acquis</i> on copyright. In summary, the relevance of the overall approach adopted by the InfoSoc Directive and its subsequent legislation would deserve a careful, but urgent, update.</p>

Selected References and Case Law

Main references

- ADE (2010), *Evaluation of the Intellectual Property Rights Enforcement Strategy in Third Countries*, Final Report, Volume I, European Commission.
- AEPO-ARTIS – Association of European Performers' Organisation (2009), *Performers' Rights in European Legislation: Situation and Elements for Improvement - Updated Version*, December, Brussels, Belgium.
- Anderson, C. (2006), *The Long Tail: Why the future of business is selling less of more*, Hyperion Books, New York.
- Barron, A. (2011), "Graduated response à l'Anglaise': online copyright infringement and the Digital Economy Act 2010", *Journal of Media Law*, 3(2), p. 305.
- BOP Consulting and DotEcon (2015), *International Report on the Comparison of Approaches to Online Copyright Infringement: Final Report*, for the UK Intellectual Property Office.
- Borghi, M. and Karapapa, S. (2011), "Non-display uses of copyright works: Google Books and beyond", *Queen Mary Journal of Intellectual Property*, Vol. 1, No. 1, April.
- Borghi, M. and Karapapa, S. (2013), *Copyright and Mass Digitization: A Cross-Jurisdictional Perspective*, Oxford University Press, Oxford.
- Charles River Associates (2014), *Economic Analysis of the Territoriality of the Making Available Right in the EU*, for the European Commission.
- Clark, G. and Philips, A. (2014), *Inside Book Publishing*, Routledge, London.
- Cohen Jehoram, T. (2001), "European Copyright Law – Even More Horizontal", 32, *IIC*, p. 532.
- De Witte, B. (2006), "Non-market values in internal market legislation", in Shuibhne (ed.), *Regulating the Internal Market*, Edward Elgar, Cheltenham, p. 61.
- De Wolf & Partners (2013), *Study on The Application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society (the InfoSoc Directive)*, for the European Commission.
- Derclayes, E. (eds.) (2009) *Research Handbook on the Future of EU Copyright*, Edward Elgar, Cheltenham.
- Dusollier, S. (2005), "Technology as an Imperative for Regulating Copyright: From the Public Exploitation to the Private Use of the Work", *European Intellectual Property Review*, 27(6), p. 201.
- Ernst & Young (2014), *Creating growth measuring cultural and creative markets in the EU*, Report for GESAC.
- European Commission (2014), *Report on 'Standardisation in the area of innovation and technological development, notably in the field of Text and Data Mining'*, Report from the Expert Group, European Commission.
- European Parliamentary Research Service (2014), *Mapping the Cost of Non-Europe 2014-2019*, European Added Value Unit, European Parliament, Brussels.

- Ginsburg, J. (1995), "Putting Cars on the 'Information Superhighways': Authors, Exploiters and Copyrights in Cyberspace", 95, *Columbia Law Review*, p. 1466.
- Ginsburg, J. (2000), From Having Copies to Experiencing Works: The Development of an Access Right in U.S. Copyright Law, Columbia Law School, Public Law and Legal Theory Working Group.
- Goldstein, P. (1994), *Copyright's Highway: The Law and Lore of Copyright from Gutenberg to the Celestial Jukebox*, Hill & Wang, New York, NY.
- Gomulkiewicz, R.W. (1998), "The License Is the Product: Comments on the Promise of Article 2B for Software and Information Licensing", *Berkeley Tech. L. J.*, Vol. 13, Issue 3, p. 891.
- Griffiths, J. (2014), "The Role of the Court of Justice in the Development of European Union Copyright Law", in Stamatoudi, I. and Torremans, P. (eds.) (2014), *EU Copyright Law. A Commentary*, *Elgar Commentaries series*.
- Handke, C. and Towse, R. (2007), "Economics of Copyright Collectives", *International Review of Intellectual Property and Competition Law*, Vol. 38, No. 8, p. 937.
- Hargreaves, I. (2011), *Digital Opportunity. A Review of Intellectual Property and Growth*, UK Intellectual Property Office, London.
- Hargreaves, I. and Hugenholtz, B. (2013), "Copyright Reform for Growth and Jobs: Modernising the European Copyright Framework", *Lisbon Council Policy Brief*, Issue 13.
- Hart, M. (2002), "The Copyright in the Information Society Directive: An Overview", 24 *EIPR* 2, 58, p. 59.
- Helberger, N. and Hugenholtz, P.B. (2007), "No Place Like Home for Making a Copy: Private copying in European copyright law and consumer law", *Berkeley Technology Law Journal*, Vol. 22, No. 3, p. 1061.
- Hugenholtz, P.B. (2012), *Codes of Conduct and Copyright Enforcement in Cyberspace*, Amsterdam Law School Research Paper No. 2012-41, Institute for Information Law Research Paper No. 2012-35.
- Hugenholtz, P.B. (2000a), "Caching and Copyright: The Right of Temporary Copying", *European Intellectual Property Review*, 22(11), p. 482.
- Hugenholtz, P.B. (2000b), "Why the Copyright Directive is Unimportant, and Possibly Invalid", *European Intellectual Property Review*, 22(11), p. 499.
- Hugenholtz, P.B. and Senftleben, M. (2011), "Fair Use in Europe: The Search of Flexibilities", *Institute for Information Law (IViR)*, Vrije Universiteit, Amsterdam.
- Hugenholtz, P.B. (1996), "Adapting copyright to the information superhighway", in Hugenholtz, P.B. (ed.), *The Future of Copyright in a Digital Environment*, Kluwer Law International, The Hague.
- Hughes, J. (2005), "On the Logic of Suing One's Customers and the Dilemma of Infringement-Based Business Models", *Cardozo Arts & Entertainment Law Journal*, Vol. 20, p. 725.
- Husovec, M. (2012), "Injunctions against Innocent Third Parties: The case of Website Blocking", 4 *JIPITEC*, 2, para. 116, see at <http://www.jipitec.eu/issues/jipitec-4-2-2013/3745/husovec.pdf>.

- Hussein FCMI, S.N. and Abdul Hadi Qais, A.H. (2013), "The Impact Of Using Security Protocols In Dedicated Private Network And Virtual Private Network", *International Journal of Scientific and Technology Research*, Vol. 2, Issue 11, p. 1.
- IVIR - Institute for Information Law, University of Amsterdam (2007), *Study on the Implementation and Effect in the Member States' Laws of Directive 2001/29/EC on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society*, Final Report for the European Commission.
- KEA and Vrije Universiteit Brussel (2012), "Licensing music works and transaction costs in Europe".
- KEA and MINES Paris Tech (2010), "Multi-Territory Licensing of Audiovisual Works in the European Union", European Commission.
- Koskinen-Olsson, T. and Muikku, J. (2014), *Direct Copyright Revenue Streams in Creative Industries in Finland an Evaluation*, Publication No. 31, Final Report, Finnish Copyright Institute.
- Kretschmer, M. (2005), "Artists' earnings and copyright: A review of British and German music industry data in the context of digital technologies", *First Monday*, Vol. 10, No. 1.
- Kretschmer, M. (2010), *Private Copying and Fair Compensation: An empirical study of copyright levies in Europe*, Study for the UK Intellectual Property Office.
- Kushnir, V. (2005), "Legal and Practical Aspects of Music Licensing for Motion Pictures", *Vanderbilt Journal of Entertainment and Technology Law*, Winter, p. 71.
- Labert et al. (2015), *The EU Public Interest Clinic and Wikimedia Present: Extending Freedom of Panorama in Europe*, HEC – NYU Clinic.
- Lessig, L. (1996), "The Zones of Cyberspace", *Stanford Law Review*, Vol. 48, No. 5, p. 1408.
- Leudijk, A. and Nieuwenhuis, O. (2012), *Statistical, Ecosystems and Competitiveness Analysis of the Media and Content Industries: The Music Industry*, JRC Technical Reports.
- Litman, J. (2005), "The Sony Paradox", *Case Western Reserve Law Review*, Vol. 55, No. 4, p. 917.
- Lorenzani, D. and Varga, J. (2014), *The Economic Impact of Digital Structural Reforms*, European Economy, Economic Paper No. 529, European Commission.
- Luchetta, G. (2013), *The Law and Economics of Intermediaries of Personal Information*, Working Paper available on SSRN at: <http://ssrn.com/abstract=2228358>.
- Manara, C. (2012), "Attacking the Money Supply to Fight Against Online Illegal Content?", EDHEC Business School.
- Margoni, T. (2014), "The digitisation of cultural heritage: originality, derivative works and (non) original photographs", *Institute for Information Law (IVIR)*, University of Amsterdam.
- Masnack, M. (2010), "Defining Success: Were the RIAA's Lawsuits a Success or Not?", *Techdirt*, June 7, 2010, <http://www.techdirt.com/articles/20100606/2308559704.shtml>.
- Mazziotti, G. (2008), *EU Digital Copyright Law and the End-User*, Springer, Berlin.
- Mazziotti, G. (2011), "New Licensing Models for Online Music Services in the European Union: From Collective to Customized Management", *Columbia Journal of Law and the Arts*, Volume 34(4), p. 757.

- Mazziotti, G. (2013), *Copyright in the EU Digital Single Market*, CEPS Report, Brussels.
- Minero, G. (2014), "The Term Directive", in Stamatoudi, I. and Torremans, P. (eds.), "EU Copyright Law: A Commentary", *Elgar Commentaries series*, p. 248.
- Oliver & Ohlbaum Associates (2013), *The Internet and the Creative Industries: Measuring Growth within a Changing Sector Ecology*, A report for Google.
- Oxera (2011), *Is there a case for copyright levies? An Economic impact analysis*, Report for Nokia.
- Picker, R. (2009), *Online Advertising, Identity and Privacy*, John M. Olin Law & Economics Working Paper No. 475.
- Plum Consulting (2012), *The economic potential of cross-border pay-to-view and listen audiovisual media services*, for the European Commission.
- Poort, J.P. and Leenheer, J. (2012), *File sharing 2@12: Downloading from illegal sources in the Netherlands*, IViR & CentERdata.
- RAND (2012), *Measuring IPR infringements in the internal market. Development of a new approach to estimating the impact of infringements on sales*.
- Ratliff, J. and Rubinfeld, D. (2010), "Online Advertising: Defining Relevant Markets", *Journal of Competition Law and Economics*, Vol. 6., No. 3., p. 653.
- RBB Economics and Value Partners (2009), *The benefits of territorial exclusivity in the European audio-visual industry*.
- Renda, A. (2011), *Law and Economics in the RIA World*, Intersentia, Amsterdam
- Ricolfi, M. (2002), *Comunicazione al pubblico e distribuzione*, Annali Italiani di Diritto d'Autore (AIDA).
- Rodríguez Pardo, J. (2003), *Copyright and Multimedia*, Kluwer Law International, The Hague.
- Rosati, E. (2011), "Originality in a work, or a work of originality: the effects of the Infopaq decision", *European Intellectual Property Review*, p. 746.
- Rudolph, J.W. (2005), *The Administration of Reprographic Rights and the Establishment and Role of Reproduction Rights Organizations*, WIPO National Seminar on Copyright, Related Rights, and Collective Management, WIPO/CR/KRT/05/6.
- SAA (2015), *SAA White Paper: Audiovisual authors' rights and remuneration in Europe*, Society of Audiovisual Authors (SAA).
- Simon, J.P. (2012a), *The Dynamics of the Media and Content Industries: A Synthesis*, JRC Scientific and Policy Reports.
- Simon, J.P. (2012b), *Changing Modes of Asset Management: IPR and Copyright in the Digital Age*, JRC Technical Reports.
- Simon, J.P. and de Prato, G. (2012), *Statistical, Ecosystems and Competitiveness Analysis of the Media and Content Industries: The Publishing Industry*, JRC Technical Reports.
- Strong, W.S. (2003), "The Legal Framework: Copyright & Trademark", in Kasdorf, W.E. (ed.), *The Columbia Guide to Digital Publishing*, Columbia University Press, New York.
- Taleb, N. (2007), *The Black Swan: The Impact of the Highly Improbable*, Random House, New York.

- Ullrich, H. (2003), "Legal Protection of Innovative Technologies: Property or Policy?", in Grandstrand, O. (ed.), *Economics, Law and Intellectual Property: Seeking Strategies for Research and Teaching in a Developing Field*, Kluwer Academic Publishers, Boston, p. 439.
- Ullrich, H. (2004), "Harmony and unity of European intellectual property protection", in Bently, L. and Vaver, D. (eds.) (2004), *Intellectual Property in the New Millennium: Essays in Honour of William R. Cornish*, Cambridge University Press, Cambridge, p. 20.
- Vinje, T. (2000), "Should We Begin Digging Copyright's Grave?", *EIPR*, Vol. 22, Issue 12, p. 551.
- Weatherill, S. (1997), *EC Consumer Law and Policy*, Longman, London & New York.
- Westkamp, G. (2007), *The Implementation of Directive 2001/29/EC in the Member States, Part II*, Queen Mary Intellectual Property Research Institute, London.
- Witten, I. and Frank, E. (2005), *Data Mining: Practical Machine Learning Tools and Techniques*, Elsevier, San Francisco.
- Xalabarder, R. (2014), "The Remunerated Statutory Limitation for News Aggregation and Search Engines Proposed by the Spanish government - Its Compliance with International and EU Law", *IN3 Working Paper Series*, Universitat Oberta de Catalunya.
- Younison (2010), *Transparency & Accountability in Collective Rights Management*, Facts and Figures, August.

Other references

- Barlow, J.P. (1994), "The Economy of Ideas: Selling Wine without Bottles", 2.03 *Wired* 84.
- Digital Citizen Alliance (2014), "Good Money Gone Bad", February, available at: <http://media.digitalcitizensactionalliance.org/314A5A5A9ABBBBC5E3BD824CF47C46EF4B9D3A76/4af7db7f-03e7-49cb-aeb8-ad0671a4e1c7.pdf>.
- Amazon Website, "Take Control with Self-Publishing", available at: <http://www.amazon.com/gp/seller-account/mm-summary-page.html?topic=200260520>, last accessed June 2015.
- Edxus Group (2013), "Digitalisation of Education will Result in Fifteen fold Growth for e-Learning Market over the next decade", available at: <http://edxusgroup.com/digitalisation-of-education-will-result-in-fifteen-fold-growth-for-e-learning-market-over-the-next-decade/>.
- Jobs, S., "Thoughts on Music", at <http://www.apple.com/hotnews/thoughtsonmusic/>.
- Madiaga, T. (2015), "Digital Single Market and geo-blocking", European Parliamentary Research Service, available at: <http://epthinktank.eu/2015/05/13/digital-single-market-and-geo-blocking/>.
- Masnack, M. (2010), "RIAA Spent \$17.6 Million in Lawsuits ... To Get \$391,000 in Settlements?", *Techdirt*, available at: <http://www.techdirt.com/articles/20100713/17400810200.shtml>.
- McCreevy, C. (European Commissioner for Internal Market and Services) (2005), 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.

Press Association (2015), "Music groups win court battle over private copying of CDs", *The Guardian*, Friday 19 June, available at:

<http://www.theguardian.com/business/2015/jun/19/music-groups-win-court-battle-private-copying-cds>

Steadman, I. (2013), "Icelandic court declares WikiLeaks donation ban 'unlawful'", *Wired*, available at: www.wired.co.uk/news/archive/2013-04/26/wikileaks-wins-visa-case.

VICE News (2015), "Why Artists Don't Make Money - The Business of Life (Episode 3)", available at: <http://news.vice.com/video/the-value-of-creativity-the-business-of-life-episode-3>, last accessed June 2015.

Weatherley, M. (MP Intellectual Property Adviser to the Prime Minister) (2014), "'Follow The Money': Financial Options To Assist In The Battle Against Online IP Piracy", Discussion Paper. Available at:

http://www.olswang.com/media/48204227/follow_the_money_financial_options_to_assist_in_the_battle_against_online_ip_piracy.pdf

Official documents

Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994. Available at: https://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm

Belgian Law on Copyright and Neighboring Rights of June 30, 1994, as amended by the Law of April 3, 1995.

Berne Convention for the Protection of Literary and Artistic Works, lastly amended on 28 September 1979 available at: http://www.wipo.int/treaties/en/text.jsp?file_id=283698.

Commission of the European Communities, Commission Staff Working Paper on the review of the EC legal framework in the field of copyright and related rights, SEC(2004)995, Brussels.

Commission of the European Communities, Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, The Management of Copyright and Related Rights in the Internal Market, COM(2004)0261 final.

Commission of the European Communities, Competition: European Commission confirms sending a Statement of Objections against alleged territorial restrictions in on-line music sales to major record companies and Apple, Press releases, 3 April 2007, Brussels.

Commission of the European Communities, First evaluation of Directive 96/9/EC on the legal protection of databases, DG Internal Market and Services Working Paper, 12 December 2005.

- Commission of the European Communities, Green Paper on Copyright and the Challenge of Technology, COM(88)172 final.
- Commission of the European Communities, Green Paper. Copyright and Related Rights in the Information Society, Brussels, 19 July 1995, COM (95) 382 final.
- Commission Recommendation on collective cross-border management of copyright and related rights for legitimate online music services of 18 October 2005, OJ L 276, 21 October 2005.
- Commission Staff Working Document, Impact Assessment reforming cross-border collective management of copyright and related rights for legitimate online music services, Brussels 11 October 2005.
- Common Position (EC) 48/2000 of 28 September 2000, OJ C 344, 1 December 2000.
- Communication from the Commission of 20.11.1996, Follow-up to the Green Paper on Copyright and Related Rights in the Information Society, COM(96) 586 final.
- Communication from the Commission, A single market for intellectual property rights, COM(2011)287 final.
- Communication from the Commission, On content in the Digital Single Market, COM(2012)789 final.
- Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ L 346, 27 November 1992.
- Council Directive 93/83/EEC of 27 September 1993 on the co-ordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJ L 248, 6 October 1993.
- Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights, OJ L 290, 24 November 1993.
- Council of Europe, The European Convention on Human Rights, Rome, 4 November 1950, and its Five Protocols, Paris, 20 March 1952.
- Council Regulation (EC) 6/2002 of 12 December 2001 on Community designs, OJ L 3, 5 January 2002.
- Council Regulation (EC) 207/2009 of 26 February 2009 on the Community trade mark (replacing Council Regulation 40/94 of 20 December 1993), OJ L 78, 24 March 2009.
- Decision of the European Commission, CASE COMP/M.6456 Universal Music Group/EMI Music.
- DG INFSO and DG MARKT (2009), Creating Content in a European Digital Single Market: Challenges for the Future, A Reflection Document.
- 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, OJ L 178, 17 July 2000. (Referred to as 'Directive on e-Commerce Directive'.)
- 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 L 167, 22 June 2001. (Referred to as 'InfoSoc Directive')

Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art, OJ L 272, 13 October 2001.

Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities. (Referred to as 'Access Directive').

Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services, OJ L 337/37. (Referred to as 'Authorisation Directive').

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, OJ L201/37. (Referred to as 'e-Privacy Directive').

Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ L 195, 2 June 2004. (Referred to as 'IPRED').

Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376, 27 December 2006. (Referred to as 'Services Directive').

Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2008 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services. (Referred to as 'Framework Directive').

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, 5 May 2009 (which replaced Directive 91/250/EEC). (Referred to as 'Software Directive').

Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights, OJ L 265, 11 October 2011. (Referred to as 'Term Directive').

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, 27 October 2012. (Referred to as 'Orphan works Directive').

Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, OJ L 84, 20 March 2014.

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, 23 November 1995. (Referred to as 'Data protection Directive'.)

Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ L 077, 27 March 1996. (Referred to as 'Database Directive')

Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access, OJ, L 320, 28 November 1998.

- European Audiovisual Observatory (2014), Yearbook Online Premium Services.
- European Commission (2006), Commission Recommendation of 24 August 2006 on the Digitisation and Online Accessibility of Cultural Material and Digital Preservation, (2006/685/EC).
- European Commission (2007), Report to the Council, the European Parliament, and the Economic and Social Committee on the Application of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, Commission Staff Working Document, SEC(2007)1556.
- European Commission (2010), 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.
- European Commission (2010), Staff Working Paper accompanying the Commission Report on Application of Directive 2004/48/EC of the European Parliament and the Council of 29 April 2004 on the enforcement of intellectual property rights SEC(2010) 1589.
- European Commission (2011), 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.
- European Commission (2012), 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, SWD(2012)2014 final.
- European Commission (2013), Public Consultation on the Review of the EU Copyright Rules, Consultation Document, available at: http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/consultation-document_en.pdf.
- European Commission (2014), Press Release "Antitrust: Commission investigates restrictions affecting cross border provision of pay TV services," 13 January, available at: http://europa.eu/rapid/press-release_IP-14-15_en.htm.
- European Commission (2014), Report on the responses to the Public Consultation on the Review of the EU Copyright Rules, available at: http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/contributions/consultation-report_en.pdf.
- European Commission (2014), Report on the responses to the Public Consultation on the Review of the EU Copyright Rules, July.
- European Commission Legal Advisory Board (LAB), Commentaire du Legal Advisory Board sur la Communication de la Commission du 20 novembre 1996 : Suivi du Livre vert "Le droit d'auteur et les droits voisins dans la société de l'information" sous l'éclairage des travaux de la Conférence diplomatique de l'OMPI (WIPO) de décembre 1996. Available (in French) at: <http://www.echo.lu/legal/fr/proprint/labcomment.html>.
- European Commission, MARKT/ZH D(2011), Public Hearing on Directive 2004/48/EC and the challenges posed by the digital environment, Brussels, 07 June 2011, available at: http://ec.europa.eu/internal_market/iprenforcement/docs/conference20110607/hearing-report_en.pdf.

- European Observatory on Counterfeiting and Piracy, Injunctions in Intellectual Property Rights, available at: http://ec.europa.eu/internal_market/iprenforcement/docs/injunctions_en.pdf.
- European Parliament (2009), Collecting Societies and Cultural Diversity in the Music Sector, Directorate-General for Internal Policies.
- European Parliament (2010), Committee on Legal Affairs, Working Group on Copyright Territoriality, Collective Management and Remuneration, 15 September.
- European Parliament (2011), Committee on Legal Affairs, Working Group on Copyright, Working Document: Copyright in the Music and Audiovisual Sectors, June.
- European Parliament (2014), Committee on Legal Affairs, Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States, Study, January.
- European Patent Office and Office for Harmonization in the Internal Market (2013), Intellectual property rights intensive industries: contribution to economic performance and employment in the European Union.
- Final Report of the High Level Group on Digital Rights Management, 2004, available at: http://ec.europa.eu/information_society/eeurope/2005/all_about/digital_rights_man/doc/040709_hlg_drm_2nd_meeting_final_report.pdf.
- German Copyright Act of 9 September 1965 (Federal Law Gazette Part I, p. 1273), as last amended by Article 8 of the Act of 1 October 2013 (Federal Law Gazette Part I, p. 3714).
- HADOPI (2014), "Réponse graduée – Les chiffres clés", June, available at : <http://www.hadopi.fr/sites/default/files/ChiffresRGjuin14.pdf>
- HM Government (2012), Modernising Copyright: A modern, robust and flexible framework, UK Intellectual Property Office, 20 December. Available at: <http://www.allpartywritersgroup.co.uk/Documents/PDF/Modernising-copyright.aspx>
- Impact Assessment accompanying the Proposal for a Council Directive amending Council Directive 2006/116/EC as regards the terms of protection of copyright and related rights., SEC(2008)2287.
- Italian Law No. 633 of April 22, 1941, for the Protection of Copyright and Neighboring Rights (as last amended by Legislative Decree No. 154 of May 26, 1997).
- JURI Committee (2010), Copyright and Digitisation of Books, Working Document, European Parliament, 18 March.
- JURI Committee (2010), Copyright Territoriality, Collective Management and Remuneration, Working Document, European Parliament, 15 September.
- JURI Committee (2011), Copyright in the Music and Audiovisual Sectors, Working Document, European Parliament, 29 June.
- French Law 2009/669 of 12 June 2009, amended on 15 September 2009, *Journal officiel de la République française*.
- Proposal for a European Parliament and Council Directive on the harmonization of certain aspects of copyright and related rights in the Information Society, COM (97) of 10 December 1997, OJ, C 108, 7 April 1998.

Regulation (EU) 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351/1, 20 December 2012.

Regulation 864/2007 on the law applicable to non-contractual obligations (Rome II), L 199/40, 31 July 2007.

Spanish Revised Law on Intellectual Property, regularizing, clarifying and harmonizing the Applicable Statutory Provisions (approved by Royal Legislative Decree No. 1/1996 of April 12, 1996).

Strömbäck, P. (2015), Interview with Mathieu Moreuil, Head of EU Affairs at Premier League, Netopia, available at: <http://www.netopia.eu/2015/05/04/be-careful-what-you-wish-sports-on-the-dsm/>.

The European Parliament, the Council and the Commission, Charter of Fundamental Rights of the European Union, 2007/C 303/01.

U.S. Department of Commerce, Patent and Trademark Office, Information Infrastructure Task Force, Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights, available at: www.uspto.gov/web/offices/com/doc/ipnii/front.pdf.

Vitorino, A. (2013), Recommendations Resulting from the Mediation on Private Copying and Reprographic Levies, available at: http://ec.europa.eu/internal_market/copyright/docs/levy_reform/130131_levies-vitorino-recommendations_en.pdf.

WIPO -- World Intellectual Protection Organisation (1980), Glossary of Terms of the Law of Copyright and Neighboring Rights, World Intellectual Property Organization.

WIPO – World Intellectual Protection Organisation (2002), Guide on Surveying the Economic Contribution of the Copyright-Based Industries, Geneva, Switzerland.

WIPO – World Intellectual Protection Organisation (2013), International Survey on Private Copying Law & Practice 2013, Geneva, Switzerland.

WIPO -- World Intellectual Protection Organisation, Managing Intellectual Property in the Book Publishing Industry, Creative Industries – Booklet No. 1.

WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty, adopted in Geneva in December 20, 1996, available at: <http://www.wipo.int/treaties>.

WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty, adopted in Geneva in 20 December 1996, available at: <http://www.wipo.int/treaties>.

EU case law

C-117/13, *Technische Universität Darmstadt v. Eugen Ulmer* (2014)

C-128/11, *UsedSoft GmbH v. Oracle International Corp.* (2012)

C-135/10, *Società Consortile Fonografici (SCF) v. Marco Del Corso* (2012)

C-145/10, *Eva-Maria Painer v. Standard Verlags and Others* (2011)

C-158/86, *Warner Brothers Inc. and Metronome Video ApS v. Erik Viuff Christiansen* (1988) ECR 2605

- C-162/10, *Phonographic Performance (Ireland) Limited v. Ireland* (2012)
- C-170/12, *Peter Pinckney v. KDG Mediatech AG* (2013)
- C-173/11, *Football Dataco Ltd v. Sportradar GmbH* (2012)
- C-192/04, *Lagardère Active Broadcast v. Société pour la Perception de la Remuneration Equitable (SPRE) and Others* (2005)
- C-201/13, *Johan Deckmyn v. Helena Vandersteen and Others* (2014)
- C-245/00, *Stichting ter Exploitatie van Naburige Rechten (SENA) v. Nederlandse Omroep Stichting (NOS)* (2006)
- C-275/06, *Productores de Música de España (Promusicae) v. Telefónica de España SAU* (2008)
- C-275/06, *Promusicae v. Telefonica* (2008)
- C-277/10, *Martin Luksan v. Petrus van der Let* (2012)
- C-283/10, *Circus Globus Bucuresti v. UCMR-ADA* (2011)
- C-302/10, *Infopaq International A/S v. Danske Dagblades Forening* (2012)
- C-306/05, *SGAE v. Rafael Hoteles SA* (2006)
- C-314/12, *UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH* (2014)
- C-324/09, *L'Oréal v. eBay International* (2011)
- C-341/87, *EMI Electrola GmbH v. Patricia Im- und Export and others* (1989)
- C-348/13, *Bestwater International GmbH v. Michael Mebes* (2014)
- C-351/12, *OSA v. Lecebne lazne Marianske Lazne* (2014)
- C-360/10, *SABAM v. Netlog* (2012)
- C-360/13, *Public Relations Consultants Association v. Newspaper Licensing Agency and Others* (2014)
- C-387/12, *Hi Hotel v. Uwe Spoering* (2014)
- C-393/09, *BSA v. Ministry of Culture of the Czech Republic* (2011)
- C-403/08, *Football Association Premier League Ltd and Others v. QC Leisure and Others* (2012), referred to as 'Premier League'
- C-419/13, *Art & Allposters BV v. Stichting Pictoright* (2015)
- C-429/08, *Karen Murphy v. Media Protection Services Ltd* (2011)
- C-435/12, *ACI Adam v. Stichting de ThuisKopie* (2014)
- C-435/12, *Copydan v. Nokia Danmark* (2015)
- C-462/09, *Stichting de ThuisKopie v. Opus Supplies Deutschland* (2011)
- C-463/12, *Copydan Bandkopi*
- C-466/12, *Svensson v. Retriever Sverige AB* (2014), referred to as 'Svensson'
- C-467/08, *Padawan SL v. SGAE* (2010)
- C-479/04, *Laserdisken ApS v. Kulturministeriet* (2006)

C-5/08 2009, Danske Dagblades Forening v. Infopaq Sverige AB (2009)

C-5/08, Infopaq International A/S v. Danske Dagblades Forening (2009), referred to as '*Infopaq*'

C-521/11, Amazon v. Austro Mechana (2013)

C-607/11, ITV Broadcasting Ltd v. CatchupTV Ltd (2013)

C-62/79, Coditel and others v. Ciné Vog Films and others (1980) ECR 881

C-70/10, Scarlet Extended v. SABAM (2011)

C-78/70, Deutsche Grammophon v. Metro-SB-Grossmarkte, (1971) ECR 487

Joined Cases C-236/08 and C-238-08, Google France & Google v. Louis Vuitton and Others (2010)

Joined Cases C-457/11 to C-460/11, VG Wort v. Kyocera and Others (2013)

Joined cases C-509/09 and C-161/10, eDate Advertising GmbH v. X and Oliver Martinez (2011)

Other case law

C-2007/AR/1730, Google Inc v. Copiepresse (2011), Court of Appeal 9th Chamber, Brussels

Annex A: National implementation of selected copyright exceptions and limitations in a sample of Member States

Table 6. Transient and incidental copies (Article 5(1))

France	Germany	Ireland	Italy	Poland	UK
Formulation similar to the InfoSoc Directive	Formulation similar to the InfoSoc Directive	Formulation similar to the InfoSoc Directive	Formulation similar to the InfoSoc Directive	Formulation similar to the InfoSoc Directive	Formulation similar to the InfoSoc Directive

Sources: Authors' own elaboration on Queen Mary (2007) and national legislation.

Table 7. Three-step test (Article 5(5))

France	Germany	Ireland	Italy	Poland	UK
Implemented	Not implemented	Not implemented	Implemented	A two-step test (without reference to certain special uses, i.e. the first step) is in force	Not implemented
The test applies to copyright, related rights, and 'sui generis' databases	The test is addressed to the legislator only	The test is incorporated in a fair dealing test based on the 'unreasonable prejudice' principle (prejudice to the right-holder)	The test applies to copyright and related rights	As the list of exceptions and limitations is closed, also the third step is assumed to be in force	The test is addressed to the legislator only
The test is adopted in judicial revisions of exceptions and limitations	The test is recognised as an instrument in judicial revisions				It cannot be used as a means to introduce 're-exception' to the benefit of right-holders

Sources: Authors' own elaboration on Queen Mary (2007) and national legislation.

Table 8. Libraries, educational establishments, archives and museums (Article 5(2)(c))

France	Germany	Ireland	Italy	Poland	UK
The exception enables publicly accessible libraries, museums and archives to perform acts of reproduction for preservation and on-site consultation without direct or indirect commercial purposes	No specific implementation	No specific implementation	Reprographic reproductions made by public and scholastic libraries, museums and public archives for their own services and without direct or indirect commercial purposes is permitted	Research centres as well as information and documentation centres may make single, short copies of fragments of copyrighted published works under the 'paper reproduction' exception. Fair remuneration is required if these copies are made available for payment	Libraries (publicly accessible or part of an educational establishment), archives and museums can make copies of all types of works permanently included in their collections in order to preserve or replace works or to supply them to other libraries to replace discarded, lost or destroyed works without any commercial advantage
The exception applies to copyright and related rights	The reproduction and distribution, for non-commercial purposes, of works of art and of photographs, in catalogues published by public libraries, museums or educational establishments in connection with a public exhibition or for the purpose of documentation of a collection is permitted	Copying (analogue and digital) in educational establishments (i.e. schools, not universities) made by persons giving or receiving instructions (or by a third party on behalf of the privileged persons) is covered by very detailed provisions	In public libraries, levies apply	Research and educational institutions are allowed, for teaching purposes or in order to conduct their own research, to use published works in original and in translation, and to make copies of fragments from the disseminated work for the same purpose	This exception is subject to several conditions. For instance: the work should not be available for loan to the public; it is not reasonably practicable to purchase a copy of the work; libraries, archives and museums are not conducted for profit

France	Germany	Ireland	Italy	Poland	UK
The exception does not apply to education establishments	The reproduction of works for inclusion into 'own' archive is covered by the private copying exception. This reproduction is allowed only on paper or similar medium. Archive must not be accessible by third parties and not intended for direct or indirect commercial purposes	Libraries and archives (and universities) can make copies only if they act on behalf of a person fulfilling the requirement of research and private study (without 'unreasonable prejudice' to the right-holder). Online delivery is possible as long as libraries and archives act as agents supplying works to other persons covered by exceptions and limitations	Digital copying is explicitly excluded from the scope of this exception	Libraries, archives and schools may prepare or order the preparation of single copies of disseminated works for the purpose of completing, maintaining or preserving their collections and for making them available free of charge	Any contract term which prevents or restricts making these copies is unenforceable
		Libraries and archives can make copies for preservation purposes or to replace lost works (which cannot be purchased) in other libraries or archives		No explicit restriction to non-commercial uses	Librarians or archivists can make copies (of a reasonable portion) of all types of published copyrighted works on behalf of other persons for commercial purposes, provided that such persons fulfilled the requirements for research and private study for non-commercial uses
		Uses by libraries and archives are subject to ministerial regulations that may impose specific provisions for different libraries and archives		The exception does not apply to museums	

France	Germany	Ireland	Italy	Poland	UK
		The exceptions listed above do not apply to museums			

Sources: Authors' own elaboration on Queen Mary (2007), De Wolf (2013) and national legislation.

Table 9. Libraries, educational establishments, archives, and museums (research or private study, Article 5(3)(n))

France	Germany	Ireland	Italy	Poland	UK
No specific implementation	The exception is limited to dedicated electronic terminals in libraries, museums and archives, for private use and research, without any commercial purpose	The exception applies only to copying and does not cover making available works on dedicated terminals	Allows communication or making available to individual members of the public for purposes of research or private study by dedicated terminals on the premises of publicly accessible libraries, educational establishments, museums or archives	Libraries, archives and schools may make available without charge copies of disseminated works or make their collections available for research or study purposes using terminals located in their premises	Educational establishments, libraries, archives and museums are permitted to offer access to copyrighted works and other subject matter on their premises at dedicated terminals
The exception applies only to establishments in charge of the legal deposit of works (e.g. National Library)	Right-holders may claim reasonable compensation to be administrated by collecting societies	The exception allows also the showing or performance of sound recordings, films, broadcast or cable programmes before a school audience for purposes of instruction	Copyrighted works should be included in the collections of these establishments	The exception is not limited to individual members of the public	Works have to be lawfully acquired by the institution

France	Germany	Ireland	Italy	Poland	UK
The exception applies only to authorised researchers	The number of copies made simultaneously available cannot exceed the number of copies owned by the concerned institution	Any use for research and private studies should not lead to 'unreasonable prejudice' for the right-holder. Hence, right-holders establishing a licensing scheme may claim for compensation	Copyrighted works should not be subject to purchase or licensing terms for these uses	The exception applies also to work subject to purchase or licensing terms for these uses	Works are not subject to purchase or licensing terms for these uses
The exception applies to copyright and related rights, and database 'sui generis' rights					Works have to be communicated or made available to individual members of the public for the purposes of research or private study
Nonetheless, on-site consultation is also covered by the exceptions on reproduction made by libraries, museum and archives					

Sources: Authors' own elaboration on Queen Mary (2007), De Wolf (2013) and national legislation.

Table 10. Teaching or scientific research (Article 5(3)(a))

France	Germany	Ireland	Italy	Poland	UK
The exception allows communication or reproduction of excerpts of works for the purpose of illustration for teaching or research	No specific implementation	No specific implementation	No specific implementation	Disseminated works (in original or in translation) can be used by research and educational institutions for teaching and research purposes. Making copies of fragments of disseminated works is permitted	Fair dealing with a work for the sole purpose of illustration for instruction does not infringe copyright, provided that: it is for non-commercial purposes; it is made by a person giving or receiving instruction (or preparing for giving or receiving instruction); and it is accompanied by a sufficient acknowledgement (if possible)
Works made for educational purposes, sheet music, and digital editions of literary works are excluded	Making available works to the public for the purpose of illustration, teaching, and scientific research for non-commercial purposes is permitted	Partially covered by exception for educational establishments and for research or private studies purposes	This exception is included in the quotation exception	The full name of the author of the work and the source, when it is possible, should be indicated	Any contract term which prevents or restricts these uses is unenforceable
The public can include only pupils, students, teachers or researchers	The exception is limited to small parts of works, small works and single contributions to journals and newspapers		The exception allows abridgment, quotation, communication or reproduction of excerpts of works for the purpose of illustration for teaching or for scientific research and without commercial purposes	The purpose of illustration is not mentioned	A recording of a broadcast, or a copy of such a recording, may be made by or on behalf of an educational establishment for the educational purposes of that establishment without infringing copyright, provided that: the educational purposes are non-commercial; and it is accompanied by a sufficient acknowledgement (if possible)

France	Germany	Ireland	Italy	Poland	UK
No commercial exploitation is possible	The public must include a limited number of students or scientists (limited access)		The making available on the Internet is permitted only for didactic or scientific uses and only for certain types of works (music works and pictures at low resolution or low quality)	There is no reference to non-commercial purposes	The recording of a broadcast can be communicated by or on behalf of the educational establishment to its pupils or staff also outside the premises of the establishment, if that communication is made by means of a secure electronic network accessible only by the establishment's pupils and staff
Right-holders are entitled to receive fair compensation	The acts of reproduction connected to the making available of rights are allowed		The purpose of illustration is mandatory also for scientific research		The recording of a broadcast is not covered by this exception when licensing agreements are available
The exception applies to copyright and related rights, and database sui generis rights	The purpose of illustration is not mandatory for scientific research				The copying of extracts (up to 5%) of a relevant work by or on behalf of an educational establishment does not infringe copyright, provided that: the copy is made for the purposes of instruction for a non-commercial purpose; and it is accompanied by a sufficient acknowledgement (if possible)

France	Germany	Ireland	Italy	Poland	UK
The purpose of illustration is mandatory also for scientific research	Right-holders are entitled to receive fair compensation				The copy of the extract can be communicated by or on behalf of the educational establishment to its pupils or staff also outside the premises of the establishment, if that communication is made by means of a secure electronic network accessible only by the establishment's pupils and staff
The exception is further regulated by sectoral agreements	Reproduction for uses in schools and educational establishments (excluding universities) is permitted under the private copying exception				The copying activity is not covered by this exception when licensing agreements are available as long as these agreements allow to copy at least 5% of the work
					These exceptions apply to copyright and related rights

Sources: Authors' own elaboration on Queen Mary (2007) and national legislation.

Table 11. Reporting of current events (Article 5(3)(c))

France	Germany	Ireland	Italy	Poland	UK
No specific implementation	Broadcast commentaries and newspaper articles may be reproduced in newspapers and communicated to the public if they concern current political, economic or religious issues, unless this use has been reserved/prohibited	No specific implementation	The exception allows making copies and communication to the public of articles published in magazines or newspapers as well as of articles broadcast or made available to the public and other subject-matter of the same character	Press, radio and television may disseminate already disseminated reports on current events, updates on political, economic or religious issues (unless their further dissemination is prohibited), current statements and reporter's photographs, short excerpts of the works listed above, reviews of publications and disseminated works, speeches delivered at public meetings and hearings, brief summaries of disseminated works	No specific implementation
Press reviews are permitted	Authors are entitled to a fair remuneration to be administered by collecting societies in case reproduction goes beyond a short part of the article	Fair dealing applies to quotations for purposes of criticism and review	The exception only applies with respect to their uses in other magazines or newspapers or to be broadcast in news programmes	Fair remuneration should be paid to authors of updates on political, economic or religious issues and current statements and reporter's photographs	The exception allows the use of works for the purpose of criticism or review of that or another work or a performance of a work provided that there is acknowledgement and that the work has been made available to the public

France	Germany	Ireland	Italy	Poland	UK
The exception allows also whole or partial reproduction for strictly limited information purposes of a work of graphical, plastic or architectural art. News reports cannot be reproduced.	Copyrighted works can be used in connection with the reporting of current events by broadcasting institutions and by press for information purposes	Uses cannot lead to an 'unreasonable prejudice' for the right-holder	The limitations does not apply if these uses are expressly reserved	Works made available during current events can be quoted in reports of current events for informational purposes and without remuneration	Based on public interest also the publication of non-published works may be allowed
The author's name and the source have to be indicated	The author's name and the source have to be indicated	The source is required	Source, date and the author's name need to be indicated	The full name of the author of the work and the source, when it is possible, should be indicated	The source should be indicated except for cases of news reporting where such acknowledgement would be impossible
			The exception allows reproduction or communication to the public of works or protected subject matter made during current events for the purposes of reporting current events and to the extent justified by informative purposes		
			Source and the author's name need to be indicated		

Sources: Authors' own elaboration on Queen Mary (2007) and national legislation.

Table 12. Quotations (Article 5(3)(d))

France	Germany	Ireland	Italy	Poland	UK
The exception allows short quotations of lawfully divulged works, justified by the critical, polemic, pedagogical, scientific, or informational nature of the work where they are incorporated	The exception allows quotations for the illustration of the content of the quoted, published work	Quotations including a non-substantial part of the work do not infringe copyright	The exception allows quotations, abridgments or reproductions of fragments or parts of a work for the purpose of criticism or discussion	Fragments from disseminated works or minor works in full can be quoted in independent works to the extent justified by explanation, critical analysis, teaching or requirements of a certain creative activity	The exception allows the use of a quotation from a work made available to the public (in compliance with fair dealing), for criticism or review or other purposes and to the extent that the quotation is no longer than what is required by the specific purpose for which it is used
Short quotations generally cannot involve works of visual arts	For musical works the quotation is limited to a few passages	Fair dealing applies to quotations for the purpose of criticism or review	These acts should not conflict with the commercial exploitation of the work	The full name of the author of the work and the source, when it is possible, should be indicated	The quotation should be accompanied by sufficient acknowledgement
	The source should be indicated	The source should be indicated	The exception applies also to purposes of illustration in teaching or research activities having a non-commercial nature		Any contract term which prevents or restricts quotations is unenforceable
			Quotations, abridgments or reproduction have to be accompanied by a mention of the title of the work, the names of the authors, the publisher, the translators (if any)		The exception applies to copyright and related rights

Sources: Authors' own elaboration on Queen Mary (2007), De Wolf (2013) and national legislation.

Table 13. Caricature, parody or pastiche

France	Germany	Ireland	Italy	Poland	UK
Caricatures, parodies and pastiches are permitted	Parodies and caricatures are possible and can be based on the free use of another work as long as they do not constitute reproductions or adaptations of the original work	No specific implementation	No specific implementation	No specific implementation	The exception enables (in compliance with fair dealing) uses for the purposes of caricature, parody or pastiche
		Fair dealing applies to caricatures and pastiches for the purpose of criticism or review	Partially covered by the quotations exception, provided it does not conflict with a normal exploitation of the work	Partially covered by the quotations exception in the passage referring to quotations to the extent required by a certain creative activity	Any contract term which prevents or restricts uses for the purposes of caricature, parody or pastiche is unenforceable
		Parodies and caricature are possible as long as they do not use a substantial part of the original work they are based on	Partially covered by the fundamental right of 'freedom of expression' enshrined in Article 21 of the Italian Constitution		The exception applies to copyright and related rights

Sources: Authors' own elaboration on Queen Mary (2007), De Wolf (2013) and national legislation.

Table 14. Freedom of panorama (Article 5(3)(h))

France	Germany	Ireland	Italy	Poland	UK
Not implemented	Reproduction of works located permanently in public roads and byways or public open spaces is permitted. The copies can be distributed and/or made available to the public	Making of paintings, drawing, diagrams, maps, charts, plans, engravings, etchings, lithographs, woodcuts, prints or similar things as well as photographing or filming or broadcasting or including in a cable programme of certain artistic works (buildings, sculpture, models, etc.) which are permanently situated or placed in a public place or in premises open to the public is permitted	Not implemented	Works permanently displayed on public roads, streets and squares or in gardens can be disseminated, but not for the same use	Making of a graphic work, photograph, film, broadcast, or visual image of buildings, sculptures, models for buildings and works of artistic craftsmanship which are permanently situated in a public place or in premises open to the public is permitted
	In the case of buildings, the exception applies only to the façade	The results of such uses can be made available to the public		The full name of the author of the work and the source, when it is possible, should be indicated	Such copies can be distributed or made available to the public
		The exception may not apply to graphic works, i.e. paintings, drawings, diagrams, maps, charts or plans, engravings, etchings, lithographs, woodcuts or similar works permanently situated or placed in a public place or in premises open to the public			The exception does not apply to graphic works, i.e. paintings, drawings, diagrams, maps, charts or plans, engravings, etchings, lithographs, woodcuts or similar works permanently situated or placed in a public place or in premises open to the public

Sources: Authors' own elaboration on Queen Mary (2007), Lobert et al. (2015) and national legislation.

Table 15. Private copying: Exceptions (Article 5(2)(b))

France	Germany	Ireland	Italy	Poland	UK
Copies are allowed for strictly private purposes and only for the private use of the person making it. This exception applies only to natural persons	Copies are allowed for domestic and personal purposes and to be strictly used in the private sphere. In this case, copies can be made also by third parties on behalf of the privileged person, absent any commercial gain. This exception applies only to natural persons	There is no general private copying exception	Copies of phonograms and videograms, for personal use and without any intent to make profit or any other direct or indirect commercial purpose, are allowed. This exception applies only to natural persons	Personal uses are allowed, without asking permission to the author and without paying remuneration	Personal copies of a copyrighted work (with the exclusion of computer programmes) are permitted. The work must be lawfully owned by the privileged person. Copies are made for the privileged person's private use and for ends which are neither directly nor indirectly commercial
The exception does not apply to file-sharing	Singular copies are allowed also for other 'own' uses beyond the private sphere (e.g. scientific purposes, 'own' archive, information about current events). In this case, limitations are restricted to non-commercial uses and apply also to legal entities and to entities making copies on behalf of the privileged person	Natural persons and certain establishments are allowed to record broadcasts for purposes of time shifting (later viewing)	Copies on paper or similar medium are covered by the reprographic exception, even when made for personal use	Personal uses includes single copies used by a circle of persons having personal relationships (e.g. consanguinity), affinity or social relationship	Format-shifting is explicitly allowed
	Private copying refers to both analogue and digital copies thus including reprographic copying	Natural persons are allowed to make copies of performances for private and domestic uses	Private copies cannot be made by third parties on behalf of the privileged person		Contract terms aiming at preventing or restricting the private copying exception are unenforceable

	The exception does not apply to file-sharing		The private copying exception can be overridden by contractual arrangements		Recording of broadcasts for purposes of time shifting (later viewing) is permitted. Recording must take place in domestic premises and copies cannot be used for any other purpose
	Private copying is not allowed from an illegal source or if it is made by circumventing TPM		Private copying is not allowed from an illegal source		

Sources: Authors' own elaboration on Queen Mary (2007), WIPO (2013) and national legislation.

Table 16. Private copying: Compensation systems (Article 5(2)(b))

France	Germany	Ireland	Italy	Poland	UK
A levy scheme for private copying is in force	A levy scheme for private copying is in force. It covers also copies for other 'own' uses beyond the private sphere	No levy scheme is in force	A levy scheme for private copying is in force	Levies for reproduction	No levy scheme is in force
Levies are applied to media and equipment with internal storage capacity, according to the capacity	Levies are applied to blank carriers and devices	Collective licensing agreements between right-holders and end-users can set fair remuneration for certain private uses	Levies are applied to blank carriers and devices enabling recording of audio and video	Levies are applied to blank carriers and devices	Collective licensing agreements between right-holders and end-users can set fair remuneration for certain private uses
Levies are paid by manufacturers, importers or intra-EU acquirers	Levies are paid by producers of devices, producers of data carriers, importers of devices and data carriers, dealers of devices and data carriers (above a certain threshold of transactions), producers, importers, and dealers of photocopying machines, certain operators of photocopying machines	Reprographic copies for research and private studies by universities and schools are covered by collective licensing agreements	Levies are paid by manufacturers and importers when they put blank carriers and devices on the market. The importer is: i) a company buying foreign products subject to levies and selling them to Italian distributors; or ii) a foreign company selling products directly to final users (e.g. via e-commerce). Fair remuneration is required also for reprographic copies to be paid by those who provide the means for copying (e.g. copy centres, libraries)	Levies are paid by manufacturers and importers	Collective licensing schemes are to a large extent regulated by law

France	Germany	Ireland	Italy	Poland	UK
Exports are exempted. The national collecting society ordered several foreign-based websites to stop selling to French consumers without levies and to report all deliveries to the French market	Exports are exempted. In cross-border sales: the German party is responsible, if the recipient is a commercial entity; the foreign party is responsible if the German recipient is a private consumer		Exporters can claim a refund for paid levies		
Levies are determined by a commission comprising: 12 representatives of right-holder organisations; 6 of manufacturers and importers; and 6 of consumer organisations	Levies are determined by national collecting societies after negotiating with associations of manufacturers and importers of blank carriers and devices. Parties are free to negotiate in relation to the amount of levies with caps for certain media		Levies are determined by a decree of the Minister of Culture and the National Heritage after hearing stakeholders represented in the Permanent Consulting Committee for Authors' Rights	Levies are determined by a decree of the Minister of Culture and the National Heritage	
Levies are collected by a national collecting society, appointed by law	Levies are collected by several national collecting societies, on the basis of the type of copied work (i.e. audio, video, text, picture)		Levies are collected by a national collecting society, appointed by law	Levies are collected by several national collecting societies, on the basis of the kind of right-holders (i.e. authors, performers, producers) and of the sector (i.e. audio and video)	
TPM and individual licensing scheme should be taken into account when determining levies	TPM should be taken into account when determining levies		TPM should be take into account	Levies do not apply to carriers or devices acquired for professional use	

France	Germany	Ireland	Italy	Poland	UK
Levies do not apply to carriers or devices acquired for professional use and which are not presumed to be used for private purposes. Professionals have the right to a refund, and they may apply for an exemption agreement	There are several exemptions for professional and industrial users		For professional uses, both a refund system and upfront exemptions are available		

Sources: Authors' own elaboration on Queen Mary (2007), WIPO (2013) and national legislation.

Table 17. Private copying: Distribution of revenues (Article 5(2)(b))

France	Germany	Ireland	Italy	Poland	UK
Three-step process: i) splitting the levies into four parts, i.e. audio, video, written works and visual artworks; ii) splitting each of the four parts, according to the law, among authors, performers and producers/publishers; iii) distributing the revenues to organisations representing different right-holders and in turn to right-holders according to contractual arrangements	Collecting societies transfer revenues to organisations representing different right-holders (these organisations are members of each collecting society). Each organisation distributes revenues to right-holders according to contractual arrangements	No levy scheme is in force	The national collecting society distributes revenues to audio and video authors, producers and performers. Distribution schemes are set by law	Collecting societies distribute revenues to relevant right-holders. Distribution schemes are set by law	No levy scheme is in force
According to the law, for 'audio' the levies are split as follows: 50% authors; 25% performers; 25% phonogram producers	There are no deductions for social or cultural purposes		According to the law, for 'audio' the levies are split as follows: 50% authors; 25% performers; 25% phonogram producers	According to the law, for 'audio' the levies are split as follows: 50% authors; 25% performers; 25% phonogram producers	
According to the law, for 'video' the levies are split as follows: 33% authors; 33% performers; 33% videogram producers			According to the law, for 'video' the levies are split as follows: 30% authors; 23% original producers of audiovisual works; 23% videogram producers; 23% performers	According to the law, for 'video' the levies are split as follows: 35% authors; 40% producers; 25% performers	

France	Germany	Ireland	Italy	Poland	UK
According to the law, for 'written works and visual artworks' the levies are split as follows: 50% authors; 50% publishers			Half of the video distribution scheme assigned to performers is dedicated by law to study and research activities as well as to the promotion, training and professional support for artists and performers	Deductions for social or cultural purposes are applied by collecting societies. These deductions are not determined by law, but determined within the statutes of each collecting society	
A social and/or cultural deduction (25%) is determined by law. Authors', producers' and performers' organisations are responsible for applying this deduction					

Sources: Authors' own elaboration on Queen Mary (2007), WIPO (2013) and national legislation.

Table 18. Balance between technological protection measures and copyright exceptions and limitations (Article 6(4))

France	Germany	Ireland	Italy	Poland	UK
Safeguard is provided for: private copying; illustration of teaching; benefit of disabled persons; exceptions for libraries	Obligations to provide means for circumvention apply to limitations in relation to: public security and judicial administration; disabled persons; collection for the use in schools and for illustration of teaching; broadcasts for educational purposes in schools; making available for research and private study; reproductions made by broadcasters	Right-holders are entitled to claim licence fees for any use, thus narrowing down the scope of any safeguard measures	Right-holders are obliged to remove TPM on request of the competent authorities for public security purposes	Not implemented	Remedies against TPM have to be provided for certain specifically designated acts. In particular, against the application of any technology, device or component that has the effect of preventing a copyright work from being copied (in whole or in part) or restricting the number of copies which may be made
A special authority is competent to rule any conflict between exceptions and limitations and TPM	Safeguard is provided also for private copying for other 'own' uses beyond the private sphere (e.g. scientific purposes, 'own' archive, information about current events). No safeguard is provided for private copying for personal domestic uses	Beneficiaries of exceptions and limitations have access to a dispute resolution mechanism before courts	Right-holders are obliged to adopt 'proper solutions' including the provisions of means to gain access on specific request of certain beneficiaries or after the conclusion of specific collective agreements with users associations		Remedies should be based on voluntary measures or agreements between parties

	The provision is limited to users having lawful access to works	The recourse by beneficiaries to self-help is still controversial	Safeguard is provided for: private use on paper or similar media; reprography within publicly accessible libraries, museums and archives; reproduction, quotation and communication to the public for purposes of review, teaching and scientific research; benefit of disabled persons		Remedies do not apply to work made available to the public by interactive services
The provision does not apply to works made available on demand			The provision can be limited to users having lawful access to works		The provision is limited to users having lawful access to works
			The provision does not apply to works made available on demand		Absent any voluntary measure or agreement between parties, beneficiaries must serve a notice of complaint to the Secretary of State who may in turn direct an order (statutory duty) to the right-holders
			The access can be dependent upon payment of fair compensation		

			<p>If negotiations among stakeholders and end-users fail, a mandatory dispute resolution will be conducted before the Permanent Copyright Consultation Committee and only afterwards normal courts will be entitled to rule</p>		
			<p>Safeguard is provided also for the private copying exception that covers only copies of phonograms and videograms. General contractual agreements between right-holders and users may override safeguard measures</p>		

Sources: Authors' own elaboration on Queen Mary (2007), Mazziotti (2008) and national legislation.



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Assets

- Multidisciplinary, multinational & multicultural research team of knowledgeable analysts
- Participation in several research networks, comprising other highly reputable research institutes from throughout Europe, to complement and consolidate CEPS' research expertise and to extend its outreach
- An extensive membership base of some 132 Corporate Members and 118 Institutional Members, which provide expertise and practical experience and act as a sounding board for the feasibility of CEPS policy proposals

Programme Structure

In-house Research Programmes

Economic and Finance
Regulation
Rights
Europe in the World
Energy and Climate Change
Institutions

Independent Research Institutes managed by CEPS

European Capital Markets Institute (ECMI)
European Credit Research Institute (ECRI)
Energy Climate House (ECH)

Research Networks organised by CEPS

European Climate Platform (ECP)
European Network of Economic Policy Research Institutes (ENEPRI)
European Policy Institutes Network (EPIN)