<table>
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<th>Bernd Justin Jütte</th>
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https://doi.org/10.5771/9783845278759
Copyright is at the heart of the „Creative Industries“ from books and music to audiovisual media and more. At the same time it is a legal construct which has been challenged more than many others by the „Digital Revolution“ with an ever-expanding online use of copyrighted materials.

It is against this background that the European Union in view of the economic aspect of creating a common market in Europe attempted at harmonising gradually parts of copyright – or in the French and German terminology *droit d’auteur* and *Urheberrecht* – over the last decades. Most notably, preparing copyright for what was then called „information society“ resulted 2001 in the introduction of several exclusive rights for authors in the InfoSoc-Directive. Less than 20 years on and also considering the limited impact of the Enforcement Directive, the EU framework – or more generally the traditional approach to copyright – is questioned and ready for a complete reform or overhaul. No small task to approach for a Ph.D. thesis but this book that we are very happy to see published as Volume 10 of the „Luxemburger Juristische Studien – Luxembourg Legal Studies“ with Nomos and Hart publishers originated in exactly that.

Bernd Justin Jütte had the courage to analyse the traditional concepts in view of their validity in the digital context and present an extensive sketch of where and how EU copyright law should be adapted. The thesis explains in very convincing terms what „Reconstructing European Copyright Law for the Digital Single Market“ means. Irrespective of whether readers agree with all conclusions concerning the way EU Directives and Regulations should be adapted in this highly political context (as presented in chapter 4), the value of the very concise overview of current EU copyright law in the international context (chapter 2) and the basis for the policy discussion (chapter 1) is highly appreciated in a time when the complexity of the copyright acquis and reform proposals can easily lead to getting lost. In the core chapter (3) of this work, the author presents us with four key areas of copyright law which are used to explain not only these concepts but also how they change or are challenged by the digital use of copyrighted works. What makes copyright such an interesting area for analysis also for EU scholars and readers that are non-experts in the
field is that the very notion of “territoriality” of copyright is an inherent matter of conflict with the idea of a single market which exists without national or e.g. language frontiers. In how far the idea of “exhaustion” of a work protected by copyright by introducing it at any point into the single market is expandable also to a digital single market is the first layer of analysis. This is followed by the so-called “L&Es”, the limitations and exceptions that are the only factor narrowing down the otherwise exclusive rights of authors. Again, these were developed in light of an “information society” that did not know many digital uses of works that are common standard today. Beyond these concepts, Bernd Justin Jütte also analyses two important instruments used for the better management of copyrighted works. On the one hand the Technical Protection Measures attached to works which are not allowed to be circumvented and with which – also in the digital context – works are supposed to be protected against unauthorized use, may point a feasible way forward with the advancement of technology. Another important element of copyright management that the EU has started to explore is the extension of Collective Management Organisations and the type of author representation that these should cover in the future.

All of this analysis is based on a very extensive and thorough discussion of the relevant case law of the Court of Justice of the European Union as well as national courts and a wide range of literature. The author manages to employ a convincing approach by first “deconstructing” existing EU copyright law in the way presented above before offering solutions on how to “reconstruct” it. He underlines convincingly the need to do so in a coherent and in a way horizontal approach to the questions related to copyright management in order to have a future-proof and potentially more widely accepted system. That this field belongs to the most controversial between supporters of the traditional approach to copyright and critics that conclude the old system has failed completely, makes it all the more astonishing how mature for a junior researcher the analysis in this thesis is. The result concerns a “moving target” in the midst of the political debate around the reform and the author has clearly positioned himself in this ongoing process. With the result of his research the fundamental questions and his analysis offered can be useful irrespective and beyond the current reform, but at the same time I am convinced it will prove valuable if considered by representatives in the forthcoming legislative procedures.
The goal of copyright law as much as of the proposals discussed in this thesis are and should be to foster the development and offer of creative content, ideally in a pan-European context which allows cultural and social exchange between the people(s) and individuals constituting the European Union. Achieving this would be of great help beyond the copyright law question and Bernd Justin Jütte’s thesis subtitle “Between Old Paradigms and Digital Challenges” aptly describes a more general challenge to the EU and its legal framework in today’s world. We are very pleased to see that this thesis was developed in Luxembourg, one of the hearts of Europe, and that it is published in the University of Luxembourg’s Research Unit in Law series. The book deserves wide attention as well as many other contributions of the author to specific questions of copyright law. I am convinced that his future academic work, which he is pursuing outside of the Luxembourg origins, will continue to be linked to the beginnings with the “Reconstruction of European Copyright Law”.

Dr. Mark D. Cole
Professor for Media and Telecommunication Law
University of Luxembourg
Acknowledgements

This final version of the work bears the marks of many who contributed directly or indirectly. They are, however, not to blame for the mistakes that remain, they are my own.

Professor Mark D. Cole let me explore copyright and more. Without his unwavering trust and constant support and encouragement I could not have completed this work. I valued and enjoyed working with him and his team. From all my colleagues Jenny Weinand stands out for many a reason.

I am also very much indebted to Professor Matthew Happold, who showed me how to approach the academic profession with a necessary modicum of humanity. Professor Stefan Braum encouraged me to come to Luxembourg in 2009 and motivated me to constantly rethink my research. Albeit reluctantly, I am glad I followed his advice. Professor Christophe Geiger and Professor Ole-Andreas Rognstad kindly agreed to examine my thesis and challenged me during my defense.

The Faculty of Law, Economics and Finance provided me with an academic environment that allowed me to pursue my research freely. The funding provided by the Luxembourg National Research Fund enabled me to conduct my research free from any financial worries and constraints. I must also thank my students in Luxembourg and in Kaunas, teaching them has been more than a mere complement to my research.

I am, not only as a matter of causality, deeply indebted to my parents. I owe my ability to think and to think critically to them. A good measure of common sense and decency I attribute to the influence of my late grandparents, whom I dearly miss.

Last, but foremost, I am grateful to my wife and best friend Maryia, I would have not been able to complete this work without her unlimited support.

Nottingham, March 2017
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<td>The Computer &amp; Internet Lawyer</td>
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<td>Cir.</td>
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<td>CISAC</td>
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<td>EC</td>
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<td>ECL</td>
<td>Extended Collective Licensing</td>
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<td>ECtHR</td>
<td>European Court of Human Rights</td>
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### Abbreviations

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<th>Full Form</th>
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<td>EFTA</td>
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<td>EU Charter</td>
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<td>Intellectual Property Quarterly</td>
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<td>IRCTL</td>
<td>International Review of Law, Computers &amp; Technology</td>
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<td>IRIS</td>
<td>IRIS – Legal Observations of the European Audiovisual Observatory</td>
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<tr>
<td>J. Copyright Soc'y U.S.A.</td>
<td>Journal of the Copyright Society of the U.S.A.</td>
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<td>J. Corp. L.</td>
<td>The Journal of Corporation Law</td>
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<td>JIS</td>
<td>Journal of Information Science</td>
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<td>JIPITEC</td>
<td>Journal of Intellectual Property, Information Technology and E-Commerce Law</td>
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Abbreviations

JIPLP Journal of Intellectual Property Law & Practice
JIPR Journal of Intellectual Property Rights
J. Legis. Journal of Legislation
JWIP The Journal of World Intellectual Property
L&Es Limitations and Exceptions
LG Landgericht (Regional Court, Germany)
Lewis & Clark L. Rev. Lewis & Clark Law Review
Loy. L.A. Ent. L. Rev. Loyola of Los Angeles Entertainment Law Review
Minn. Law Rev Minnesota Law Review
MLR Modern Law Review
MMR MultiMedia und Recht
NJW Neue Juristische Wochenschrift
Nw.U.L.Rev Northwestern University Law Review
OECD Organisation for Economic Co-operation and Development
OHIM Office for Harmonization in the Internal Market
OJLS Oxford Journal of Legal Studies
OLG Oberlandesgericht (Higher Regional Court, Germany)
Ohio St. L.J. Ohio State Law Journal
UOLTJ University of Ottawa Law & Technology Journal
QMJJ Queen Mary Journal of Intellectual Property
Queen's L.J. Queen's Law Journal
RRA Reciprocal representation agreement
Rutgers Computer & Tech. L.J. Rutgers Computer and Technology Law Journal
S. Ct. Supreme Court Reporter (US)
S.D.N.Y. US District Court for the Southern District of New York
SSRN Social Science Research Network
TEC Consolidated version of the Treaty Establishing the European Community
TFEU Consolidated version of the Treaty on the Functioning of the European Union
TPMs Technological Protection Measures
### Abbreviations

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<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tr>
<td>TRIPS/TRIPs</td>
<td>Agreement on Trade-Related Aspects of Intellectual Property Rights</td>
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<td>Tul. L. Rev.</td>
<td>Tulane Law Review</td>
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<td>UCLA Ent. L. Rev.</td>
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<td>UCLA L. Rev.</td>
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<td>UGC</td>
<td>User-generated content</td>
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<td>UrhG</td>
<td>Gesetz über Urheberrecht und verwandte Schutzrechte (Copyright Law of Germany)</td>
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<td>US/USA</td>
<td>United States of America</td>
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<td>U.S.</td>
<td>United States Reports</td>
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<td>Vand. J. Ent. &amp; Tech. L.</td>
<td>Vanderbilt Journal of Entertainment and Technology Law</td>
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<td>VoD</td>
<td>Video on Demand</td>
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<td>Washburn L.J.</td>
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<td>Wash. L. Rev.</td>
<td>Washington Law Review</td>
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<td>WCT</td>
<td>WIPO Copyright Treaty</td>
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<td>WIPO</td>
<td>World Intellectual Property Organization</td>
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<td>WPPT</td>
<td>WIPO Performances and Phonograms Treaty</td>
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<td>WTO</td>
<td>World Trade Organization</td>
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<td>ZGE/IPJ</td>
<td>Zeitschrift für Geistiges Eigentum/Intellectual Property Journal</td>
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<tr>
<td>ZUM</td>
<td>Zeitschrift für Urheber- und Medienrecht</td>
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“Ach, Luise, laß ... das ist ein zu weites Feld.”

“Ah, [Commission], that’s enough ... that’s too vast a subject.”

Theodor Fontane (Effi Briest)1

1 Adapted by the author, the translation is taken from the leading English edition of Fontane’s novel of 1896, translated by Hugh Rorrison and Helen Chambers, London: Angel Books (Angel Classics) 1995.
Introduction

The idea of a “Digital Single Market” has fascinated European policy makers in the recent years. They imagine a market that would enable European citizens to take advantage of a variety of online services irrespective of where they are physically located within the European Union. One pillar of such a European digital market, as it is imagined by the European Commission, are content based services. They rely on the exploitation of works which are protected by copyright: music, films, images, books, and digitized works. The use of such works on big media platforms, streaming and download services by enterprises and private users requires the permission of the authors or rightsholders of these works. It requires, therefore, communication between the owners of rights and the potential users of rights. In a digital environment, where the number of uses of protected works has significantly increased in comparison to the analog world, the requirement to communicate to receive authorization increases transaction costs significantly. But also the question for what kind of uses authorization to use is necessary at all increases the information costs users must bear. In such a situation an efficient copyright system is important in order to reduce transaction and information costs so as to avoid that these costs disable the provision of online services.

This study accompanies the policy ambitions of the European Union in the process to create a digital single market by highlighting and analyzing the problems current copyright legislation at EU level poses. In doing so, it critically observes whether the current reform proposals in the context of the EU’s “Digital Agenda”\textsuperscript{2} and the “Digital Single Market Strategy”\textsuperscript{3} can enable, rather than disable the creation of content-based online services in

\textsuperscript{2} European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions. A Digital Agenda for Europe, COM(2010) 245 final/2, Brussels, 26.08.2010.

\textsuperscript{3} European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions. A Digital Single Market Strategy for Europe, COM(2015) 192 final, Brussels, 06.05.2015.
Introduction

a pan-European digital single market, and whether the proposed reforms create an efficient and predictable legal framework that respects the interest of rightsholders, intermediaries and users alike, in other words, whether it respects a just and fair balance of interests.

A. Copyright Old and New

Copyright’s history can shed light on the problem this particular set of legal rules faced today. To begin this short excurse, which will be continued and deepened in the next section, recourse should be had to a historical metaphor, which is closely related to the birth of modern (European) copyright.

At the end of the 18th century, the Ancien Régime in France was flawed by old, aristocratic structures that upheld an outdated system of governance and privileges that created social unrest and dissatisfaction with the state amongst the French citizens. The system had grown to a point where France was paralyzed and only a revolution, the French Revolution, fueled by ideas of enlightenment and driven by the people could break the chains and the crust that held the Ancien Régime together. It is not coincidental that along with the French Revolution came the first truly ‘continental’ European copyright law that granted authors the right to their intellectual property. This approach to copyright started its campaign throughout continental Europe in the years to follow.

At the beginning of the 21st century, more than 220 years later, and in a world that has changed much since the Déclaration des droits de l’homme et du citoyen of 1789, Europe has lost its commanding role in the world, and with it its economic dominance. Another revolution that took place in the meantime was not fought with knives and hayforks, but with telephone lines and microchips. The digital revolution saw the coming of the Internet and opening of new cyber-marketplaces on which the trade in real goods is facilitated and digital ‘goods’ appeared. By plain numbers, Europe has lost ground on the leading economies in the US and Asia on the digital marketplace. In order to regain the advantage on (or at least to close the gap a little) other big economies, the European Commission, in its...
Communication “Europe 2020”, identified intellectual property as one of the issues that needs to be tackled to get the EU back on track and rolling again. “Europe 2020” took a multi-sectoral approach and divided its fields of action into seven flagship initiatives, two of which expressly mentioned copyright and licensing of digital content, and thereby underlining the special significance of this area for the EU.

The current state of European copyright, similarly to the state of the French governance of the *Ancien Régime*, is based on old, and for some applications outdated paradigms that do not provide legal solutions appropriate for modern challenges. Further, because of the territorial nature of copyright, the system is regionally fragmented. This problematic legal environment is rooted in a multitude of different national copyright laws, all with their own substantive provisions, albeit partially harmonized. That, in connection with the overlooming principle of territoriality of IPRs, contributes to immense hindrances for marketing digital content effectively in the European internal market.

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5 “Europe faces a moment of transformation. The crisis has wiped out years of economic and social progress and exposed structural weaknesses in Europe's economy. In the meantime, the world is moving fast and long-term challenges – globalisation, pressure on resources, ageing – intensify. The EU must now take charge of its future. Europe can succeed if it acts collectively, as a Union. We need a strategy to help us come out stronger from the crisis and turn the EU into a smart, sustainable and inclusive economy delivering high levels of employment, productivity and social cohesion. Europe 2020 sets out a vision of Europe’s social market economy for the 21st century.” *Ibid.*, p. 6, see also the preface by José Manuel Barroso, the then President of the European Commission (p. 2); see also Benjamin Farrand, “The Digital Agenda for Europe, the Economy and its Impact upon the Development of EU Copyright Policy”, in: Irini Stamatoudi & Paul Torremans, *EU Copyright Law: A Commentary*, (Cheltenham, Northampton: Edward Elgar Publishing, 2014), 988-1018, para. 17.01.

6 From a total of seven flagship initiatives of EUROPE 2020 only two are of particular relevance: the Digital Agenda for Europe (European Commission, COM(2010) 245 final/2), will be discussed in more detail, the second (European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Europe 2020 Flagship Initiative Innovation Union, COM(2010) 546 final*, Brussels, 6.10.2010) did not live up to the expectations and only touches very briefly on copyright and licensing of intellectual property rights, and shall therefore be largely ignored for the purpose of this research.
Whereas in the outgoing 18th century it was the French people that removed its chains from centuries of suppression, today it is the European copyright framework that must free itself from the chains of national copyright laws that limit the free flow of digital content in the EU. This will be for the benefit of the European consumer and enable, thereby, the free flow of thoughts and ideas in the internal market – and, admittedly, digital content that would yield high pecuniary returns for rightsholders or those who manage and market their rights.

The justification for copyright, in its early appearances in the form of printing privileges, and as still maintained in mainly common law jurisdictions, has been supported by utilitarian arguments. It was argued that copyright should provide for incentives to authors to create works, furthering the knowledge of society. Here it should be noted that the notion of society at that time was certainly more limited to the nation state rather than a world society at large, or even an Internet society; and problems that a multilingual, multicultural and therefore multi-territorial digital market faces today were still unimaginable.

A similar rhetoric can be identified in recent EU policy documents. Reasons to improve the existing system of copyright legislation are predominantly of an economic nature. These documents demand that the legal framework for intellectual property in the EU in general, and copyright in particular, must be modernized in order to stay competitive vis-à-vis other national markets around the world. This reasoning is not so much different from the arguments brought forward more than two centuries ago in continental Europe, when the first French copyright laws were discussed, although the latter were subsequently perceived as an emanation of a natural law approach and their further development certainly followed this direction.

7 This is not to say that other intellectual property rights or industrial property rights are less important or need less of an overhaul than copyright does, however they are less exposed to the effects brought about by the development of digital technologies and digital communication over the last 20 years or so.


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The aspects of copyright to be pursued in this work, and which might be more beneficial for rightsholders, businesses and users alike, are those that are of particular relevance for the establishment of a digital single market in the EU. These are elements of the existing copyright system that are presumed to be ill-suited to enable the commercial and non-commercial use of copyright protected digital content. Or, more drastically, those elements that are partially dysfunctional, or have become dysfunctional with the development of new information technologies.

The actors on this market have different priorities which will guide this research, and one goal of this research is to find an appropriate balance between these priorities, or interests. For rightsholders this means that they should be able to market their content, if they wish, and receive a fair remuneration. For businesses this means that they can set up offers for digital content without facing prohibitive transaction costs for clearing licenses. And for consumers, whose benefit must be measured by non-economic standards rather than ‘coin by coin’, it means better access to digital content in terms of quantity and quality and the ability to have access to this content throughout the EU.

Enabling a use of copyrighted works that remunerates rightsholders and gives the user the opportunity to escape legal uncertainty by acquiring a license – for some marginal, economically insignificant uses a license might even be waived – cannot only increase the marketing of digital content online, first in quantitative terms and as a result in more qualitative offers for consumers, but it can facilitate other uses of the Internet that are not primarily of an economic nature. But such an analysis must equally treat those cases in which copyright must not be (actively) managed, but where the balance struck between the interests of authors and those of the public enable members of the public to use – in a wide sense – protected works, or parts thereof, without permission of the rightsholder.

The challenge the EU as one common economic area is facing in relation to copyright in a digital environment is posed by the idea of a borderless internal digital market on the one hand and the ‘nationality’ of copyright and neighboring rights on the other hand. As a general rule, any entrepreneur or end-user who wants to use, commercially or non-commercially, copyright protected works needs to ask for permission from the rightsholder, which must not necessarily be the author of the work; the
former or the latter, or even both, can be difficult to identify or find.\textsuperscript{10} In a
digital environment the time that passes between creating a business
model based on the use of intellectual property or, for private persons,
creating content that uses or incorporates copyright protected material and
its launch or upload is shorter than in the ‘real’, \textit{viz.} non-digital world.
Any significant delays in clearing rights for online uses or high practical
barriers in acquiring relevant licenses can have a deterring effect for inno-
vative business models and put the EU at a disadvantage \textit{vis-à-vis}
competing markets.

The policy goals that will shape a future legal framework are dictated
by the European Commission,\textsuperscript{11} which has displayed a high degree of
productivity over the last years in the policy field of intellectual property,
copyright modernization being one of the pillars of these initiatives. More
recently, however, a participation by different stakeholder groups in the
debate on the reform of the EU copyright rules has added another layer of
aims, which are often not congruent with those proclaimed by the
Commission.

A central point in the analyses undertaken in this work is the center-
piece of EU copyright law, the \textit{Directive on the harmonisation of certain
aspects of copyright and related rights in the information society} (InfoSoc
Directive).\textsuperscript{12} However, the Directive will be taken more as a point of refer-
ence which will repeatedly appear in the discussion of other elements of
the EU copyright system.

Before giving a more detailed overview of the guiding policy goals,
which will introduce the wider scope of this work, the following part of
this introduction gives by way of a brief excursion a condensed survey of
the genesis and historical development of copyright before the emergence
of digitization, referring also to the technological evolutions that spurred
the development of national and international copyright laws. Any

\textsuperscript{10} For some of the problems the result from orphan works the EU passed the \textit{Orphan
Council of 25 October 2012 on certain permitted uses of orphan works, OJ L
299/5, 27.10.2012, p. 5-12 (\textit{Orphan Works Directive})).
\textsuperscript{11} These goals are set out in a number of communications and green papers, not
necessarily dealing exclusively with copyright related aspects of the digital
market. These documents are discussed in detail in Chapter 1.C.
2001 on the harmonisation of certain aspects of copyright and related rights in the
analysis of the problems created by the emergence of digital content and the management thereof can only profit from such historical recapitulation.\textsuperscript{13} It also helps to explore the development of and rationales behind the current EU copyright rules.

\textbf{B. A historical perspective: Copyright before digitization}

This recapitulation presents only a brief historical review to illustrate the genesis of copyright itself as well as its neighboring rights and, equally brief, and therefore incomplete, a summary of the technological evolutions that spurred the development of national and international copyright laws.\textsuperscript{14} This will serve to develop an understanding of the technical and legal developments that shaped the use of works protected by copyright and their dissemination through various channels, which makes the legal treatment of such works so complicated in our modern networked world. Ideally, this is done together to observe the interdependence of both, although it can be argued that the development of copyright laws is dependent on technical developments. Copyright, and the process it was designed to protect, namely the copying of books and other written works, and later also other types of works, of a more or less artistic nature, have undergone a significant evolution over the last 550 years, and it is this development that one may learn from when thinking about a modernization or recasting of the current copyright system that should be fit for the digital age.\textsuperscript{15}

\textsuperscript{13} On the importance to be mindful of the history of IP, also from a comparative perspective, see Justine Pila, “Pluralism, Principles and Proportionality in Intellectual Property”, \textit{OJLS} (2014), 181-200, p. 183 et seq. (with further references).

\textsuperscript{14} For a more detailed treatment see for example an edited volume by e.g. Lionel Bently, Uma Suthersanen, & Paul Torremans (Eds.), \textit{Global Copyright: Three Hundred Years Since the Statute of Anne, from 1709 to Cyberspace} (Cheltenham, Northampton: Edward Elgar Publishing, 2010); further Brad Sherman & Leanne Wiseman (Eds.), \textit{Copyright and the Challenge of the New} (Alphen aan den Rijn: Kluwer Law International, 2012).

\textsuperscript{15} A comprehensive treatise of copyright history is better left to other authors; underlining the importance of the historical development to reflect on current problems, in particular the challenges of the digitization and the perception of copyright amongst consumers Catherine Seville writes: “Viewed from a historical perspective, many of these ‘new’ challenges may be seen simply as fresh presentations of familiar dilemmas which copyright law has attempted to address in the past.
Copying, for the most time of modern mankind’s existence, was not subjected to any particular legal framework. Instead, copying works depended on a good relation between the owner of the physical work and the designated reproducer, however subject to factual limitations, namely that the process of copying was very burdensome. No technical means existed to reproduce hand-carved clay plates or other works worth copying, and when papyrus and later paper were used to record human knowledge those works were written and, as a consequence, copied by hand. Already in ancient Egypt and Rome, certain works were mass copied; those acts of reproduction, however, took place in human copy-shops, where cheap slave labor allowed to produce multiple copies of popular texts for the first mass-markets for literary productions. It was the invention of the commercially employable printing press by Johannes Gutenberg in the 15th century that enabled the quick and cheap replication and mass distribution of books, a convenient carrier of information and knowledge, and as an effect raised the interest of rightsholders for special protection. All this happened with little regulatory intervention from the sovereign entities. And it were not authors that initially sought for protection of their works, but publishers who asked for protection from unauthorized reproductions of their products, which created competition on their national markets. This protection was given by sovereigns in the form of printing privileges on an individual basis, which were rights granted by sovereigns within the territory under their rule for exclusive printing rights to a specified work. The reasons for a system of privileges were almost the same throughout Europe: the right to print a work granted to individ-

17 Even before the system of privileges was established throughout Europe, the English Stationers’ Company, a guild of booksellers, founded in 1403, established a system of self-regulation, enforceable only against members of the guild, which gave the stationer, or bookseller, the exclusive right to print and sell a certain work; in 1557 the Stationers’ Company obtained a state imprimatur, a similar system was maintained already in ancient Rome by leading Roman publishers who regulated the competition amongst each other on the basis of non-interference, cf. Ibid., pp. 64-7.
uals enabled sovereigns to control the book-trade within their territories, and in this way maintain control of a new industry that had the potential to disseminate any kind of information relatively quickly and in relatively high numbers. In effect, the system of privileges enabled a sovereign to censure works or prohibit their printing altogether. For printers, privileges guaranteed economic survival and stability by constantly shielding them from unwanted competition, which helped to foster the new printing industry.\(^\text{18}\) It was not until the early 18th century that the first copyright law would be enacted; later more modern printing techniques and the gradual digitization of copying processes and the works themselves required a constant legal evolution that had to keep up with technical development.\(^\text{19}\) In the outgoing 17th century, the first move was made to establish the first national copyright legislation that regulated the printing industry and book trade.\(^\text{20}\)

It was England that abolished the system of privileges in 1696 and introduced a true copyright law with the Statute of Anne in 1710.\(^\text{21}\) The Statute provided authors, or those to whom the right was assigned to, for a 14-year protection for their works, it required a registration as one condition for the recognition of the right.\(^\text{22}\) The stationers, or publishers, continued to profit from this protection for some time, but with the enactment of the Statute of Anne the status of authors had dramatically changed, simply by including them in the wording of the act, however

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21 Also referred to as the Act of Anne, see Ricketson & Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (2006), para. 1.02.

22 The registration requirement is an indication of the more economic focus underlying the enactment of the Statue of Anne as opposed to the more author-focused approach that was to be taken by continental European states; the first continental copyright act was passed in Denmark (Copenhagen) in 1741, however it resembled the British example and did not expressly confer rights on authors but rather ‘entitled’ persons, cf. *Ibid.*, para. 1.02.
with little immediate economic benefits for them. Nevertheless, the publishers remained the main beneficiaries of the new system which gave, and gives until today, the common law copyright a “decidedly economic and pecuniary bias”.

The first true author’s right-style legislation was not passed until the late eighteenth century. Following the French Revolution and inspired by the recognition of property as a right and the freedom of expression including the right to print by the Declaration of Rights of Man and the Citizen, the French copyright acts of 1791 and of 1793 granted authors certain rights. As opposed to the English system the main beneficiaries were the creators of protected works and not those who held the rights, which they might have acquired against a one-time payment to the author.

From France, the author’s rights approach spread over Europe more or less quickly. Countries under French influence and ever shifting national

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23 Ibid., para 1.02, the role of authors in England would only change later, giving them not only more economic benefits from their works, but increasing their standing and importance in British cultural life.


25 In France, from the late 16th century on, copyright was granted to Parisian publishers for certain books on an individual basis. Under pressure from regional publishers, who challenged the monopolies of the Parisian publishing houses, these rights were extended to the entirety of the French territory. On the eve of the French Revolution authors received a lifelong right of reproduction and publishers received exclusive rights to recover their investments, see Gunnar Petri, “Transition from guild regulation to modern copyright law (Sweden)”, in: Lionel Bently, Uma Suthersanen, & Paul Torremans, Global Copyright: Three Hundred Years Since the Statute of Anne, from 1709 to Cyberspace, (Cheltenham, Northampton: Edward Elgar Publishing, 2010), 103-115, pp. 111-3; also Ricketson & Ginsburg, International Copyright and Neighbouring Rights: The Berne Convention and Beyond (2006), para. 1.04.

borders brought the system first to the neighboring states.\textsuperscript{27} In the German territories, after the collapse of the Holy Roman Empire of the German Nation in 1806, during which a system of privileges had survived until the beginning of the nineteenth century, copyright laws that provided for the protection of authors and publishers were introduced. Due to a fragmentation into a multitude of Kingdoms, Duchies and other sovereign constructs of the territory of the former Holy Roman Empire, the progress was rather slow and furthermore produced, albeit similar, still widely non-uniform copyright laws.\textsuperscript{28} Only in 1870 Germany (then the North German Confederation and as of 1871 the Second German Empire) received its first uniform copyright law.\textsuperscript{29} Other European countries followed the French approach throughout the century, and in 1886, at the time of the signing of the \textit{Berne Convention}, 17 European countries had enacted copyright laws.\textsuperscript{30}

\textsuperscript{27} Laws resembling the French acts were enacted in Belgium and the Netherlands in 1795, see Ricketson & Ginsburg, \textit{International Copyright and Neighbouring Rights: The Berne Convention and Beyond} (2006), para. 1.05; see also Willem Grosheide, “Transition from guild regulation to modern copyright law – a view from the Low Countries”, in: Lionel Bently, Uma Suthersanen, & Paul Torremans, \textit{Global Copyright: Three Hundred Years Since the Statute of Anne, from 1709 to Cyberspace}, (Cheltenham, Northampton: Edward Elgar Publishing, 2010), 79-102. pp. 80-92.

\textsuperscript{28} This was due to the fragmentation of the territory of the former Holy Roman Empire, which after its dissolution in 1806 became the German Confederation (\textit{Deutscher Bund}) with initially 34 territories, all of which had their own laws and regulations on printing and copyright, see Dutfield & Suthersanen, \textit{Global Intellectual Property Law} (2008), p. 70, Ricketson & Ginsburg, \textit{International Copyright and Neighbouring Rights: The Berne Convention and Beyond} (2006), para. 1.05 and Adrian Sterling, \textit{World Copyright Law} Sweet & Maxwell, 2008), para. 1.12; see only on the history of German copyright history: Martin Vogel, “From privilege to modern copyright law”, in: Lionel Bently, Uma Suthersanen, & Paul Torremans, \textit{Global Copyright: Three Hundred Years Since the Statute of Anne, from 1709 to Cyberspace}, (Cheltenham, Northampton: Edward Elgar Publishing, 2010), 116-121, pp. 116 et seq.

\textsuperscript{29} Gesetz, betreffend das Urheberrecht an Schriftwerken, Abbildungen, musikalischen Kompositionen und dramatischen Werken, BGBl. 1870 Nr 19 339-353 (Law relating to the rights of authors in their writings, drawings, musical compositions and dramatic works); the law was strongly influenced by the Prussian Law of 11 June 1837 in its coherent approach, cf. Sterling, \textit{World Copyright Law} (2008), para. 1.12.
These two traditions that developed in relative geographic proximity and emanated from a comparable system of privileges, today mark the divide in the world of copyright. The earlier British ‘copyright’ tradition has a strong focus on economic rights and follows a more utilitarian approach than the continental European author’s rights tradition, the main objective of which is to protect the author as the creator of a work. Nevertheless, both systems usually come to similar results.\(^{31}\)

Copyright in its early forms was granted by sovereign states in their territories and for their nation’s interests.\(^{32}\) As in the case of the US Copyright Act of 1790,\(^{33}\) copyright existed only for nationals and residents of the United States,\(^{34}\) with the effect that foreign authors did not enjoy any rights (such as to prohibit the copying of their works) within the territory of other states. This protectionist system, which in the case of the US in the late 18th and early 19th century went along with high tariffs for imported books, provided a safe environment for domestic authors that gave an incentive for creative production and at the same time promoted a printing industry that pirated foreign authors’ works for cheap mass-distribution.\(^{35}\) An interesting side-note, which deserves more than a footnote, is that in the early days a US author had to seek copyright protection in each of the federal states of the US, the US Copyright Act could only be introduced after the US Constitution granted Congress competence to protect

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30 See Ricketson & Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (2006), para. 1.05, with all countries and references to the respective national laws.


33 In the US, first state laws were enacted before the Federal Copyright Act was passed in 1790, it was inspired by the British Statue of Anne, cf. *Ibid.*, p. 70; more on the development of US copyright law and its roots and evolution see Seville, *The Internationalisation of Copyright Law: Books, Buccaneers and the Black Flag in the Nineteenth Century* (2006), Chapter 5.


This, it will be seen, is not much different from the situation in the European Union and the new competence to enact EU intellectual property titles under Article 118 of the Treaty on the Functioning of the European Union (TFEU); whether the latter will have a comparable impact is a question that needs to be discussed in more detail.

Since the enactment of the first copyright laws, an acceleration in technological progress has increased the problematic environment copyright has to operate in. New forms of ‘works’ required legislative adaptions as these works did not fit within the traditional concept of copyright anymore. The triggers were new technologies which created ‘sound recordings’ and ‘film productions’ that did not fall within the individual categories of protected works as defined by the majority of national copyright laws, and which were already stretched beyond their original meaning.

More importantly, the trade in copyright protected works necessitated an international system based on cooperation between national states that would not leave rightsholders defenseless whose works entered, in one way or the other, foreign markets. First approaches to safeguarding rightsholders interests abroad were made on the basis of bilateral treaties. Only at the end of the 19th century the first multilateral treaty, the Berne Convention for the Protection of Literary and Artistic Works of 1896 (Berne Convention), provided for international copyright protection, although not universally. The Berne Convention was revised several times.

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36 The episode of Noah Webster, who sought copyright protection for his speller, grammar and reader and played an important role in lobbying for and drafting the US Copyright Act is described in more detail in: Ibid., p. 4.
38 The term ‘work’ is used to describe an (not necessarily physical) intellectual creation that is subject to copyright protection. Because it is sometimes uncertain whether any given object falls under the legal definition of work, as provided in virtually every national copyright law or in international and European instruments, the non-legal use of the term will be indicated by the term in inverted commas.
40 The US rejected the Berne Convention initially and only became signatories in 1989, on the reasons and a more detailed analysis of the genesis of the international copyright system see Goldstein & Hugenholtz, International Copyright:
times and supplemented by a number of special treaties\(^{41}\) which were usually reactions to new technological developments.

Neighboring rights received international protection for the first time in 1961 through the *Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome Convention)*. Technological developments led to an increase of neighboring rights, such as the rights of making available and communication to the public, or the right to rebroadcast, none of which are particularly relevant for printed materials today, and which were subsequently reflected in a number of international instruments.\(^{42}\)

It becomes apparent that protection for rightsholders has been gradually increased over the centuries.\(^{43}\) The basic privilege to publish certain works exclusively has been reinforced with a number of individual rights for authors and other related rightsholders. Especially related rights mainly serve economic interests, which are justified by ‘higher purposes’, namely to promote science, culture and the arts.\(^{44}\) In addition, with the advent of new communication technologies, and new opportunities to exploit protected uses across borders, the territorial dimension of copyright gained significant importance.

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\(^{41}\) As the *Berne Convention* was not accepted universally, initiatives for competing legal frameworks led to the adoption of other international copyright instruments, most notable amongst them the *Universal Copyright Convention* (1952); their importance faded with the wide acceptance of the *Berne Convention*, not least because of the substantive provisions of the Convention were included in the *TRIPS* by virtue of Article 9(1): “Members shall comply with Articles 1 through 21 of the *Berne Convention* (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived therefrom.”

\(^{42}\) See Chapter 2.A.


C. Outline and Structure

The overarching aim of this study is to outline the contours of the central elements of a system for copyright in the EU digital single market that enables the use and access to digital content. Such a system should be efficient for rightsholders in the sense that they can exploit their works more easily, ranging from large-scale commercial uses to uses of marginal and insignificant economic importance. But at the same time this system must provide those who use digital works of others with legal certainty as to the possible uses of digital content and the compensation that might, in some cases, be due to rightsholders. The development of such a system must be oriented towards a reform and not a revolution of the current system of EU copyright legislation. This is due to well-known political boundary conditions in the legislative process at EU level.

I. Four factors to rule copyright

This fundamental reform should take into account four particular factors. These factors are interlinked and complement each other to form a set of rules that displays a systemic coherence and that helps to enable a Digital Single Market. The first two factors are efficiency and certainty which constitute operative conditions that should guide the formulation of EU copyright rules. These rules, as a third factor, should reflect a balance between the competing interests involved. Fourth, these three factors should form a system of rules, rather than a patchwork of loosely related legal instruments.

1. Efficiency and certainty

A copyright reform should safeguard that European copyright rules provide efficiency from a transactional perspective. Identification of rightsholders and intermediaries should be facilitated, the relevant rights, but also the relevant exceptions for particular uses must be understandable for lawyers as well as knowledgeable users. Efficiency and (legal) certainty must be understood as concepts that complement each other. They should both work in concert to enable desired uses and copyright should be permitted to disable uses only in cases that negatively touch upon the
fundamental interest of authors and rightsholders. Efficient copyright rules that provide legal certainty should therefore mainly reduce transaction costs for rights clearance and information costs for uses that do or do not require prior authorization.

2. Balance

A copyright reform should not succumb only to economic considerations of efficiency and legal certainty as enablers of business models that generate revenues for commercial users. It should also reflect that copyright is meant as an incentive for the creation of intellectual and artistic creativity which should then foster a vibrant exchange of ideas that find their manifestation in concrete expression. By favoring the interests of only one or few of the copyright actors, copyright rules can become unbalanced. As a result, copyright laws cannot fulfill their functions for which they were designed. Furthermore, a set of rules that disadvantages certain stakeholders will lose trust and acceptance amongst these stakeholders, who would not accept the legitimacy of these rules. Therefore, it is important that the rules that determine exclusive rights and lawful uses of works protected by copyright reflect a fair and just balance of interests.

3. System

A copyright reform that is efficient, provides legal certainty and is balanced should, moreover, have a systematic structure. This systematic structure should stabilize the system to make it flexible, to a certain degree, without abandoning the justification for the system of copyright. A systematic approach to copyright law, which it is argued below does not exist in the EU, can overcome uncertainties and facilitate the progressive development of copyright norms in the future. A system is also more likely to provide guidance in borderline cases, which cannot be decided clearly on the text of the laws. A system that should master these challenges must be based on concepts that are relatively stable and that express the essence of copyright. It will be argued that these concepts should take the form of general principles of EU copyright law.
II. Structure

The study will focus on several elements, or levels, of the (EU) copyright system as it has been developed so far: The level of policy planning, the normative level, and the operational level, the latter comprising concepts to balance interests of rightsholders and users as well as instruments to manage the copyright system. Also, it will become apparent, how these levels interact in terms of mutual dependencies, ambiguities, or in contradiction to one another.

The major components structuring the study can thus be described and outlined as follows:

The level of policy planning (Chapter 1) reflects the scope of awareness within the EU as to the regulatory requirements in a digital copyright world. Following a summary of major issues of “The modern copyright dilemma”, a series of policy papers published by both the Commission and the European Parliament between 2010 and 2015 is analyzed. These documents, or parts thereof, were formulated to assist in the design of a “Digital Agenda of the EU”, eventually culminating in 2015 in the “Digital Single Market Strategy”.

The normative level (Chapter 2) comprises the body of substantial legal provisions, the existing copyright acquis, relevant to copyright in the EU, molded into EU legislation as well as their interpretation in the jurisprudence of the CJEU. In this context, also relevant international instruments – conventions, treaties, agreements – are reviewed that have influenced EU copyright legislation.

The operational level (Chapter 3) describes, in separate subsections, important concepts (Territoriality/Exhaustion and Limitations & Exceptions) and instruments (Technical Protection Measures and Collective Management Organizations) as elements of a framework for a European copyright management system. Most of these elements originated in the pre-digital era and now have to be examined as to whether or to what extent they may also be applicable in the digital world of copyright, or whether new interpretative approaches or even legislative accommodations are necessary and conceivable. Rulings of the CJEU and some national courts in a number of cases are particularly relevant, as is a rich body of academic analyses and recommendations.

The first of these concepts is the principle of territoriality which, in combination with the principle of exhaustion (Chapter 3.A) traditionally restricts the extent to which copyright could be claimed and enforced by
rightsholders. Both were originally developed with regard to the distribution of copies of protected works in physical forms and basically provided that once a copy had been sold in a specific territory (usually a state) by, or on behalf of, a rightsholder certain of his rights are “exhausted”, i.e. they can no longer be exercised by their owner, and the user who has rightfully acquired the copy is then entitled to exercise control over his copy, for example by selling it to a third party. The continued application of this limitation in (no longer physical) digital contexts needs a number of reconsiderations as certain assumptions underlying its definition and introduction with respect to tangible forms no longer hold. In the EU, the principle has reached a regional dimension, whereby for the purpose of applying exhaustion all Member States are considered as one territorial unity. This interpretation has been challenged in a digital context and is discussed based on recent jurisprudence at EU level, at national levels and, comparatively, in the US. The interpretations the exhaustion doctrine has received in different courts will help to foster an understanding if, and how, exhaustion can also apply to digital content and which changes – legislative, interpretative, systematic – would be required.

Also the second concept, Limitations & Exceptions (Chapter 3.B), limits the exclusive rights of rightsholders so as to achieve a reasonable balance between the interests of rightsholders and the public, allowing protected works to be used without permission and with or without payment of compensation. Typical cases of limitations and exceptions (L&Es) are the use for educational purposes, in libraries or by disabled persons, but also of fundamental rights, e.g. the freedom of expression, or another public interest are concerned. Despite a number of references to L&Es in EU directives, the detailed formulation of L&Es is largely left to and determined by national legislation so as to produce a considerable variance in format and content. Moreover, the existing L&Es more often than not, in particular in the European tradition of fixed catalogs, do not conform to the new requirements in a digital environment. Topics discussed in this part with respect to the EU thus comprise issues of harmonization of L&Es across EU Member States as well as, in methodological terms, substantial and procedural revisions towards a greater flexibility to allow for continual adjustment to technological changes in digital contexts. In this regard, a comparative view on the legal practice in the US based on the “fair use” doctrine will provide some instructive insights that may potentially become relevant in further discussions of reshaping L&Es in the EU.
The possibilities for the enforcement of digital rights (Chapter 3.C) were greatly enhanced, parallel to the expansion and progress of technologies in the digital distribution chains for copyright protected works, by the instrument of Technical Protection Measures (TPMs). TPMs shall secure several aspects of the use of copyrighted material, e.g. the prevention of access to such material by unauthorized users, the prevention of certain forms of use, and the unauthorized copying of protected material. Typical methods to these ends are either password protection or encryption. The application of TPMs encounters, however, several lines of criticism. In the most general form, it is argued that TPMs may unduly favor, technically and legally, the side of the rightsholders at the expense of also authorized users and permitted uses, including exercises of L&Es. In the EU, relevant directives contain a number of ambiguities concerning the transformation in national laws, and a wide margin of discretion is reserved to national legislators as to the mode and scope of transformation, resulting in a lack of legal certainty by rather diverse regulations across Member States. The discussion of these concerns addresses necessary reforms in EU policies with respect to TPMs to rebalance the protection of both rights of rightsholders and users, the clarification of the relation between TPMs and L&Es and necessary legislative tasks.

The role of Collective (Copyright) Management Organizations (CMOs) will be dealt with (Chapter 3.D). The raison d’être of CMOs is to enable authors to safeguard their financial interest by collecting compensation for uses of their works. Even before the advent of digital uses, authors were not able to individually monitor uses of their works and enforce their claims in every single case. "Collecting societies" were therefore mandated with this task. In today's digital environment, CMOs have grown far beyond their original territorial (national) boundaries of the scope of their activities regarding membership, the extension of the repertoires in terms types and quantities of works, handled as well as multi-territorial licensing. The requirements of new business models for the exploitation of music in particular triggered networks of cooperating CMOs from different countries which aggregate diverse profiles of members and works represented so as to raise their attractiveness, especially for large-scale commercial users seeking efficient procedures of rights clearance and licensing. In particular regarding the latter aspect, the EU increasingly recognized a need, not the least in the light of its Single Market policies, to harmonize different legislative approaches to collective rights management in Member States by a framework of uniform stan-
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dards across all Member States. This section looks at the recent developments in the field of collective rights management in Europe and analyzes in particular the new “Directive on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market” (Collective Management Directive) \(^45\) with regard to its ability to provide solutions for multi-territorial licensing models as well as a number of deficits, that were identified in the preparatory work for the Directive concerning issues of governance, administration and transparency in the work of CMOs. Besides, the effectiveness of the European framework for multi-territorial licensing for online uses and its balancing effect is examined.

The concluding Chapter 4 evaluates the changes suggested in Chapter 3 as to their potential to create an efficient and balanced set of EU copyright rules, individually, as well as in their interactions. As a perspective for future legislative interventions three options and their different impacts on effectiveness and the balance in copyright are discussed. The chapter concludes with a perspective on future copyright reform. Finally, Chapter 5 summarizes the findings of the study.

Today, copyright is not dead. But the advent of digital technologies rang in a new era for copyright. Whereas national copyright laws and international agreements had difficulties catching up with the insane speed of technological development, businesses and consumers adapted rather quickly and constantly scratched at the borders of the legal *terra cognita*, and often dared to wander beyond the chartered territories. Throughout its – still rather short – history, copyright had to adapt to technological developments. Concepts that were developed against a certain technological background often turned out to be ill-suited for new technologies. Particular exclusive rights did not necessarily cover all activities and products that were deemed worthy of protection (e.g. phonographs, radio broadcasts), and some concepts rather served to complicate copyright than to make it a reliable legal framework for creativity. As a consequence, copyright, not so much the system as a whole, which balances the interests of authors and the public, but more its concrete realization through normative intervention, had to adapt. This process is far from over, although the first international attempts to cope with digitization and its conflicts with copyright were made already in the mid-nineties of the 20th century.46

A. *The Modern Copyright Dilemma*

The law as it stands today has to face a public that is technologically enabled to copy and store large amounts of data at very low cost. The process of making copies has shifted from printing houses, to copy shops and eventually to home computers, and from bulky tape recorders to hand-held mobile devices. Digital books, music files and large movies are downloaded and streamed naturally by a generation that experiences the

46 See for the *WIPO Internet Treaties* Chapter 2.A.III. And it can rightfully be asked, in a rhetorical manner, whether copyright will ever finish the process of adaption, or whether the nature of lawmaking has the inherent quality that it will always require periodical adaptations; in copyright, these periods might just be a little shorter than in other areas of the law.
Internet as something normal, and that possibly cannot understand the impact it had on the legal use of copyright-protected works. Ever increasing broadband capacities\textsuperscript{47} increase the volume and the speed of digital content that moves between servers around the world, and which enables new transmission modes such as live streaming of music and audiovisual content. The Internet, one could argue, is perceived by many as a repository of digital content that is available anywhere (where there is fast access to the Internet) and anytime.\textsuperscript{48} Beyond a repository for passive consumption the Internet is a marketplace where files are exchanged, offered and often altered. Forms of user-generated content (UGC) use protected works and combine them with other (potentially protected) works, alter or distort them, change the medium on which they were created.

I. Specificities of digital reproduction

Digital technology has opened access to protected works to bigger and new audiences. This proliferation of digital content went hand-in-hand with an increase in copyright-relevant acts of reproduction. Moreover, digitization has facilitated cross-border access to content and challenged established licensing mechanisms.

\begin{thebibliography}{99}
\bibitem{47} The European Commission in “Europe 2020” and more specifically in the “Digital Agenda” has set ambitious goals to increase access to high speed internet and higher transmission rates, by 2013 all European citizens should have had access to broadband internet with at least 30 Mb/s and a significant increase of bandwidth to 2020, European Commission, COM(2010) 2020 final, pp. 12-3 and European Commission, \textit{Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. The Digital Agenda for Europe - Driving European growth digitally}, \textit{COM(2012) 784 final}, Brussels, 18.12.2012, pp. 6, 19-20.
\end{thebibliography}
1. New reproductions

The history of copyright has seen a de-individualization of the process of reproduction. Today, we are back to making individual copies, we are (almost) back to where we started from. But works are not copied word by word, or picture by picture, but by a simple mouse-click, the computer takes care of the rest; their nature makes digitized works easier to copy than any works ever before. Today, in almost every house, in almost every briefcase, in almost every pocket of a teenager there is a digital printing press that has the ability to multiply works by the click of a mouse or the swipe of a finger. We carry these devices with us for constant access. Copies can be shared and exchanged through the Internet at an unprecedented speed, ever wider bandwidth makes it possible to transfer increasingly larger files and better data compression ratios decrease the size of files that are copied.\textsuperscript{49} Digital copies, compared to copies of physical works, do not suffer from a loss of quality. Therefore, multiple replications do not result in ‘unattractive’ copies due to lower sound or video quality. Digitization makes it possible to view, read, and listen to countless works on one device. For what one used to have books, magazines, newspapers, vinyl records, audio cassettes, CDs, video tapes and DVDs, today a desktop computer, a smart-TV connected to the Internet, a laptop or a smartphone are sufficient.\textsuperscript{50} Machines that offer quicker and cheaper access to digital content have reduced in size that they literally fit in a pocket, thereby making digital content a daily commodity that people want to access anywhere at any time and on a multitude of different devices;\textsuperscript{51} and people are asking for and expect diversity in content and the ability to access and to ‘use’ the content in many different ways.\textsuperscript{52}


\textsuperscript{50} Already in 1990 Pamela Samuelson has discussed the distinguishing aspects of digitization in relation to tangible works has established six criteria: (1) ease of replication, (2) ease of transmission, (3) ease of modification, (4) equivalence of works in digital form, (5) compactness of digital works and (6) capacity for searching and linking, Pamela Samuelson, “Digital Media and the Changing Face of Intellectual Property Law”, \textit{Rutgers Computer & Tech. L.J.} (1990), 323-340.

\textsuperscript{51} Cf. Christoph B. Graber, “Is there potential for collective rights management at the global level? Perspectives of a new global constitutionalism in the creative sector”,

\textsuperscript{52}
2. New uses

Not only has the process of making copies changed drastically. The roles of traditional actors in the copyright world have changed as well. More accurately, one group has become a true actor. Consumers, enabled by new technical possibilities, have become producers themselves that create, broadcast, make available digital content in all sorts of different forms. First, and rather unproblematic, consumers now have access to professional production tools for music and video editing. With these tools at their hands they create original works, mostly for private use, which they nevertheless often publish on one of the many online picture- and video-sharing sites. The very same tools enable consumers to alter, recompose and combine other existing works. In the same way as private videos and pictures are published, collages, remixes and mashups are published online. In such a case the composer of the derivative work would need to ask the authors and other rightsholders of the works used whether they allow publication of the new work containing their works. Considering the amount of remixes and mashups or other works that contain protected works published, rightsholders would, even if a direct mechanism existed, be faced with thousands of requests. Even major record labels or big collecting societies would be overwhelmed with responding to every request, determining whether fees have to be paid and contacting the author whether he agrees to the use of his work in another context.

3. Different authorization-markets

In a digital environment the number of users and the number of uses have increased, as have the number of uses that require authorization. Accord-


52 In this sense Samuelson, “Digital Media and the Changing Face of Intellectual Property Law”, *Rutgers Computer & Tech. L.J.* (1990), pp. 333-4; Samuelson argues that digitized works are more similar due to their form. Digital content can be stored on the same device whether it is images, sound files or software. Data in digital form is therefore equivalent and Samuelson believed that copyright legislation would not distinguish between different types of media anymore if this media is in digitized form.
ingly, the requirements for a copyright system have increased and their fulfillment will be decisive for whether a European Digital Single Market finally takes off, or will remain in a patchwork-state, in which access to online content for consumers can be a piecemeal. Equally, entrepreneurs or other parties interested in disseminating original works, or works that incorporate copyright protected works can be frustrated if they want to make their efforts in accordance with the law.

When individuals were still copying works by hand for their own private use, or for the use of their patrons, no interest in a comprehensive copyright system that extended to the management of (digital) works existed, least at European or international level. In the end it was simply easier to ask the owner of a work to borrow it in order to make one copy for oneself. Nor was licensing an issue as mass-reproduction was not yet possible due to technological restraints, a vibrant book market did not exist and music was performed live.\textsuperscript{53} Given the burdensome process of copying, which required time and effort, the extent to which works were replicated was marginal in relation to modern times. Therefore, little potential existed to monetize the copying business on a large scale. Whereas in the olden days scribes hand-copied precious books, and later the printing press enabled publishers to mass-produce popular literature, and even more recently private persons recorded music from the radio or films from television on audio and video cassettes respectively and later CDs and DVDs at their home computers, in this day and age digital files are downloaded from file-hosting sites, exchanged via peer-to-peer file-sharing or torrents are used to share larger files in a more anonymous environment.\textsuperscript{54} For this purpose, the ‘original’ must not be in the possession of the person who intends to make a digital copy, but it can be located on a computer literally on the other side of the world, and the ‘owner’

\textsuperscript{53} Copying and translating scientific works was a common exercise for much of human history. Without reproductions of works the sciences would have never developed the way they did until today. See on a history of European science, illustrating the importance of reproductions and translations: John Freely, \textit{Aladdin’s Lamp: How Greek Science Came to Europe Through the Islamic World} (New York: Vintage, 2010).

\textsuperscript{54} The difference between peer-to-peer file-sharing and torrents is that the former transfers files from host to host, which makes the ‘transferor’ easy to identify. The latter system segments a file and these small segments can be downloaded from several users at the same time and when all segments are downloaded the file is rearranged and can be used by the receiver.
must not even be asked directly for permission. This ‘opportunity’ of making quick and easy copies of high quality is often not used to make carefully selected copies for private use, but is used by private persons to acquire a mass of digitized content form other consumers for which they would usually have to pay the rightsholder compensation. One might endeavor into an analysis why such persons do not pay for legal (digital) copies, but this discussion can be shortened by simply realizing that there is currently no EU-wide offer, which could satisfy a demand side, demand created by consumers who might be – and probably are\textsuperscript{55} – willing to pay for music, films and other digital content on the Internet. But there is often simply nobody users can ask for authorization to use content they have legal or illegal access to. Similarly, online services find it difficult to request authorization to use protected works for the entire European online market. Seeking the right rightsholders and requesting licenses for all works used and for every separate act that requires authorization under current copyright law can be very burdensome, to nearly impossible.\textsuperscript{56}

This dilemma is caused by a delay in the development of copyright law, in that it faces severe difficulties to adapt in time to the reality of the

\textsuperscript{55} In France, a survey showed that consumers are willing to pay for legal downloads of music tracks, the recent success of services such as Spotify, Deezer and most prominently Apple’s iTunes store have demonstrated that a demand for legal possibilities to access and acquire (against consideration) digital content legally exists. Such services show as well that clearing licenses for services can be burdensome and time consuming; it took Apple more than eight years after its initial iTunes launch in the US to clear licenses and to serve all EU Member States with national offers. Spotify, an online streaming offer, only opened its Luxembourg service in late 2012 with many Member States unserved at that point in time, at the end of 2014 users in three Member States (Croatia, Romania and Slovenia) remained excluded from the service. However, a number of artists have expressed their dissatisfaction with the service and have withdrawn their songs from Spotify (the contemporary, and commercially successful, pop artist Taylor Swift withdrew her entire repertoire from Spotify in November 2014 after the release of her album “1989”: Hannah Karp & Sven Grundberg, “\textit{Taylor Swift Pulls Her Music From Spotify. Move Comes Week After New Album Release}”, 04.11.2014 (The Wall Street Journal), available at: http://online.wsj.com/articles/spotify-says-taylor-swift-pulls-her-music-from-service-1415035751 (accessed: 10.01.2016).

\textsuperscript{56} Cf. Ian Hargreaves & Bernt Hugenholtz, “Copyright Reform for Growth and Jobs, Modernising the European Copyright Framework”, (2013), 1-16, p. 6; the authors focus on the transaction cost aspect of the current insufficiencies of EU copyright law.
A. The Modern Copyright Dilemma

Internet, which is that it offers content for consumers disregarding where they are situated. And consumers certainly expect to have access to digital content wherever they are. Although we are back to where we started from, individuals making copies of single works, the legislative framework that exists today is not suitable for the current state of the Digital Market. Even more, it has to be more elaborate than ever before to accommodate all the different uses and business models the Internet enables.

II. Aggravating factors

Technological developments alone pose many problems to copyright as a system. But some areas of copyright have been affected by technological developments in such a way that they merit special attention. They became important due to the sheer amount of reproductions for various uses and their delocalization because of the ubiquitous nature of the Internet.

The first is moral rights, which must be considered in relation to transformative works and their implications for the author's right to integrity of their work. The second is fragmented harmonization at the European level due to a reactive approach to copyright legislation. The third is territoriality, which plays an increasing role beyond the exhaustion principle in the age of digital communication. Each of these problems will be briefly outlined and discussed in more detail in the relevant chapters.

1. Problems with moral rights

The traditional objects of copyright protection are books or other printed works and, at a later point in time, fixed musical recordings. These items are tangible and usually have some kind of wrapping or casing, some type of protective cover or dust jacket. The name of the author of the work and other rightsholders, unless purposely omitted, are displayed on the book cover, the record sleeve or the CD case. Further, those types of works are usually sold in their original embodiment, which is an original copy marketed by or with the consent of the author or his assignees. Even for illegal copies the reproducer has an interest to keep the name of the author on the product. The name of the author of such works vouches for a certain quality the acquirers of the copies are looking for, certain charac-
teristics unique to the author's work are actively sought by an audience. An author's name here carries a certain reputation and establishes the market value of the work. Also publishing houses and certain record labels or other publishing institutions are popular with certain audiences. In a digital context, this is still the case for many works: audio files of certain performers and groups and e-books of known authors are downloaded for the same reasons.

In a digital environment files travel without dust jackets and cases and the only way of identification might be the name of the file or metadata. Both can be changed in the process of transfer, alteration or transformation so that attribution of a work to the author or other rightsholders can be difficult. The ease of reproduction of entire works or parts of works makes transformative uses easier than before. Transformation of works is facilitated further by specialized software, and dissemination of transformative works takes place quickly via hosting websites and social networks. Keeping control of attribution rights and integrity rights in such environment is virtually impossible. A stable legal environment that safeguards the interests of rightsholders and users, consumers and creators of transformative works does not exist.

2. Fragmentation and effects of harmonization

During a period of continuous harmonization at EU level over the last 20 years copyright has still remained a national property right; important areas of copyright have remained untouched by EU legislative interventions. In areas not harmonized by legislation, for example moral rights and authorship, copyright rules across the EU still differ widely. However, Member States are relatively limited to tackle the digital challenge individually, as Rosati explains, see Eleonora Rosati, “Copyright in the EU: in search of (in)flexibilities”, GRUR Int (2014), 419-428.


58 However, Member States are relatively limited to tackle the digital challenge individually, as Rosati explains, see Eleonora Rosati, “Copyright in the EU: in search of (in)flexibilities”, GRUR Int (2014), 419-428.
Harmonization itself has mainly strengthened the position of rightsholders to the detriment of the public interest. While the scope of copyright protection has been extended, limitations and exceptions (L&Es) to copyright remain subject to strict interpretation and therefore limited application. But even within the harmonized fields differences persist, owed to the principle of subsidiarity. Because directives, as the main instrument of copyright harmonization, leave Member States a certain degree of discretion when implementing EU law, national legislation based on the copyright acquis displays significant differences. This is particularly relevant in the field of L&Es. In addition, the often general and unclear wording of EU copyright legislation created uncertainty among lawmakers and the judicature. Recent references to the CJEU have demonstrated the uneasiness of national judges with the concepts of reproduction and communication to the public.

This uncertainty, paired with the ever-increasing scope of protection has created a paradox that, although historically not unknown, has disrupted the balance of the copyright system. The paradox between strengthening exclusivity by limiting the application of limitations and exceptions and failing to provide mechanisms to enable the legitimate use of copyright

59 Geiger, “The Three-Step Test, a Threat to a Balanced Copyright Law?”, IIC (2006), p. 695, underlining that the extension of exclusive rights has not been accompanied by parallel extension of L&Es.


61 This is in particular with regard to fields which do not have an immediate or strong effect on intra-EU trade, cf. also Ibid., pp. 130-1. See also Agnès Lucas-Schloetter, “Is there a concept of European Copyright Law? History, Evolution, Policies and Politics and the Acquis Communautaire”, in: Irini Stamatoudi & Paul Torremans, EU Copyright Law: A Commentary, (Cheltenham, Northampton: Edward Elgar Publishing, 2014), 988-1017, para. 1.09.

62 See CJEU, Judgment in Case C-466/12, Nils Svensson and Others v Retriever Sverige AB, EU:C:2014:76 and CJEU, Judgment in Case C-360/13, Public Relations Consultants Association Ltd v Newspaper Licensing Agency Ltd and Others, EU:C:2014:1195: In Svensson the referring court had asked whether hyperlinking does not constitute an act of communication to the public, the CJEU added that Member States could not extend the protection offered under Article 3(1) InfoSoc Directive beyond the wording of that provisions; in Public Relations Consultants Association the Court rules that reproductions made in the cache of a computer or on the computer screen for the purpose of browsing are protected under Article 5 InfoSoc Directive and also under Article 5(5).
protected digital content by users, even against compensation for right holders, poses only one of the many barriers for a digital single market.

The effects of fragmentation created by the forgiving flexibilities of harmonization by means of directives has partially been compensated for by the interpretation of the CJEU of fundamental concepts of EU copyright law. Although not always very precise, the CJEU has interpreted concepts under the directives autonomously. This autonomous interpretation of legal concepts has increased the degree of harmonization of copyright in the EU and slowly replaced national concepts that pre-existed prior to the harmonization efforts at EU level.63

III. The poles of the copyright balance

Copyright is not an expression of natural law, which entitles rightsholders to absolute, almost unconditional protection, but a balance must be struck to accommodate the interests of (economic) actors.64 Hilty argued that these interests change and therefore adaptions, in particular regarding the systems of L&Es, must be considered.65 Effectively, such alterations necessitated by a shift in the balance due to technological developments would be necessary in ever decreasing intervals.

The balance of copyright has almost become an enigmatic notion that escapes any palpability. This balance is often invoked when something is declared to be wrong with copyright. The Information Society Directive makes reference to this balance: “A fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter


must be safeguarded.”66 It states this goal of “striking a balance” in relation to exceptions and limitations, more precisely exceptions and limitations in a “new electronic environment”. The Directive is silent on how such a balance should look like, all that can be assumed is that this balance is reflected in Article 5 InfoSoc Directive, which deals with exceptions and limitations. In practice it is determined by the application of a proportionality assessment.67 But the recital uncovers another problem that requires attention. The balance that must be sought is a multipolar balance. A balance must exist not only between rightsholders and users, it must further exist between different classes of rightsholders, and, presumably, between all these classes of rightsholders and users.

A precise differentiation between the different actors is difficult to make. Partly because the borders between the groups are fluid, or have become fluid in a digital environment.68 Only to begin counting the actors that have interests in a copyright framework, interests that must be then balanced not only in a bilateral relationship, but more complex in a multilateral context, would include the following groups. It is important to stress that this enumeration is not exhaustive.

At the basis of copyright is the author, who creates works that are subject to protection. The author in order to exploit his exclusive rights can license his works or assign them to other persons who become derived rightsholders of different exclusive rights. Related rightsholders also have interests that their related rights are protected. These rights build on the

67 Jonathan Griffiths, “Constitutionalising or harmonising? The Court of Justice, the right to property and European copyright law”, E.L.Rev. (2013), 65-78, p. 74. The CJEU has often referred to different fundamental rights and the necessity to balance them against copyright, without, however, conducting a full proportionality test, see in particular CJEU, Judgment in Case C-70/10, Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM), EU:C: 2011:771; Griffiths remarked in this regard: “It is difficult to escape the impression that the Court’s application of the Charter in Scarlet Extended is little more than window-dressing, functioning primarily to bolster the prior conclusion that the national court’s order was incompatible with the requirements of the E-commerce and Enforcement Directives. A thorough assessment of the ‘fair balance’ requirements in the specific circumstances of the case ought to have involved much closer attention to the respective weights of the rights at issue within the framework of established jurisprudence on fundamental rights.”
exclusive rights of authors, but enjoy individual protection besides the
rights held by the author. These rights exist in parallel and the use of a
certain work can (and often does) also require permission from related
rightsholders. And related rightsholders can also assign or license their
rights to third parties who exercise these right on the behalf of related
rightsholders. In a digital marketplace these could, as only one example,
be operators of online services that are based on the use of protected
works.

The individuals, but also institutions or corporations that use protected
works are, simply speaking, users. At a very basic level users are limited
to the passive consumption of works. Again, with the advent of the
Internet, users have also become disseminators of content, with a large
variety of online platforms serving as hubs for sharing and
(re-)distributing works created by others. Users also interact with content,
decontextualize works and include them, whole or in part into their own
creations. They themselves become authors and are, suddenly, authors and
users at the same time. This new creature of the Internet is often referred
to as “prosumer”, which is a person who consumes and produces content
at the same time.

The wide use of protected material has also created a divide between
authors, related rightsholders and commercial enterprises which base their
services on protected subject-matter. In the absence of direct negotiations
for the use of their works, service providers themselves become (commer-
cial) users of protected content. This is more than a terminological
problem, but constitutes a shift in the relations between rightsholders and
those actors that exploit their exclusive rights for economic gains.

The three actors that will be most commonly referred to throughout this
study are, then, rightsholders, users and commercial users (or service
providers/intermediaries). Their respective interests will be those for
which an attempt is made throughout this work to create a meaningful
balance that is also conducive to the creation of a digital single market in
the EU. The expectations of each group can only be described in their
extreme positions without much attention to nuances within the groups.
Often particular interests will be subjective. For the purposes of the study,
we will resort to those interests most commonly associated with the
respective groups. Reference will be made to the contributions of each
group to the political discussion that has commenced with the “Digital
Agenda”.

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Chapter 1. Copyright in a Digital EU – Problems & Policy
1. Rightsholder interests

From an extreme perspective, rightsholders are interested to control the use of their works or of other protected subject-matter. The directives of the copyright acquis grant rightsholders the exclusive right to authorize certain acts in relation to their creations. The younger copyright directives since the Satellite and Cable Directive (SatCab Directive) also regularly refer to the goal to provide a high level of protection for copyright and related rights. The Database Directive had still referred to an “appropriate and uniform level of protection of databases as a means to secure the remuneration of the maker of the database”.

At the same time it can also reasonably be assumed that rightsholders have an interest that their works are used, ideally against remuneration. The argument is also often made that the more a particular work is used, and with it such subject-matter that is protected by related rights, the more its economic potential grows. For example, transformative works, it is argued, can have a positive effect on the exploitation of the original

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70 Kretschmer identifies four main interests of rightsholders: (1) to achieve wide reproduction and distribution of their works, (2) receive credit for it, (3) to receive appropriate remuneration based on the works’s commercial value, and (4) to engage creatively with other works; cf. Kretschmer, “Digital Copyright: The End of an Era”, E.I.P.R. (2003), pp. 338-9; this study will not differentiate between the interests of rightsholders and those of authors, although these interests may very well differ, their particular interests are often difficult to identify, see Peter K. Yu, “The confuzzling rhetoric against new copyright exceptions”, in: Peter Drahos, Gustavo Ghidini, & Hanns Ullrich, Kritika: Essays on Intellectual Property, (Cheltenham, Northampton: Edward Elgar Publishing, 2015), 278-307, p. 307.
work. At the same time, certain transformative works will be seen unfavorably by rightsholders because such works can affect the marketability of a work in a negative way.

Although, in general, rightsholders should be entitled to control the use for their protected subject-matter, there are certain cases for which this privilege should not apply.

2. (Private) User interests

Users have a different set of interests that translate into expectations of what a copyright framework should provide. At a very basic level, users expect some way of access to protected material. This links to the utilitarian justification for copyright, under which copyright serves to further knowledge and creativity, in the case of users through access to existing knowledge and creativity. It is further in the user interest to have access to protected works under reasonable terms and conditions. Access to works should not be overly expensive, and especially in a digital environment, access should not be overly burdensome.

The digital user would also expect to be able to interact with content and to transform content. This interest is in conflict to the control-interest of rightsholders. In principle the competing interests could be reconciled with a permission system by which rightsholders would grant users the right to use their works or protected subject-matter. However, a rigid permission system would not necessarily satisfy the demands of users to use and re-use protected content. Besides, a system based on individual requests and subsequent permission for certain uses would be difficult, if not impossible, to manage.

Users would finally expect that their lawfully acquired access to content would give them certain rights to such content, similar to the rights enjoyed in relation to physical property. This relates in particular to the disposability of content that has been acquired in digital form but also to activities that relate to conservation and transformation of such content. An interest particular to a digital environment, and in Europe this is a multi-national digital environment, is the expectation to use lawfully acquired content on multiple devices, multiple platforms, and in multiple territories. The multiplicity of rights implied by this interest requires multiple consents by multiple rightsholders; and possibly consent from multiple intermediaries.

3. Interests of businesses (and the Commission)

For digital exploitations of works the role of intermediaries becomes ever more important. Access to content is usually granted by commercial entities that create platforms which enable users to access content in different ways. These platforms are primarily interested in acquiring the rights to create their content offer as efficiently and as cheap as possible. In other words, it is in their interest to keep the transaction costs to acquire licenses as low as possible; this means that, ideally, licenses should be administered centrally and be granted for all Member States of the EU in which a particular service should be available. This does not mean that the same service will be available in all countries and can be accessed across borders, this is an entirely different question. But the acquisition of licenses would nevertheless be possible for more than one territory.

But businesses are also interested that once they have acquired the right to exploit content commercially, this content does not create competition for their own services. Otherwise they would not be able to recoup their investment they made into the acquisition of the rights to market that content.

79 See also Klaas & Rupp in: Stamatoudi & Torremans, EU Copyright Law: A Commentary (2014), paras. 16.110-111 in the prevailing economic interests of intermediaries, however distinguishing non-profit, publicly funded intermediaries, which have a primary interest to make cultural content accessible without economic motivations.
The Commission shares most of these interests, as will be described further below. It favors the establishment of a digital common market that makes online services accessible over borders and which generates an attractive content offer for consumers. These are means to the end to increase the competitiveness of the EU market vis-à-vis other foreign markets.

B. The Digital Agenda of the European Union

The final version of the EU Digital Agenda for Europe\textsuperscript{80} was published in late August 2010 as one of the seven flagship initiatives of the Europe 2020 strategy.\textsuperscript{81} Europe 2020 has identified three main priorities that, so it is hoped, will revive the European economy after the crisis and build up a strong European economy based on (1) smart growth, (2) sustainable growth and (3) inclusive growth to avoid another economic backdrop. The Digital Agenda falls into the first category, although the Commission stresses that all three targets are interrelated.\textsuperscript{82} Its objective “is to deliver sustainable economic and social benefits from a digital single market based on fast and ultra fast internet and interoperable applications.”\textsuperscript{83}

The Communication Europe 2020 only mentions copyright once in 34 pages in the context of improving “framework conditions for business to innovate”, amongst other aims such as modernizing the EU patent system and enabling access to capital.\textsuperscript{84} The Digital Agenda deals a little more extensively with copyright issues in chapter 2.1 of the communication under the title “A vibrant digital single market”.\textsuperscript{85} The comprehensive approach of the Agenda, however, does not permit to go into too much detail for any of the proposed initiatives. The Agenda does not refer to two

\textsuperscript{80} European Commission, COM(2010) 245 final/2.
\textsuperscript{82} The three categories promote three different policy approaches: smart growth aims at “developing an economy based on knowledge and innovation”, sustainable growth should promote “a more resource efficient, greener and more competitive economy”, and inclusive growth shall foster “a high-employment economy delivering social and territorial cohesion”, European Commission, COM(2010) 245 final/2, p. 5.
\textsuperscript{83} Ibid., p. 3.
\textsuperscript{85} In particular Chapter 2.1.1. (Opening access to content), Ibid., pp. 7-8.
communications dating back to 2004 that brought up copyright issues, in particular a Commission communication had already discussed copyright management in the European Union, and thus many aspects that now resurfaced in recent discussions.\textsuperscript{86} Where proposals from the two 2004 papers are picked up by the more recent documents this will be indicated in the following analysis of the newer generation of policy initiatives. The communication makes brief reference to a 2008 Green Paper on “Copyright in the Knowledge Economy”, without, however, going into the substance of the document.\textsuperscript{87}

In 2011, the European Commission published three documents in close succession, which can be seen as gradually approximating the topic of copyright management and copyright reform in the European single market for a limited number of aspects.

I. Single Market Act

The first document was the “Single Market Act” in mid-April 2011. It is a more comprehensive document which acknowledged that “the internal market has shortcomings”.\textsuperscript{88} In its chapter 2.7., which deals with the “Digital Single Market”, reference is merely made to the “Digital Agenda”, however chapter 2.3 is dedicated solely to intellectual property rights. The inevitable demand for a modernization of the European patent system is followed by a short paragraph that calls for a more transparent and simple system for licensing legal online music services, for which the

\begin{itemize}
\item \textsuperscript{87} European Commission, \textit{Green Paper Copyright in the Knowledge Economy, COM(2008) 466 final}, Brussels, 16.07.2008, the document mainly deals with L&Es in relation to four particular fields: libraries and archives, people with a disability, teaching and research and user-generated content.
\end{itemize}
Commission proclaims that “[i]n the internet age, collective management must be able to evolve towards European models which facilitate for licenses covering several territories for a multitude of online services, whilst at the same time providing a high level of protection for rights holders.”\(^{89}\) This, the Commission continues, should enable new business models that will increase the distribution of digital content throughout Europe.\(^{90}\) At the end of the section on intellectual property the Commission refers to a strategy for intellectual property to be published later that year; it took the Commission only a little more than a month to come up with this paper.

II. A Single Market for Intellectual Property Rights

In May 2011 the communication “A Single Market for Intellectual Property Rights” (IPR Strategy)\(^{91}\) tackled a multitude of intellectual property topics, the subtitle of the document, “Boosting creativity and innovation to provide economic growth, high quality jobs and first class services in Europe” echoed the objectives of Europe 2020. An entire chapter, almost six full pages, introduced a number of different aspects for the “[c]reation of a comprehensive framework for copyright in the digital age”,\(^ {92}\) amongst them some that are of particular importance for a comprehensive system for the management of copyright in the digital age.

The first of a total of eight suggestions is titled “European copyright governance and management”.\(^{93}\) It begins with a sort of a preamble, which stresses that any effort to reform copyright in the internal market should

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90 Further initiatives in the field of copyright relate to the easier creation of digitized catalogs on European cultural institutions, in which context orphan works are of particular importance; other IP topics that feature in the communication are the fight against piracy and counterfeiting and a modernization of the European trade mark system.
91 European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions. A Single Market for Intellectual Property Rights. Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe, COM(2011) 287 final, Brussels, 24.05.2011.
92 Ibid., pp. 9-14.
93 Ibid., Section 3.3.1.
have the aim of ‘enabling’ the use of copyright. Although unwritten in the communication, this is a clear statement against further restricting the use of copyright protected material by increasing the scope of protection and thereby limiting uses by third parties. “Enabling further” means, as stated explicitly in the communication, to give incentives for new creative uses that can be translated into innovative business models, which would further increase the offer of digital content in the internal market to the benefit of consumers. This is followed by a first concrete initiative for a European framework of online copyright licensing and the outlook for a proposal for a legal framework for the collective management of copyright in 2011. In fact it was not until July 2012 that such a proposal was finally tabled with two cornerstones for a European collective management system, namely multi-territorial and pan-European licensing for musical works for online uses, and common rules of governance for collecting societies. This structure for a framework for the management of collective licensing was kept in the final directive which was passed in February 2014, the scope, however, which in the communication was still undefined, and thus might have created the expectation of comprehensiveness, encompassing copyright in general, was significantly narrowed. The second suggestion in this context is to create a European Copyright Code that would codify the current system of copyright directives and would give the opportunity to “clarify the relationships between the various exclusive rights [...] and the scope of exceptions and limitations“. Finally,

94 Ibid., p. 10.
95 Ibid., p. 10.
the Commission brought into play the possibility of introducing a ‘unitary’ copyright title under the new Article 118 TFEU.\textsuperscript{97}

Another aspect, which was separated from the section on governance and management of copyright, deals with user-generated content (section 3.3.3.). This division does not necessarily seem apparent on a first view, given that UGC is often based on material that is protected by copyright. The distinction the Commission makes is of an economic nature in that it underlines that UGC is intended for non-commercial uses. For such uses in the context of social networking and social media sites, the vision of the Commission is one of “responsible use while ensuring that users enjoy the full benefits of new interactive online services.”\textsuperscript{98} What “responsible uses” and the “full benefits” of such uses are, and how they fit into the agenda of the European Union, remains unanswered, but the aim pursued becomes apparent by comparing the terminology used in the section of copyright management and governance and this section on UGC. Whereas the former speaks of “enabling legislation” for new emerging business models, the latter seeks to promote a “simple and efficient permission system” for non-commercial purposes. In other words, UGC is qua assumption non-commercial and should therefore not be subjected to licensing involving the payment of fees (or possibly only small fees). However, to safeguard the rights of copyright holders, UGC based on, or integrating copyright-protected material, should be subjected to a permission system. This sounds very vague and such is the proposed procedure the Commission envisages to pursue the issue by “explor[ing] the issue further”. It is interesting, though, and this makes it worthwhile to further pursue this aspect, that the Commission expressly acknowledges UGC as a new form of expression that needs to be balanced against the rights of content creators,\textsuperscript{99} and this might even have constitutional implications.\textsuperscript{100}

\textsuperscript{97} European Commission, COM(2011) 287 final, p. 11.
\textsuperscript{98} Ibid., p. 12.
\textsuperscript{99} Ibid., p. 12.
\textsuperscript{100} On the intersection of copyright and the right to freedom of expression see e.g. Christophe Geiger, “‘Constitutionalising’ Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union”, \textit{IIC} (2006), 371-406, Christophe Geiger & Elena Izyumenko, “Copyright on the Human Rights’ Trial: Redefining the Boundaries of Exclusivity Through Freedom of Expression”, \textit{IIC} (2014), 316-342, two recent cases in front of the ECtHR have also ruled on the relationship between the right to freedom of expression and the right to property under the ECHR, in both cases the interests
A further section deals with access to Europe’s cultural heritage (section 3.3.5) which is aimed at facilitating the creation of digital libraries to preserve and disseminate the European cultural heritage. The solution here, so the Commission, should be licensing models that enable institutions to use copyright-protected materials while at the same time providing for compensation to the authors. Other problems in this context are out-of-commerce works and orphan works. As one example for a successful online platform that would profit from a facilitated licensing system the communication mentions Europeana.\footnote{Europeana is a portal that gives users digital access to the collections of over 2000 institutions from Europe, the project is co-funded by te European Commission, Europeana, “Europeana”, (Europeana), available at: http://www.europeana.eu/portal/ (accessed: 10.01.2016).} In addition, this section contains paragraphs on solutions for visually-impaired-people and authors’ rights for journalists, however, neither aspect is of particular relevance for this research.

The last of the eight sections, indeed with significant relevance for this study, briefly discusses pan-European licensing for audiovisual works. The Green Paper announced in the communication will be analyzed further below. An interesting observation already at this point is the division between audiovisual content and other content (section 3.3.1. of the communication), which indicates that the licensing frameworks for audiovisual and other content are foreseen to be different.

The other sections of the communication with less relevance for this research deal with technology and database management (section 3.3.2.) for the implementation of collective licensing, a more technical than legal aspect; section 3.3.4. deals with private copying levies and their relevance for the free movement of goods; performers’ rights are discussed in section 3.3.6 and the last section is on artists’ resale rights (section 3.3.8.).
III. Green Paper on the online distribution of audiovisual works

The “Green Paper on the online distribution of audiovisual works in the European Union”\textsuperscript{102} goes one level further down compared to the IPR Strategy communication. As the name suggests, only one aspect of a common digital market, namely the distribution of audiovisual works, is raised by the Green Paper. The paper takes a three-pronged approach to isolate obstacles to the development of a digital single market. The first prong focuses on rights clearance for audiovisual media services for the purpose of online distribution, with a view to identify the “precise nature” of these problems. The second and third prong relate to the remuneration of rights holders for online exploitation of audiovisual works and special uses and beneficiaries of exceptions. The more interesting part in relation to copyright management is Section 2, which, in three of its four subsections, deals with rights clearance for (2.1.) online transmission, (2.2.) retransmission of audiovisual media services and for (2.3.) transactional Video on Demand (VoD) services; the fourth subsection (2.4.) deals with European film production and distribution, which is more of a cultural problem and not directly related to copyright or the management of copyright, but should be listed for the sake of completeness. For each of the three different uses mentioned, for which rights clearance is necessary, the Green Paper isolates the most relevant problems that need to be addressed in order to make a digital European market for audiovisual works more workable. Whereas for cross-border satellite broadcasting and cable retransmission services legal instruments exist to facilitate rights clearance, no such instrument exists for clearing copyright and related rights for cross-border online audiovisual media services,\textsuperscript{103} which leads to fragmented online offers. The result is that residents of some countries with markets which are of little economic interest for service providers are not able to access certain services.\textsuperscript{104}


\textsuperscript{103} Ibid., p. 6.

\textsuperscript{104} The countries that are usually left out of the scope of online offers, not only audiovisual media services, are those with smaller populations and lower income rates, or such states that require specific language offers, on the other hand, well catered markets are those of the major language groups which represent the high income markets, it is usually the latter that, in addition to their economic attrac-
Rights clearance for online transmissions of audiovisual media services requires specific licensing approaches. As opposed to traditional broadcasting, ether by air, satellite or cable, where the rights reproduction and of communication to the public needed to be cleared only for one country, the making available online on an on-demand basis requires different sets of rights. Moreover, in the absence of EU harmonization measures, the rights for online on-demand services must be cleared for every country in which the service is made accessible. This can constitute excessive, and sometimes prohibitive administrative burdens, especially for smaller enterprises, and have the effect of a barrier for entering the market.

In what concerns rights clearance for retransmission of audiovisual media services, it is questionable whether the provisions of the Satellite and Cable Directive on the licensing of rights can be applied to online retransmissions, which is referred to as ‘simulcasting’, or whether the current framework for retransmission must be revised in order to put in place a technology-neutral system for the licensing of retransmission and simulcasting rights.

The third relevant section on rights clearance for transactional VoD services inquires into the implications of the inclusion of VoD in the staggered release of audiovisual works over different platforms (e.g. cinema, video/DVD/BlueRay, Pay-TV, free TV). Normally, it is the producer of a movie that holds all rights in an audiovisual work. However, these rights might be split at a later point in time, and sometimes even rights clearance for isolated rights in relation to subject-matter incorporated in the audiovisual works might create problems.

105 Online on-demand services require the making available right and the reproduction right, see: Ibid., p. 8.
106 SatCab Directive, Article 9 and 10: Article 9(1) reads: “Member States shall ensure that the right of copyright owners and holders or related rights to grant or refuse authorization to a cable operator for a cable retransmission may be exercised only through a collecting society”. Article 9 further provides that collecting societies can manage rights without explicit mandate, if they already manage rights of the same class, which enables collecting societies to grant blanket licenses to operators of cable retransmission services.
107 Ibid., p. 9.
108 Ibid., p. 10.
Section 3 describes a number of policy approaches to remedy the shortcomings of the system currently in place for the management of copyright in order to “close the gaps in the availability of online services for consumers”. The Commission suggests five main approaches: First, as had already been suggested in the IPR Strategy, a European framework for the collective management of copyright would at least facilitate the clearing of (e.g. musical) rights for the production of audiovisual works.

Second, the ‘country of origin’ principle, which only applies to satellite broadcasting, could be extended so similar services rendered online, such as catch-up TV. An ensuing problem is how to determine the country of origin in relation to online transmissions. Whereas for satellite broadcasting the Satellite and Cable Directive explicitly provides that the country of origin is the country in which “the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth”, for online services the country of origin cannot be determined that easily. Third, a more comprehensive approach taking the form of a European Copyright Code could be considered as a ‘big legislative solution’, and would further provide the opportunity to evaluate and possibly alter the current framework of limitations and exceptions to copyright, that are included in the Information Society Directive. Fourth, a unitary European copyright title under Article 118 TFEU could be introduced. This title would exist in

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109 Ibid., p. 12.
110 The Commission acknowledges that audiovisual works, in particular feature films, are often managed directly by the producer via a quasi one-stop-shop, Ibid., p. 10.
111 Article 1(2)(b) SatCab Directive.
112 Article 2(1)(b) SatCab Directive.
113 A number of locations, that have technological or other factual links with regard to the 'location' of the upload could be considered. These could be the place where the server that hosts the content is located or the computer from which the digitized content is copied to the server; it could also be the country of the top-level domain or the country in which the company that makes the content available is established. The technological links have the disadvantage that these 'locations' can easily be shifted to other countries, avoiding stricter legal regimes, similarly the place of establishment and the top-level domain can be altered rather easily. Therefore, no single factor provides sufficient certainty to identify the county in which relevant rights must be cleared in order to legally offer content online.
114 Article 5 InfoSoc Directive.
parallel to national copyright titles and would be optional for right holders and subject to registration. Finally, the Commission believes it necessary to establish a system for the management of rights ownership information in audiovisual works and works incorporated therein.

The policy approaches are followed by a list of twelve questions open to a consultation, which closed on 18 November 2011. The consultation received 226 replies, however, no final report on the consultation was ever published.  

IV. Continued efforts and external input

The Digital Agenda left a number of significant gaps. Admittedly, it could not possibly cover all aspects of a, yet to be designed, comprehensive system of copyright in the European digital common market, its scope was far too wide to take up all the threads and follow them into greater detail. As an early Christmas present, the Commission issued two additional communications in mid-December 2012 on content in the Digital Single Market and a document that refocused the Digital Agenda. The Communication on the Digital Agenda recommitted to “free flow of data and access to and supply” and announced proposals to strengthen the European data industry. It stressed that “copyright is the universal means to reward creation” and therefore the process of the review of

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115 Of all submissions, 226 were authorized for publication (see for the responses: European Commission, “Contributions to the Consultation on the online distribution of audiovisual works”, (European Commission), available at: http://ec.europa.eu/internal_market/consultations/2011/audiovisual/index_en.htm (accessed: 10.01.2016)), amongst them 115 from non-registered organizations, 76 from registered organizations, 14 from public authorities and 21 from private citizens.

116 A comprehensive framework for copyright in the digital single market was addressed by European Commission, COM(2011) 287 final, Chapter 3.3.

117 European Commission, Communication from the Commission. On content in the Digital Single Market, COM(2012) 789 final, Brussels, 18.12.2012; the document states on p. 2: “Whilst good progress has been made in delivering the copyright-related actions identified in the Digital Agenda and the Intellectual Property Strategy, there remains work to be done to ensure an effective single market in the area of copyright.”


119 Ibid., p. 6.

120 Ibid., p. 6.
EU copyright policy must be continued. As elements of this review the Commission highlighted territoriality in the Internal Market, harmonization and fragmentation of the EU copyright market, L&Es to copyright in the digital age and the improvement of copyright enforcement, “underpinning its legitimacy in the wider context of copyright reform.” In addition, this was the subject of the second communication, the Commission announced a structured stakeholder dialogue.

1. Stakeholder dialogue “Licenses for Europe”

The Communication “On content in the Digital Single Market” launched the stakeholder dialogue under the title “Licensing Europe”. The topics to be tackled were the following: (i) Cross-border access and the portability of services, (ii) User-generated content and licensing for small scale users of protected material, (iii) Audiovisual sector and cultural heritage institutions and (iv) Text and data mining. All four “work strands [were] tasked with delivering effective market-led solutions”, but the Commission reserved the right, if necessary, to take further public policy actions.121 The Commission further stressed its plans to continue its review of the EU copyright framework.122 The stakeholder dialogue was concluded with a conference on 7 January 2014 and produced a document titled “Ten pledges to bring more content online”.123 The initial reactions to the outcomes of the stakeholder dialogue were disappointment and cynicism.124

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122 In this regard it was re-stated that the following elements need to be addressed: territoriality in the internal market, harmonization, limitations and exceptions for digital works, fragmentation of the market for copyright-protected works, and effectiveness and efficiency in enforcement matters; cf. Ibid., p. 5; L&Es featured as one element of copyright harmonization, but they seem to take a more important role than other fields of potential harmonization, in 2008 the Commission had already dedicated a Green Paper on the issue of L&Es: European Commission, COM(2008) 466 final.
Two of the four working groups did not reach an agreement, these were the groups on UGC and data mining. The other pledges use mainly non-binding language expressing “willingness to continue to work”, promising to “continue to work”, commit to the “spreading of best practice” and some stakeholders “agreed to find solutions”. Some pledges indeed only refer to existing licensing mechanisms, for example for background music for websites (pledge 3).

Due to the failure of the industry to suggest concrete solutions for Europe's licensing shortcomings the EU continued to rely on a legislative approach to bring more content online. Ironically, the foreword, or introduction, to the final document of “Licenses for Europe” announced that the 10 pledges and discussions of the stakeholder dialogue “will feed into the review process”\(^{125}\) of further review of the EU copyright framework and announced a consultation process.

2. The Public Consultation on the review of EU copyright

In December 2013, the European Commission launched a public consultation on the review of EU copyright rules.\(^{126}\) This call received more than 9500 replies, which is an impressive number given the usual turnout for


\(^{126}\) European Commission, Public Consultation on the review of EU copyright rules, 05.12.2013.
More than 50% of the replies came from persons who considered themselves as end users or consumers, which underlines the public interest in the topic. The consultation covered 6 broad areas, most of them of high relevance for digital copyright. The first set of questions related to the exclusive rights and their operation in the Single Market. In particular, questions were raised as to the role of rights in accessing online content across European borders and the necessity to clear multiple rights for single acts of exploitation. Further questions related to linking, browsing and downloading. The second set of questions inquired into L&Es in the Single Market for purposes such as access to content in libraries and archives, teaching and research. Three other topical blocks dealt with private copying and reprography, fair remuneration for authors and performers and respect for rights. The last big set of questions related to the perspective of a single EU Copyright Title.

The report on the consultation was published in July 2014 and summarized the responses to the 80 questions. Each topical set of questions was divided by answers of certain categories of respondents. A general trend that can be detected is that stakeholders close to the entertainment and publishing industry take the position that the current legislative framework is sufficient and sufficiently clear, and that the cross-border unavailability

127 All submission are available via the website of the consultation: European Commission, “Contributions to the Consultation on the online distribution of audiovisual works”, (European Commission), available at: http://ec.europa.eu/internal_market/consultations/2011/audiovisual/index_en.htm (accessed: 10.01.2016); as a comparison, the consultation on the online distribution of audiovisual works received only 225 replies, Rosati criticized that the questions of the consultation were closely oriented to pending proceedings before the CJEU, and the way the questions were phrased would hardly produce results that cold “translate to workable legislative initiatives”, Eleonora Rosati, “A closer look at the EU public consultation on the review of EU copyright rules”, 06.03.2015 (The IPKat), available at: http://ipkitten.blogspot.com/2013/12/a-closer-look-at-public-consultation-on.html (accessed: 10.01.2016),

128 European Commission, Public Consultation on the review of EU copyright rules, p. 5.

129 Under this title questions to L&Es in relation to preservation and archiving, off-premises access to library collections, e-lending and mass-digitization were asked.

130 The division of answers were (1) End users/Consumers, (2) Authors/Performers, (3) Institutional Users, (4) Publishers/Producers/Broadcasters, (5) Service Providers/Intermediaries, (6) Collective Management Organisations, (7) Members States, (8) Public Authorities and (9) Other.
of content is owed to lack of demand; adequate licensing mechanisms exist. Consumers on the other hand complain about the unavailability of cross-border services and non-portability of national services. Accordingly, the latter see territoriality as a problem, the former do not. Opinions are even more divided on the subject of L&Es and whether there should be L&Es at all, whether the current set of L&Es is sufficient, whether L&Es should be binding on Member States or remain optional, and whether territoriality poses problems for L&Es.\textsuperscript{131} The perspective of an EU copyright title is seen favorably by consumers, institutional users and the majority of authors and performers, the majority of the other groups sees an EU copyright title more critical and academia in principle supports the idea, however, suggest to pursue a revision of the \textit{InfoSoc Directive} in the short term.\textsuperscript{132}

V. The new “Digital Single Market Strategy”

Neelie Kroes had been in charge of digital affairs as the Commissioner for the Digital Agenda. She had been influential in pushing the European copyright project and was behind the passing of the \textit{Collective Management Directive} and the \textit{Orphan Works Directive}. The output of Green Papers, consultations and other related documents was impressive. However, her term was not marked by a horizontal recasting of copyright, although the idea was a constant topic under her reign.\textsuperscript{133}

The new President of the EU Commission, Jean-Claude Juncker took office on 1 November 2014. He was burdened with the heritage of two

\begin{enumerate}
\item \textit{Ibid.}, pp. 89-91.
\end{enumerate}

As one of the Vice-Presidents of the Commission, Andrus Ansip was assigned the responsibility for the “Digital Single Market” and his mission includes to “[break] down national silos in telecoms regulation, in copyright and data protection legislation and in the management of radio waves”.\footnote{Jean-Claude Juncker, “Mission Letter to Vice-President for the Digital Single Market, Andrus Ansip”, 01.11.2014 (European Commission), available at: https://ec.europa.eu/commission/sites/cwt/files/commissioner_mission_letters/ansip_en.pdf (accessed: 10.01.2016).} In Juncker’s mission letter to Ansip he entrusted his Vice-President with one of “well defined priority projects”\footnote{\textit{Ibid.}, p. 2.} which included the task of “modernising copyright rules in the light of the ongoing digital revolution – taking full account of Europe’s rich cultural diversity – and modernising and simplifying consumer rules for online and digital purchases.”\footnote{\textit{Ibid.}, p. 4.} Juncker also nominated Günther Oettinger as new Commissioner for Digital Economy & Society. The website of Commissioner Oettinger lists among his responsibilities to “[prepare] ambitious legislative steps towards a connected Digital Single Market by breaking down national silos in telecoms regulation, in copyright and data protection
legislation, in the management of radio waves and in the application of competition law.” and to “[modernize] copyright rules.” In his mission letter Juncker asked Oettinger as a member of the Digital Single Market project team to present legislative proposals “towards a connected Digital Single Market.” Juncker also underlined that “copyright rules should be modernised, during the first part of this mandate, in the light of the digital revolution, new consumer behaviour and Europe’s cultural diversity.”

On the modernization of EU copyright rules, both Commissioners were to collaborate closely, with Ansip in charge of steering and coordinating the efforts.

1. A leaked White Paper

Less than a month before Juncker’s speech before the European Parliament, an internal draft of a White Paper circulated in informed circles. The leaked document gave much more detailed insights into, what can only be assumed, the ‘then-policy’ of the Commission. The document titled “A Copyright Policy for Creativity and Innovation in the European Union” was dedicated entirely to EU copyright policy, and it identified three main areas for review. First, it addressed cross-border dissemination of creative content in the digital single market. Second, the document addressed copyright’s role in supporting other policy fields. Third, it discussed effective tools for a functioning marketplace and value-chain. The original goal of the internal draft was to “provide orientations to address current and future policy challenges”. The paper gave hope for

142 Ibid., p. 3
a comprehensive review of the EU copyright system, it even identified four “parameters” important for the “design and functioning of copyright systems”.\textsuperscript{143} These were, unsurprisingly, the definition of rights, L&Es, enforcement (“upholding those rights”) and a licensing infrastructure. The arguments were still very much economic, suggesting that a lowering of copyright protection would potentially decrease investment in creativity. The draft made room for the possibility that copyright might occasionally be overstretched in its application, but emphasized one sentence later that copyright should maintain its initial purpose – without elaborating on what this “initial purpose” might be.\textsuperscript{144} Access and new uses were main challenges identified, stressing that user expectations had changed in a “multi-territory and increasingly service-based digital single market”.

The “orientations” provided by the internal draft were quite detailed. It suggested, among other areas of review, to clarify the scope of the making available right by either introducing the ‘country of origin principle, by taking a ‘targeting’ approach to copyright licensing, or by introducing a single unitary copyright title for the EU. In echoing FAFL/Murphy,\textsuperscript{145} the possibility for rightsholders to segment the internal market, it was stated, should also be addressed to the effect that the “essential reward function of copyright” is maintained and users can use and access services indiscriminately of their place of residence.\textsuperscript{146} In light of the UsedSoft v. Oracle judgment, the application of exhaustion of the distribution right to digital content was addressed, but considered to be “premature” for further initiatives. An entire section dealt with L&Es for different purposes, again partly inspired by case-law of the CJEU. It expressed the need for clarifications and possibly reconsideration of certain L&Es. For browsing and hyperlinking an intervention in the future was not excluded, but it was suggested to explore alternative ways, e.g. by clarifying the concepts of ‘reproduction’ and ‘communication to the public’. Similarly, by clarifying the scope of the preservation exception, cultural heritage

\textsuperscript{143} Ibid., p. 2, see also pp. 4-5.
\textsuperscript{144} Ibid., p. 4.
\textsuperscript{145} CJEU, Judgment in Joined cases C-403/08 and C-429/08, Football Association Premier League Ltd and Others v QC Leisure and Others (C-403/08) and Karen Murphy v. Media Protection Services Ltd (C-429/08), EU:C:2011:631.
\textsuperscript{146} European Commission, […](2014) XXX draft, p. 7.
\textsuperscript{147} CJEU, Judgment in Case C-128/11, UsedSoft GmbH v Oracle International Corp., EU:C:2012:407, see also Chapter 3.A.V.5.
institutions should be enabled to digitize their works, an initiative in the field of e-lending was rejected, again, as premature, due to the current development of the relevant market. The teaching exception was also considered, with vague suggestions to clarify its application and possible reform. The document suggested a similar approach for text- and data-mining, which could either be supported by clarifications of applicable exceptions, or a self-standing exception. Rather unspectacular was the statement that the disabilities exceptions should be further harmonized, not least in the light of the *Marrakech Treaty*.\(^{148}\) With regard to UGC, the internal draft suggested to clarify the scope of existing exceptions, to develop licensing mechanisms and to raise awareness and encourage education on the legal aspects of UGC. These suggestions did not deviate from the course taken over the last years that suggest to enable licensing, rather than enabling UGC by way of L&Es. Finally, with regard to L&Es the document addresses the private copying exception and the need to address the implications of disparate levy systems for the internal market.\(^{149}\)

The third section addressed four more issues: data management, fair remuneration for authors and performers, mass-digitization, and enforcement. All these issues aimed at guaranteeing easy licensing flows to enable digital uses and to safeguard that rightsholders receive fair remuneration for their works.\(^{150}\) The internal draft concluded by highlighting four aspects for a reform of the EU copyright system. Copyright rules should be predictable, which as it was stated, could be achieved by a higher degree of harmonization. New, or adapted rules, should also reflect the “cross-border potential of content dissemination” and should be “future-proof and adaptable” to be able to respond to changes in technology and market conditions, while respecting the subsidiarity principle and having cultural diversity as an objective. Finally, a “balanced distribution of value among market players” should guide the drafting of new copyright rules.\(^{151}\) The consideration of the aspects raised with the goal to make policy decisions was envisaged for the 2014-2019 legislative term.

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148 *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled*, open for signature 27 June 2013, 52 ILM 1309.


Unfortunately, although it was said to be published merely two months later in early September 2014, the final White Paper never saw the light of day, and never made it past the status of an internal draft. It was remarkable, though, in its analytical depth and the multitude of issues it addressed, and that it only focused on copyright in the digital single market. It was further remarkable that it called for an evidence-based approach to copyright reform. Indeed, it did not promise a full reform of EU copyright, but it at least identified the most pertinent areas in need of reform, or ‘consideration’ (excluding other important areas, such as exhaustion) and was open-minded as to the form of future harmonization. For opponents of a rights-centered approach to copyright it disappointed by adhering to the mantra of licensing over exceptions, in particular with regard to L&Es for UGC.152

2. The Commission 2015 Work Programme

The Commission published its 2015 Work Programme in mid-December 2014, another early Christmas present, merely suggesting to modernize EU legislation of copyright as part of the Digital Single Market Strategy.153 The Programme was subtitled, “A New Start”, but it was not immediately apparent what this meant for copyright reform. One day after the publication of the Programme, Günther Oettinger tweeted, rather cryptically: “New EU legislation #copyright should only cover what no longer works national level. Will be new rules, no extention [sic!] existing nation rules.”

On 19 December 2015, even before further action on EU copyright reform could be announced, the European Copyright Society, a group of leading European scholars and academics, addressed an open letter to


Commissioner Oettinger. In this letter the group encouraged Oettinger to pursue unification of EU copyright in the long term. Unification, so the Society, would directly address problems of territorial fragmentation and provide legal security and transparency for all actors involved. A unified EU copyright title would instantly create a common online and offline market for copyright and related rights. The European Copyright Society also referred to their response to the public consultation, which was much more detailed, however, it found it necessary to stress that pursuing the big picture should not be forgotten. It was precisely this big picture that was expected from the reform process that was to be initiated by the new Commission.

3. The “Reda Report”

Linking into the discussion on copyright reform, the Committee on Legal Affairs of the European Parliament published a draft report on the implementation of the InfoSoc Directive in early 2015. The rapporteur for the report was the Pirate Party MEP Julia Reda. The “Reda Report” underlined the need for copyright reform and stressed the fundamental rights implications of copyright under the Charter of Fundamental Rights of the European Union (EU Charter). The report focused on two elements of the Directive, recalling, with reference to the Public Consultation, that users had reported difficulties to access online services in the EU, in


particular when online offers were restricted to certain territories by technological protection measures (TPMs).\footnote{European Parliament - Committee on Legal Affairs, Draft report on the implementation of 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, 2014/2256(INI), 15.01.2015, para. 2.}

First, the report made a few suggestion with regard to exclusive rights. It demanded that the position of authors and performers be improved in relation to other rightsholders, in particular that fair remuneration is paid to all classes of rightsholders. It further supported an initiative to introduce a unitary copyright title under Article 118 \textit{TFEU} to overcome the shortcomings of the harmonization effects of \textit{Directive 2001/29/EC}. The use of public sector information should be facilitated and rightsholders should be able to waive their rights and dedicate them to the public domain. Finally, as regards to exclusive rights, the report advocated for a reduction of the term of protection to the international minimum standard under the \textit{Berne Convention}, which is currently 50 years.\footnote{Ibid., paras. 3-7.}

Second, and in much more breadth and detail, the report dealt with L&Es. As general remarks the draft report recalled the objective of the \textit{InfoSoc Directive}, which is to create a fair balance between different rightsholders and users. It claimed that L&Es should find equal application in the digital and analogue worlds and expressed concerns about the negative effects of differences in implementation of L&Es, which lead to legal uncertainty and hinders the functioning of the digital single market. For this reason, all L&Es contained in the \textit{InfoSoc Directive} should be made mandatory and complemented with an open norm to enable, judging by the context in which this claim is made, transformative digital uses. The demand for an open norm came with a commitment to the three-step test and is followed by an appeal to ensure that L&Es are technologically neutral and future-compatible; in particular with regard to “media convergence” and “audio-visual quotations”.\footnote{Ibid., paras. 8-14.} The report then commented on a number of particular exceptions. In comparison with the leaked draft White Paper, it suggested to introduce an exception for e-books lending\footnote{Ibid., para. 20.} and a very broad exception for research and education that goes beyond...
the use of protected material by educational institutions.\footnote{Ibid., para. 19.} A harmonized approach to calculate the harm caused by private copies should be developed,\footnote{Ibid., para. 22.} and it should be safeguarded that when accessing content the exercise of L&Es is not hindered by TPMs.\footnote{Ibid., para. 23; it was suggested that the employment of TPMs should be made conditional on the publication of the source code or the interface specification.}

The Draft Report, which came with a five-page explanatory memorandum, was not always received warmly. As a representative of rightsholders, the International Confederation of Societies of Authors and Composers (CISAC) answered with an open letter.\footnote{Jean Michel Jarre, Javed Akhtar, Angélique Kidjo, Ousmane Sow, & Marcelo Piñero, “Open Letter to MEP Julia Reda”, 14.04.2015 (CISAC), available at: http://www.cisac.org/Media/Files/Letter-to-MEP-Julia-Reda (accessed: 14.04.2015).} The letter harshly criticized the user-centered approach towards L&Es the Draft Report took and argued that it neglected the effects of exceptions on rightsholders. CISAC suggested an approach that is more reconcilable with the position of the Commission, as expressed in the leaked White Paper draft, in the sense that small-scale licenses are preferable over all-or-nothing exceptions. In its letter, CISAC also rejected a reduction of the term of protection, instead arguing that, especially in the digital world, a longer term of protection would be justified, because digital exploitation increases the exploitation-lifespan of a work. One may think of this argument what one wants, it is probably not compatible with the CJEU’s finding in \textit{FAPL/Murphy} for a ‘reasonable’ exploitation.\footnote{CJEU, Judgment in FAPL/Murphy EU:C:2011:631, para. 108, the Court’s argument that exclusive rights do not entitle rightsholders to maximize their profits through territorial segmentation should equally apply to an unreasonable extension of the term of protection.} But at the end of the letter, CISAC agreed with Julia Reda on one issue, namely that the system of fair remuneration should be improved to increase the income for rightsholders, though this is not necessarily what Reda had in mind. The initial Draft Report received 556 suggestions for amendments,\footnote{The suggestions were compiled in two documents; European Parliament, \textit{Amendment 1-280, Draft report Julia Reda on the implementation of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on}
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The “Reda Draft Report” was indeed polarizing and it did not manage to carry this spirit into the final resolution. Many of the rather bold propositions of the draft were watered down, or, in other words, formulated more moderately. Whereas the Draft had suggested to consider the introduction of a European Copyright Title, the Resolution, which was adopted by the European Parliament on 9 July 2015, called on the Commission to “study the impact of a single European Copyright Title” on a variety of factors.168

From a discursive perspective it is an interesting observation that, with regard to L&Es, the Draft called on the “EU legislator to remain faithful to the objective stated in Directive 2001/29/EC of safeguarding a fair balance between the different categories of rightholders and users of protected subject-matter, as well as between the different categories of rightholders;"169 The Resolution, though, interpreted the InfoSoc Directive differently by calling on the “EU legislator to remain faithful to the objective stated in Directive 2001/29/EC of providing adequate protection for copyright and neighbouring rights as one of the main ways of ensuring European cultural creativity” as a first priority, and only then continued “and of safeguarding a fair balance between the different categories of rightholders and users of protected subject-matter, as well as between the


169 European Parliament - Committee on Legal Affairs, 2014/2256(INI), para. 8 (emphasis added).
different categories of rightholders”. Although the Resolution underlined the need to apply L&Es in a way as to give effect to their purpose, in particular in a digital environment, it added, however, that some L&Es should be reviewed to that effect, while maintaining the balance between rightsholders and the interests of the public. These examples show that the language of the Resolution reflected the compromise struck in the negotiations in the European Parliament. The Resolution notably abandoned the demand of the Draft Report that all L&Es should be made mandatory. Instead, it suggested to examine “minimum standards across the exceptions and limitations, and further to ensure the proper implementation [of the InfoSoc Directive] and equal access to cultural diversity across borders within the internal market, and to improve legal certainty”. How exactly this should be achieved was not answered in the text of the Resolution. Surprisingly, though, it made a clear statement on the relation between TPMs and L&Es, to the effect that the former should not hinder the exercise of the latter. It also added that, given the speed of technological development, a future legal framework for copyright in the internal market should be technology-neutral.

After the “Reda Report” had been adopted by the European Parliament, both Commissioners, Ansip and Oettinger, responded via Twitter. Ansip described the report as a good basis for future reform plans and Oettinger simply stated ”Time to reform”.

170 European Parliament, T8-0273/2015, para. 33 (**emphasis added**).
171 Ibid., para. 35.
172 Ibid., para. 38.
173 Ibid., para. 61.
174 Ibid., para. 64.
175 Andrus Ansip, “@Ansip_EU”, 09.06.2015 (Twitter), available at: https://twitter.com/AnsipEU/status/619117237945925633 (accessed: 10.01.2016), the full message read: “Thanks @Senficon [Julia Reda] and #EPlenary [European Parliament] for #copyright report, good basis for reform plans later this year #DigitalSingleMarket”.
176 Günther Oettinger, “@GOettingerEU”, 09.06.2015 (Twitter), available at: https://twitter.com/GOettingerEU/status/619077376731951108 (accessed: 10.01.2016), the full message read: “Consensus in #EPlenary: Time to reform #copyright. @Senficon # fixcopyright”.

4. The Digital Single Market Strategy

The “Digital Single Market Strategy” was published on 6 May 2015. Its rhetoric did not differ much from that of earlier Communications, in particular “Europe 2020” and the “Digital Agenda”. The introduction “Why we need a Digital Single Market” stressed again that Europe should take advantage of the “immense opportunities” that technological changes offer to maintain Europe's position “as a world leader in the digital economy”. One of the three pillars, on which the Strategy rests, is “Better access for consumers and businesses to online goods and services across Europe”. The Commission envisioned that changes to achieve this goal could be achieved during the current Commission's mandate until 2019. It must have dawned upon readers that this is hardly a timeframe sufficient for a complete overhaul of the EU copyright system.

Before the publication of the “Digital Single Market Strategy”, the two involved Commissioners, Oettinger and Ansip, had expressed disagreements about the future of geo-blocking. Whereas the latter had signaled his discontent with geo-blocking practices and wanted to do away with them rather sooner than later, the former was more skeptical. Ansip, whose statement was often quoted out of context, had said that different legislations in Member States would make geo-blocking acceptable, e.g. in the case of online gambling. He continued: “But deep in my heart I would like to say: I hate geoblocking.” Oettinger answered in an interview with a German newspaper, suggesting that initiatives to abandon geo-blocking were premature and that the matter required further investigation. This timid dispute was resolved under point 2.3. of the Communication, which announced legislative proposals to end unjustified geo-blocking for the first half of 2016. From the brief explanation provided in the document, such legislation will aim at enabling users to access online stores and services cross-border throughout the EU to take advantage of

178 Ibid., p. 3.
the best offers. The section did not expressly address geo-blocking for audiovisual content or online services in particular, but related solely to price discrimination regarding online cross-border purchases. Justified geo-blocking, so the Communication, would relate to restrictions based on diverging national legislation.\footnote{European Commission, COM(2015) 192 final, p. 6.}

Section 2.4 was dedicated to a modern European copyright framework for digital content. Limitations to cross-border access to digital content were credited, partly, to the territoriality of copyright and resulting problems in rights-clearing and financing plans for (audiovisual) works. The Commission acknowledged user expectations to Europe-wide access and portability of services and content legally available in a Member State. For this purpose, the Commission announced a review of the scope of application of the \textit{Satellite and Cable Directive}. This can only mean that it is contemplated to apply the country of origin principle of Article 1(2)(b) of that Directive and that it should be extended to online transmissions of broadcasts.\footnote{The Digital Single Market Strategy is less clear on the issue, Ibid., p. 7.} This does not imply that the principle should also apply to the communication of the public or making available of other content besides online transmissions of broadcasts. The Strategy also announced to provide greater legal certainty for certain uses for the purposes of, including commercial and non-commercial text and data mining, research and teaching.\footnote{Ibid., pp. 7-8.} This goal should be achieved through greater harmonization of the relevant exceptions, but on how this would take shape, the Communication remained silent. Finally, the document announced actions with regard to activities of intermediaries to protected content and a modernization of the current enforcement framework.

Compared to the ambitions of the original “Reda Report”, the “Digital Single Market Strategy” was limited in its scope, in particular with regards to L&Es. A more sympathetic, open approach to UGC was missing, as is a commitment to make all exceptions mandatory to safeguard maximum legal certainty for users and rightsholders. A clarification on the application of TPMs was also missing, as was an initiative to clarify the relation between contractual obligations and L&Es. The Strategy also failed to indicate which concrete steps should be undertaken to implement the few
changes announced in relation to copyright. A positive aspect of the Strategy is that it was accompanied by a Staff Working Document on analysis and evidence, which gave deeper insights into the background of the Strategy and fulfilled the promise of a more evidence-based approach made in the leaked White Paper. With the “Digital Single Market Strategy” the Commission continues to pursue an approach to copyright harmonization of small steps, without daring a more comprehensive approach.

The first of these small steps was the tabling of a proposal for a Draft Regulation on ensuring the cross-border portability of online content services in the internal market. The proposal was published on 9 December 2015 together with a Communication titled “Towards a modern, more European copyright framework”, parts of which had

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already been leaked more than a month before its official publication.\textsuperscript{189} The Commission reaffirmed its position that a “more European Framework is needed to overcome fragmentation and frictions within a functioning single market.” However, it maintained that the foundation of for a European framework for copyright is a high level of protection.\textsuperscript{190} Such a framework would require the injection of “more single market” by increased harmonization and new approaches to address aspects related to the principle of territoriality, as well as certain changes necessitated by technological changes.\textsuperscript{191} The Communication further considered legislative proposals to ensure wider access to content by “[e]nhancing cross-border distribution of television and radio programmes online”, help for rightholders and service operators to negotiate cross-border licenses, and facilitate the digitization of out-of-commerce works.\textsuperscript{192} Other suggestion included the promotion of licensing hubs. With regard to L&Es, legislation was announced to implement obligations arising out of the Marrakesh Treaty, other instruments for exceptions that would enhance effective “access to education, knowledge and research” will be considered in spring 2016. An increased level of harmonization should be safeguarded by making the respective exceptions mandatory, in order “to give users and right holders a legally certain and predictable system.”\textsuperscript{193} The Commission further expressed its intention to assess whether action is required to ensure the functioning of the system for copyright levies in the internal market. It will also assess whether it is necessary to specify the definitions of exclusive rights against the background of new online distribution forms for digital content.\textsuperscript{194} A self-regulatory approach will be

\textsuperscript{190} European Commission, COM(2015) 626 final, p. 2.
\textsuperscript{191} Ibid., p. 3.
\textsuperscript{192} Ibid., p. 6 (emphasis omitted).
\textsuperscript{193} Ibid., p. 8.
\textsuperscript{194} Ibid., pp. 9-10.
taken to ensure the effective enforcement of commercial-scale copyright infringements, based on a “follow-the-money-approach” involving intermediary service providers. Other aspects of copyright enforcement will be considered by autumn 2016, with possible adjustment to the existing legal framework. Finally, the Communication announced further stakeholder dialogues and consultations to foster a vision for a long-term vision for copyright reform. This section explicitly mentioned the possibility of a “single copyright code and a single copyright title”. Both would, however, require significant changes. The Commission notably mentioned that, to identify and define the areas that need reform, it would involve experts to assist it with this task. This long-term vision, the Communication concluded, should not be abandoned due to the complexities of the task, but it should be developed to pursue the vision of building an EU single market.

C. Elements of a European Copyright Framework for the Digital Single Market

From the multitude of copyright aspects that have been mentioned at least once during the political discussion between the “Digital Agenda” and the “Digital Single Market Strategy” only a few are addressed in this study. However, those few elements are those that are indispensable for an efficient copyright system, given that they interact smoothly. This study will further focus on these elements that are important for digital uses, uses that are dependent on “[a]tractive content and services [that are] available in an interoperable and borderless internet environment.”

In search for solutions which can help to establish a complete digital common market for content one single approach cannot prove effective. Instead, a number of initiatives that tackle different issues individually are likely to achieve more promising results. The European Commission has

demonstrated its understanding of this fact in its numerous communications, Green and White Papers, consultations and stakeholder dialogues that dealt with different aspects in varying degrees of thoroughness.

It is important to understand that these approaches cannot be developed in isolation but their development must take into account the complementary nature of each approach. For example, collective licensing is very useful for large scale commercial users that intend to offer wide repertoires of music or (potentially) films to their customers. For small-scale private users the current offer by collecting societies is less useful. Their needs could either be catered for by extending the offer of collecting societies, establishing an online copyright exchange\textsuperscript{198} or by clarifying the scope of application of limitations and exceptions. In addition, whereas collective management can be useful for the music sector, it might not necessarily be an appropriate solution for other types of media. Whatever the solutions are, only a combined application of several cures will enable the ailing EU digital economy to recover and catch up with other markets. A number of elements have crystalized in a review of the policy initiatives from 2010-16.

The elements discussed in this study are those that can reasonably be expected to be discussed, too, in the coming years, or have already been subject to discussion in the context of the “Digital Agenda”. They also form a coherent set in the sense that they are, with one exception, contained in the InfoSoc Directive, or arise from provisions contained in this instrument. In 2012, the European Commission had isolated four areas that should form the core of a review of the EU copyright framework: “territoriality in the Internal Market; harmonisation, limitations and exceptions to copyright in the digital age; fragmentation of the EU copyright market; and how to improve the effectiveness and efficiency of enforcement while underpinning its legitimacy in the wider context of copyright

reform.”  The last point, enforcement, will not be discussed in this study, the three other issues form the basis for analysis. Of course they cannot be the only aspects in an attempt to construct a comprehensive European copyright framework that can enable a digital single market and feed it with content, but they constitute its cornerstones. They will be supplemented with an analysis of the new Collective Management Directive, which was passed under the Digital Agenda.

Territoriality is the basic principle and obstacle in the common market for copyright. With fragmented harmonization, and in the absence of a unitary title, copyright is subject to 28 different legal frameworks in the EU. Territoriality forms the analytical background for this study, not least because it has driven harmonization in the early days of EU copyright. The first section of Chapter 3 is dedicated to this principle, its evolution is described and the release valve of the principle of territoriality, the exhaustion doctrine, is examined against the background of recent jurisprudence of European courts, but also in comparison with the case-law of US courts. These cases illustrate the insufficiency of the current legal framework for new business models, but also the misadjusted balance of interests created by modern copyright legislation when applied to digital scenarios.

The thorny issue of L&Es and they role they play as a counterbalance to exclusive rights form the subject of the second section of Chapter 3. L&Es permit the public to use protected works without prior authorization by the respective rightsholder. In a digital environment the exercise of L&Es has been significantly hampered. It will be argued that the interests of users are neither sufficiently reflected in the legislative language that establishes L&Es under Article 5 InfoSoc Directive, nor are they reflected in the application of L&Es. Suggestions are made how the current wording of Article 5 could be adapted to give users those exceptions (or rights) that they need to effectively exercise certain acts that form the essence of an information society, such as the creation and dissemination of UGC and access to protected works to exercise fundamental rights.

As the second wider topic under the InfoSoc Directive, the third section of Chapter 3 discusses technical protection measures (TPMs). These measures enable rightsholders to automatically enforce their right by

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preventing the exercise of certain acts. The unilateral imposition of rules that are sometimes not in congruence with the rights rightsholders enjoy under EU copyright legislation creates collateral effects on the user’s ability to exercise L&Es. The impact of TPM legislation as interpreted by the CJEU will be used to assess whether TPMs applied in accordance with the law can be used to stabilize the balance within copyright and make copyright management more efficient.

Finally, the Collective Management Directive will be discussed. Collective Management of different rights bears the potential to facilitate licensing processes by offering one-stop-shops for users of protected works, and to provide rightsholders with efficient licensing services that relieves them from the burden of individual licensing. This traditional view has been challenged in a digital environment.200

The Directive was created to facilitate licensing for online music services but also to strengthen the position of rightsholders vis-à-vis collecting societies by establishing minimum standards and by incentivizing competition between collecting societies. Both aspects are considered as to their effectiveness to achieve the goals set out be the Commission and as to their potential effects on the balance of interests. It will also be considered what role collecting societies can play beyond what has been foreseen by the directive.

Together, these four elements can form the cornerstones of a reformed legal framework for copyright management at EU level. Chapter 4 then assesses the legislative options for the EU legislator to implement those changes that will be suggested in each topical section of Chapter 3. The effects on harmonization can vary depending on the legal instrument that is used to implement harmonizing measures. Three options are suggested, ranging from partial adjustment of the existing acquis by way of direc-

200 European Commission, COM(2011) 206 final, p. 9: “Meanwhile, current systems for the granting of copyright licences for legal on-line services should also be simplified and made transparent[28]. In the internet age, collective management must be able to evolve towards European models which facilitate for licences covering several territories for a multitude of on-line services, whilst at the same time providing a high level of protection for rights holders. The new flexibility provided by an updated legal framework will enable new business models to emerge, leading to a wider and targeted distribution of creative content to more mobile consumers. In addition, the creation of a digital version of the catalogues of European cultural institutions, including of orphan works, should be facilitated.” (footnotes and emphasis omitted).
tive(s), over a more comprehensive reform of copyright through a “Euro-
pean Copyright Code”, and a unitization of EU copyright fashioned after
trademark, designs and patents.
Chapter 2. Copyright (Regulation) in the Single Market

Copyright law has not undergone such transformation as those of trademark law or design law, and more recently patent law, all of which have been Europeanized by the introduction of European intellectual property titles.\footnote{Trade marks and designs alike have been harmonized in a first step by two respective directives (Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks, OJ L 299, 8.11.2008, p. 25-33 \textit{(Trademark Directive)} and Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs, OJ L 289, 28.10.1998, p. 28-35 \textit{(Community Design Directive)}) and were subsequently \textit{unitized} by two separate regulations (Council Regulation (EC) No. 6/2002 of 12 December 2001 on Community designs, OJ L 3, 5.1.2002, p. 1-24 \textit{(Community Designs Regulation)} and Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark, OJ L 78, 24.03.2009, p. 1-42 \textit{(Community Trade Mark Regulation)}), both unitary titles are administered by the Office for the Harmonization of the Internal Market (OHIM), which serves as a registry, the decisions of OHIM can be appealed before of the CJEU; the legal basis for both unitary titles was Article 308 \textit{TEC}, the legal basis for unitary intellectual property titles after Lisbon is Article 118 \textit{TFEU}.} Copyright in the EU – sometimes referred to as European copyright, although this terminology might be misunderstood and therefore misleading – must be understood as the applicable law to copyright in the European Union. What is considered under the notion of European copyright does of course include EU legal instruments in the form of the relevant secondary law, further international treaties and conventions to which the EU and its Member States are parties, as well as national legislation that implements EU legislation. All three levels, international law, EU law and national law interrelate.

Three factors contributed to the current state of European copyright law, in particular, but not limited to, as regards the influence on EU and national legislation. First, the tension between EU primary law and copyright, as reflected in the case-law of the CJEU, has contributed to a development of rules and concepts that today are reflected in a corpus of secondary law. Second, technical developments have necessitated a continuous adaption of copyright law to technological progress. Third,
copyright at EU level has been influenced by the principle of non-discrimination, which prohibits a different treatment of rightsholders from other Member States in comparison to the treatment national rightsholders receive.\textsuperscript{202}

The different approaches to harmonization, as well as the role of the EU judiciary in inspiring and interpreting legislation are described below. First, however, a brief overview of the relevant international instruments will be provided. International treaties do not only bind the EU as signatory to such treaties, and the Member States as far as they are involved as regards mixed agreements. Furthermore, the CJEU has adopted the practice to interpret terms used in international treaties if they fall into an area where the European legislator has already acted.\textsuperscript{203}

A. International Copyright Legislation with EU Relevance

The title of this section can easily be misunderstood in the sense that it might be perceived as implying that there are only a few international conventions dealing with copyright matters that are relevant for the European Union with its internal market. However, copyright has been the subject of some important, and nowadays widely ratified treaties and conventions, beginning with the \textit{Berne Convention for the Protection of Literary and Artistic Works} of 1886 as the foundation for modern international copyright law, the \textit{Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)}\textsuperscript{204} as an annex to the \textit{Agreement Establishing the World Trade Organization (WTO)}, which gave the international copy-


right system teeth, *viz.* a forum to enforce obligations under the *TRIPS*,\textsuperscript{205} and more recently, although already more than 17 years ago, the *WIPO Copyright Treaty (WCT)*\textsuperscript{206} and the *WIPO Performances and Phonograms Treaty (WPPT)*.\textsuperscript{207} Of course there were other initiatives at international level, which sometimes resulted in treaties that dealt with copyright issues, either ancillary or exclusively, but none of these are of particular relevance today and in this particular context.\textsuperscript{208} Therefore, this section is limited to a targeted analysis of the relevant international copyright instruments.

Before examining each legal instrument for itself, it is worthwhile dwelling on the rationale behind the internationalization of copyright. More specifically, the guiding question, the answer to which will later explain why copyright as a system is such a pertinent *problématique* in the EU, is: Why was, and still is, there a need to regulate copyright and neighboring rights on the international level? And even before answering the former question: What is it that makes copyright so difficult to manage and enforce across the national borders of states? For this purpose it is indispensable to briefly look into the history of international copyright.

The latter question can be answered by one word, which describes the entire dilemma of international copyright law, the root of all evil – if one were to put it metaphorically: *Territoriality.* Territoriality as a principle of international copyright law and its implications for the EU common market will be discussed further below.\textsuperscript{209} The general meaning of the principle in relation to copyright, and indeed intellectual property as well as industrial property in general, must be clarified before examining the international framework, however.

\begin{flushleft}
208 E.g. the Universal Copyright Convention, concluded by Berne member states and also states that were not members to the *Berne Convention*, see Goldstein & Hugenholtz, *International Copyright: Principles, Law, and Practice* (2012), pp. 44-6.
\end{flushleft}
The evolution of copyright in different national states has already been described above. The quintessence being that copyright is a property title granted by national law, the content of which differs from state to state. Certain aspects of copyright have been subject to international and EU harmonization, but this does not alter the basic concept that copyright is granted by a national state within its territory, and therefore limited thereto. Territoriality does not play a role at national levels because within the territory of each state the copyright regime is the same. For the international level the principle states that copyright and neighboring rights do not enjoy any extraterritorial effects. In other words, the effects of national copyright and neighboring rights stop at the respective national borders.

Now, at the international level, authors historically faced the difficulty that as nationals of foreign states they did not automatically enjoy copyright protection, as protection was often limited to authors holding the citizenship of that respective state, or authors residing in the territory of a state, or only for works that were published for the first time in the territory of a state. The first concern of international copyright was thus to grant equal protection to foreign authors.

Soon after the enactment of the first real copyright law, the Statute of Anne in 1709, calls for international agreements for the protection of copyright were voiced and even draft agreements were presented by indi-

210 See Chapter 1.A.
viduals. It took another century until the first international agreements on copyright were concluded, first between states that shared a common language and later between countries with different languages. All those international initiatives, however, were of bilateral nature, resulting in a plethora of treaties throughout Europe in the 17/18th century. Considering the constantly shifting borders in a Europe marked by a patchwork of small states, such system was hardly satisfying for authors because the bilateral approach provided neither for coherent standards of protection, nor for any systematic order.

The first considerations for a truly international approach in the form of a multilateral international treaty revolved around the idea of a uniform international copyright regime, an idea that was supported by the universalist camp, strongly opposed by the pragmatists in this debate, that thought such a multilateral attempt was politically unfeasible. The struggle between copyright universalists and copyright pragmatists hindered the advance of concrete proposals for some time as both parties, though in particular the universalists, remained firmly attached to their respective positions. A compromise was finally found in the outgoing 18th century with the adoption of the *Berne Convention on the Protection of Literary and Artistic Works*.

What followed were a series of international agreements that regularly established minimum standards for copyright and related rights. This

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214 The substantive provisions of these early bilateral treaties are of no significant importance for this work, a brief overview is offered in: *Ibid.*, pp. 13-4 and Ricketson & Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (2006), pp. 27 et seq.
216 *Ibid.*, p 43-4, the authors describe the *Berne Convention*, the first and most important multilateral treaty, as a distillate of universalist ideas, boiled down to a consensus among the negotiating parties, calling it a “limited kind of international copyright code.”
does not mean, however, that an author enjoys the same protection worldwide, or that he holds one copyright. In fact, an author owns a multitude of copyright titles, each of which exists under the rights and conditions granted and imposed by states that grant protection of copyright and, of course, only within the territory of the respective state; the multitude of national copyright titles is usually referred to as a bundle of rights.

The relevance of international copyright law for EU copyright law is twofold. On the one side, European legal instruments often serve to implement international obligations incurred by the EU or its Member States into European law. On the other side, European legislation must “so far as possible” be interpreted in the light of the international obligations of the EU. The interpretation of the applicable international copyright agreements by the CJEU has been criticized.

The treaties of particular relevance to the EU (copyright) and most commonly referred to in EU legislation as well as by the jurisprudence of the CJEU in its interpretation of the copyright acquis will now be surveyed with individual overviews. These instruments are the Berne Convention for the Protection of Literary and Artistic Works, the Agreement on Trade-Related Aspects of Intellectual Property Rights, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.

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219 CJEU, Judgment in SGAE v Rafael Hoteles EU:C:2006:764, para. 35 for international agreements to which the EU is not a member (e.g. the Rome Convention) see CJEU, Judgment in Case C-135/10, Società Consortile Fonografici (SCF) v Marco Del Corso, EU:C:2012:140, para. 49.

According to the Berne Convention, the very first multilateral treaty on copyright, an author who created a work that is protected by copyright can enjoy this right of protection – nowadays – not only in his home state, usually where the work was created, but in many other countries. This protection takes effect simply by the act of creation of the work itself. Authors enjoy this extended protection by virtue of international agreements that extend protection under copyright (and related rights) to other contracting states. As opposed to existing bilateral agreements at that time, the union established by the Convention was not limited in time and is applicable to all member states of the union.\textsuperscript{221}

The main achievement of the Convention was to extend national treatment to all authors of the ratifying states.\textsuperscript{222} Beyond national treatment, it provided a minimum degree of harmonization. Here it should suffice to describe the provisions of the Convention in its 1979 version as they stand today (i.e. a revision adopted in Paris 1971 with a later amendment in 1979), without dwelling too much, or at all for most aspects, on its historical development.\textsuperscript{223} Regard will be had to selected provisions and their evolution in those parts of this work, where it will be instrumental in supporting the analysis and discussion.

Today, the Berne Convention in its 1971 Paris version is the most widely ratified international agreement on the protection of copyright, and therefore the most important legal document on the international level.\textsuperscript{224} The substantive provisions of the Convention aim to protect “the rights of authors in their literary and artistic works.”\textsuperscript{225} The term author is not defined, but Article 2(1) defines the term “literary and artistic works”

\footnotesize

\begin{itemize}
  \item Article 1 Berne Convention.
  \item For historical accounts of the Berne Convention, negotiation history and later developments see e.g.:\textit{Ibid.}; Chapter 3.1.2., Ricketson & Ginsburg, \textit{International Copyright and Neighbouring Rights: The Berne Convention and Beyond} (2006), Vol I, Chapter I, pp. 41 et seq.
  \item Article 1 Berne Convention.
\end{itemize}
through a non-exhaustive list of examples. Member States are free to determine whether protection requires a fixation of a literary or artistic work. The Berne Convention explicitly provides that works do not require to be registered in order to benefit from copyright protection, in general protection may not be subject to any formalities.

Authors enjoy protection of their works throughout their life, and it persists for an additional 50 years after the death of the author. Member states may derogate from this general rule for cinematographic works and for works which have been published anonymously or under a pseudonym. A further exception is provided for photographic works and works of applied art. In any case, states may provide for longer terms of protection for any types of works that enjoy protection under the Berne Convention.

With regard to rights, the Convention establishes moral rights for authors, which exist independently of economic rights and which remain with the author even after the economic rights have been transferred. The economic rights contained in the Convention include the rights of

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226 Article 2(1) Berne Convention reads: “The expression “literary and artistic works” shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.”

227 Article 5(2) Berne Convention.

228 Article 7(1) Berne Convention.

229 Article 7(2) Berne Convention.

230 Article 7(3) Berne Convention.

231 Article 7(4) Berne Convention.

232 Article 7(6) Berne Convention.

233 Article 6bis (1), the moral rights of the author are “the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.” These rights remain with the author or with his estate at least until the economic rights have expired. (Article 6bis (2)).
The right of reproduction of works “in any manner or form” is subject to such exceptions that conform with the test of Article 9(2). It was introduced to the Berne Convention together with the so-called “three-step test” only at the 1967 Stockholm Conference. It allows member states to include in their national copyright laws exceptions to the reproduction right “in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.” The reproduction right applies also to sound or visual recordings. Further rights contained in the Convention are the rights to public performance and communication to the public for authors of dramatic and musical works, broadcasting and related rights, certain rights in literary works including the recitation and communication to the public rights, and the right of adaption. Special rules apply to cinematographic works under Articles 14 and 14bis, Article 14ter establishes the “Droit de suite” for works of art and manuscripts.

The Berne Convention has been revised several times. But after the 1971 Paris revision further attempts have failed. However, under Article 20 members to the Berne Union have concluded special agreements that grant authors in the countries of the contracting parties more extensive rights than those contained in the Convention, as long as these more extensive rights do not contradict the provisions of the Convention.

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234 Article 8 Berne Convention.
235 Article 9(1) Berne Convention.
237 Article 9(3) Berne Convention.
238 Article 11 Berne Convention.
239 Article 11bis Berne Convention.
240 Article 11ter Berne Convention.
241 Article 11 Berne Convention.
II. Trade-Related Aspects of Intellectual Property Rights (TRIPS, 1994)

The TRIPS agreement as part of the WTO Agreement has little significance in terms of concrete substantive protection, it did not offer any new protection standards or introduced new types of works. Its contribution to the international copyright law regime was that it incorporated Article 1-21 of the Berne Convention by reference in its Article 9, thereby making them binding on all members of the WTO. This included even those WTO members that had not previously ratified the Berne Convention. As an effect, the application of the provisions of the Berne Convention at the international level has significantly widened with the TRIPS Agreement. In addition, TRIPS provisions are subject to the WTO Dispute Settlement Understanding, which, for the first time, gave intellectual property disputes a real legal forum for the resolution of disputes.

Although already widely considered to be protected by copyright, Article 10 TRIPS confirmed the protection of computer programs under the Berne Convention. Article 10 is therefore considered to have only a declaratory nature, at least for the EU Members States. For states that are not signatories to the WCT, which, as a special agreement to the Berne Convention under Article 20 of the latter, provides in Article 4 that computer programs are works of literature under Article 2 of the Berne Convention, Article 10 TRIPS provides protection for computer programs under copyright law.

Article 11 establishes minimum rights for the rental and lending of computer programs and films, and Article 12 sets the minimum duration

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242 The respective provisions of the Berne Convention are therefore binding on all TRIPS signatories, irrespective whether a state has signed and ratified the Berne Convention or not, cf. Jan Busche, Peter-Tobias Stoll, & Andreas Wiebe, Kommentar: TRIPs – Internationales und europäisches Recht des geistigen Eigentums (Köln: Carl Heymans Verlag, 2013), Brand: Artikel 9, para. 13.

243 Cf. Daniel Gervais, The TRIPS Agreement: Drafting History and Analysis (London: Sweet & Maxwell, 2008), para 2.90. The Berne Convention, as well as other international treaties in the field of copyright do not contain dispute settlement mechanisms, the enforcement of the respective provisions would fall within the jurisdiction of the International Court of Justice (see Article 33 Berne Convention), which is hardly an appropriate forum for such disputes. With the introduction of the WTO Dispute Settlement Mechanism intellectual property has received a non-exclusive forum at international level.

of the term of protection of copyright, with the exception of photographic works and works of applied art, to 50 years. Neighboring rights are set out in Article 14 for performing artists, performers of phonograms and broadcasting organizations. The protection thereby afforded slightly lags behind that of the Rome Convention.  

With regard to limitations and exceptions Article 13 adopts the three-step test of Article 9(2) Berne Convention and extends it beyond the reproduction right to all other exclusive rights, in particular related rights. According to Article 13, limitations and exceptions to exclusive rights must be confined “to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.” Article 13 preserves the Berne equilibrium between exclusive rights and permitted uses, in any case Article 20 would have prevented a less strict formulation. But, combined with the WTO Dispute Settlement Understanding, Article 13 provided the opportunity for an interpretation of the elements of the three-step test by an international tribunal.

In addition to copyright-specific provisions, the TRIPS Agreement contains a number of general provisions and basic principles that apply to all types of IPRs. These are national treatment (Article 3) and most-favored nation-treatment (Article 4); the exhaustion principle is explicitly excluded (Article 6).

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245 The protection afforded is lower because the Rome Convention is not incorporated in the TRIPS Agreement, and in general is less widely accepted than the Berne Convention, cf. Ibid., Füller/Langeloh, Artikel 14, para. 2.
246 Cf. Ibid., Füller/Langeloh, Artikel 13, paras. 1-2.
249 See Gervais, The TRIPS Agreement: Drafting History and Analysis (2008), para. 2.63, on copyright in particular paras. 2.64 and 2.65.
III. WIPO Internet Treaties

The *WIPO Copyright Treaty* was adopted together with the *WIPO Performances and Phonograms Treaty* on 20 December 1996. Both treaties were reactions to technological developments. Originally, it was planned to adopt provisions to grapple with the challenges created by the information society through a protocol to the *Berne Convention*.\(^{250}\) After a phase of focusing the core of both treaties developed into a new exclusive right, the right to communication to the public including the right to make works available. These rights were supported by the introduction of protection for technological protection measures and rights management information.\(^{251}\)

The *WCT* was, although not a protocol to the *Berne Convention*, concluded as a special agreement within the meaning of Article 20 *Berne Convention*.\(^{252}\) The *WPPT* was considered to be outside the scope of the *Berne Convention* and, therefore, does not make reference to it. It refers, however, to the *Rome Convention*, from the provisions of which it does not derogate.\(^{253}\) As regards digital copyright, both Conventions are widely similar with regard to their respective subject matter.\(^{254}\)

The exclusive rights introduced were the right of distribution (Article 6) and the rental rights (Article 7) for computer programs, cinematographic works, and works embodied in phonograms. The distribution right also permitted the Contracting Parties to determine if and under which conditions exhaustion should apply to the rights of distribution. A comparable provision was not included in Article 8, which established the communication to the public right. The exclusive rights of the *WCT* were made subject to limitations and exceptions under Article 10, which adopted the three-step test of the *Berne Convention* for the exclusive rights of the *WCT*. Article 11 introduced an obligation to provide “adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection

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251 Ibid., Vol. I, para. 4.19.
252 Article 1(1) *WCT*.
253 Article 1(1) *WPPT*.
with the exercise of their rights” for unauthorized acts in connection with their works. The WCT also contained a number of agreed statements which were adopted together with the text of the Convention to clarify a number of provisions of the Berne Convention and the WCT.

B. EU Copyright Legislation

The European copyright acquis reflects the evolution of EU copyright law, and the motives behind the different instruments that constitute the codified part of EU copyright law differ. The majority of EU legislation harmonizes substantive aspects of copyright law and aspects of the practical management of copyright for digital uses have only been subject to harmonization in the recent past.

All instruments that form the EU copyright acquis are directives, which, by their nature, cannot provide full harmonization. The first set of directives are either reactions to developments in the case-law of the CJEU or attempts to increase the protection of rightsholders in relation to certain creations, to give Europe a competitive edge over other markets or to level the playing field by granting copyright protection to certain intellectual creations that otherwise would have remained without protection (e.g. computer programs and non-original databases). Until 2001, all harmonization efforts were of a vertical nature, only certain categories of rights were concerned. In 2001, the only horizontal harmonization instrument was enacted in form of the Directive on the harmonisation of certain aspects of copyright and related rights in the information society. Compared to the other three big IPRs, trade marks, designs and patents, copyright has only been harmonized and not unitarized, which means that no EU title for copyright exists, but the respective national laws have only

255 Article 11 WCT.
257 Trade marks and designs have been harmonized at the EU level first by means of directive, and in a second step by regulation, the respective second step market the unification of both IRs in the EU, which means that both rights received their own unitary title, which is valid and enforceable for the entire territory of the EU.
258 The institution that is now the CJEU will be referred to as such, even if the judgment to which reference is made was rendered before 2009.
been approximated to a certain extent. Accordingly, the legal basis for copyright harmonization has been Article 114 *TFEU* (ex Article 95 *TEC*).


The most important Directive in the field of copyright in the EU is, without doubt, the 2001 *Directive on certain aspects of copyright and related rights in the information society* (*InfoSoc Directive*, or *Copyright Directive*). Although the title might suggest otherwise, the directive harmonizes copyright not only in relation to the information society, but within its scope also for copyright in general. On the one side, the Directive served to fulfill a number of obligations arising under the WIPO Treaties, but, on the other side, the negotiations quickly went beyond a mere transposition of the WIPO treaties towards a more comprehensive harmonization of copyright at EU level. This becomes more clear when looking at Article 5 and its enumeration of limitations and exceptions. Whereas the *WCT* (Article 10) and the *WPPT* (Article 16) only contain what is commonly referred to as the three-step test, and the *Berne Convention* little more than a few permitted uses in Articles 10 and 10bis, the *InfoSoc Directive* provides one mandatory exception and a list of 20 optional exceptions, which Member States can implement at their discretion.

In more detail, the Directive provides for a reproduction right with a very wide scope (Article 2) that covers “direct or indirect, temporary or permanent reproduction[s] by any means and in any form, in whole or in part”. The protected subject-matter are works, which are not further defined in the Directive, as well as performances, phonograms, films and fixations of broadcasts. Article 3 implemented Article 8 *WCT* and Article


6(i) WPPT by granting authors and other rightsholders the right to communication to the public including the right of making available their protected subject-matter. Pursuant to Article 4, authors enjoy the right of distribution with respect to the original of their works and any copies thereof. Article 4(2) codifies established case-law of the CJEU in relation to the exhaustion of the distribution right. Two of the numerous Recitals, namely Recitals 28 and 29, seem to restrict the exhaustion doctrine to tangible items. The lengthy Article 5 on limitations and exceptions gives a list of a total of 21 exceptions; this list is exhaustive according to Recital 32. Article 5(5) inserts the three-step test into the EU legal system, however, its role is still unclear.

The relation between limitations and exceptions and technical protection measures is clarified in Article 6(4). In general, according to Article 6(1) Member States should provide “adequate legal protection against the circumvention of any effective technological measures” and other acts, such as the “manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the provision of services” in relation to technical protection measures.

Article 7 obliges Member States to provide for adequate legal protection against acts in relation of the removal of electronic rights-management information for the purpose of inducing, enabling, facilitating or concealing infringements of copyrights or related rights. Finally, Member States must provide for effective sanctions and remedies for copyright and related rights infringements (Article 8).

II. Vertical harmonization – extending rightsholder protection

In what has been called the second period of EU copyright law, vertical harmonization directives steadily increased copyright protection. By introducing specific rights for rental and lending and sui generis protection

for non-original databases, a separate protection regime for software, and the general extension of the term of protection, the EU has granted rightsholders, old and new, a significant level of protection that covers a wide variety of works and related-subject matter.

What this stage of harmonization failed to develop was a coherent system of copyright protection that is based on rules of general application. Harmonization efforts were made by means of directives, and not regulations, and left national laws, but also the European copyright acquis, in a state of fragmentation. Therefore, the rules do not only conflict and overlap at EU level, but also between Member States the degree of harmonization achieved has not resulted in identical rules at national levels within the scope of harmonization, based solely on EU copyright legislation.

The second phase was rung in with the Software Directive (or Computer Programs Directive, re-codified in 2009), which obliges Member States to protect computer programs by copyright as literary and artistic works. It defined the exclusive rights of rightsholders, including the right of distribution, and provided for two sets of exceptions applicable to software. The Directive also established a separate regime for “special measures of protection”. The Rental and Lending Rights Directive (re-codified in 2006) introduced the lending and rental rights at EU

266 Article 1(1) Software Directive.
267 Article 4(2) Software Directive.
268 Article 5 and 6 Software Directive.
269 Article 7 Software Directive.
270 Article 2 Software Directive, including an unwaivable right to equitable remuneration (Article 4).
level as well as certain related rights.\textsuperscript{271} Databases are protected by copyright\textsuperscript{272} or, for non-original databases under the \textit{sui generis} database right\textsuperscript{273} by virtue of the \textit{Database Directive}. The \textit{SatCab Directive} granted authors the broadcasting rights for their works,\textsuperscript{274} and also introduced the cable retransmission right, which can only be exercised by a collecting society\textsuperscript{275} After the \textit{InfoSoc Directive} was passed, the \textit{Artist Resale Right Directive} added a remuneration right for authors of “original works of art”.\textsuperscript{276}

III. Purposeful copyright management – orphans and online music

Certain instruments of the EU copyright \textit{acquis} serve very particular purposes that relate to very narrowly defined areas of copyright law. In relation to the management of copyright three directives contain specific provisions. The \textit{SatCab Directive}, which is currently under review,\textsuperscript{277} already contained provisions to management related aspects of copyright for satellite broadcasting and cable retransmission. It established the so-called “country of origin principle” for satellite broadcasts, under which the rights for a satellite broadcast must only be cleared in the country in which the “programme-carrying signals are introduced into an uninterrupted chain of communication”.\textsuperscript{278}

In the framework of the “Digital Agenda”, two legislative initiatives came to fruition. Neither was a reaction to an international agreement, and neither fundamentally changes substantive copyright rules. Instead, both instruments addressed aspects of copyright management. The first to see

\textsuperscript{271} The fixation right (Article 6), the reproduction (Article 7), the broadcasting and communication to the public rights (Article 8) and the distribution right (Article 9), respectively for certain classes of rightsholders, the exception to these rights were globally defined in Article 10 of \textit{Software Directive}.

\textsuperscript{272} Article 3 \textit{Database Directive}.

\textsuperscript{273} Article 7 \textit{Database Directive}.

\textsuperscript{274} Article 2 \textit{SatCab Directive}.

\textsuperscript{275} Article 8 and 9 \textit{SatCab Directive}.

\textsuperscript{276} Article 1 and 2 \textit{Artist Resale Right Directive}.


\textsuperscript{278} Article 1(2)(b), \textit{SatCab Directive}.
the light of day was the Orphan Works Directive, which facilitated the use of works with unknown authors or who cannot be located under certain circumstances. The second instrument is the Collective Management Directive. This instrument, which will also be discussed in more detail in Chapter III, harmonized certain elements of the administration and governance of collecting societies, and established a system by which certain qualified CMOs could issue multi-territorial licenses for the online use of musical works.

In comparison to the earlier copyright directives the two instruments did not extend the scope of protection for protected works. They were introduced to facilitate access to works in a European cross-border context. However, both instruments continue to base their approach on the principle that copyright should provide a high level of protection for rightsholders. Nevertheless, the two directives mark a slight change in turn in copyright harmonization away from the approximation of substantive rules towards a more transactional approach to copyright. Whereas the Collective Management Directive has harmonized an area of law that has been shaped by the EU competition rules, the Orphan Works Directive can be compared to one big limitation or exception, under certain very specific conditions, i.e. the general rule that every use requires the authorization of the rightsholder.

IV. Interim conclusion: restrictive trends in EU copyright harmonization

What seems odd after the first 20 years of European copyright legislation, starting with the Computer Programs Directive in 1991 to the InfoSoc Directive in 2001, is that lawful marketing of copyright protected works has not been the object of any of the directives, and only in 2012 with the Orphan Works Directive and in 2014 with the Collective Rights Management Directive the EU put the focus on enabling the dissemination of copyrighted works in the common market. Instead, the EU legislator consistently focused on increasing the scope and intensity of protection, often further than the minimum standards of the Berne and Rome Conven-

279 Recital 3 Collective Management Directive; Recital 8 Orphan Works Directive.
280 Recital 1 Collective Management Directive; Recital 8 Orphan Works Directive.
tions. Similarly the European judiciary, when it interpreted the copyright directives, was hardly enthusiastic in loosening the tight standards of protection at least a little, while at the same time it interpreted L&Es strictly. Quite to the contrary, it provided for a wide scope of application of exclusive rights under EU copyright legislation. The reasons for this approach can be found in the preambles of the relevant directives: A high standard of protection is believed to benefit authors of works and will result in higher incentives to create works of all natures. Only recently a slight turn in jurisprudence loosened the absolute control of rightsholders and the focus shifted towards rights to use against remuneration.

With the more recent legislative proposals the Commission has made a step in the other direction. Still far from loosening the EU copyright corset, the Collective Rights Management Directive and recent policy proposals focus on using copyright to the benefit of the EU digital market and its users and not to the exclusive benefit of rightsholders. Although a clear economic motivation is still visibly driving current reform efforts, that path set out by the “Digital Agenda” constitutes a turn in EU copyright policy from preventing uses to enabling uses. This trend is being continued under the “Digital Single Market Strategy”. Both periods of EU copyright reform are an expression, however cautious, of a political will to adapt copyright to the realities of the 20th century, while rebalancing the

281 Hugenholtz in: Derclaye, Research Handbook of the Future of EU Copyright (2009), p. 17, examples are the extension of the term of protection to 70 years post mortem auctoris and the sui generis database right for non-original databases.


interests of rightsholders and users of protected works. The copyright rules currently in place were drafted with the Internet of the 20th century in mind, but since then technology and society have changed.\(^\text{286}\)

C. The CJEU’s Jurisprudence in Relation to Copyright

The jurisprudence of the Court of Justice has had an important impact on the development of European copyright that cannot be overstated. The Court has been a driving force in developing the subject area from the early days of the internal market until today. In its early case-law it tested the operation of national copyright law against the market freedoms and against European competition law. At this stage, harmonization of national copyright laws was still rejected as a policy option at EU level. Instead, the Commission relied on the harmonizing effect of international agreements.\(^\text{287}\) After parts of the case-law had been codified, starting in the mid-1990s the Court shifted its activities, though not exclusively, to the interpretation of EU copyright legislation. It is worth outlining the nature and the consequences of both periods of case-law.

I. The (early) copyright case-law

The CJEU’s jurisprudence in relation to copyright and related rights dates back to the earlier days of the common market. The first cases in which the CJEU dealt with copyright in the European Communities were set

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\(^{287}\) See Gotzen in: Synodinou, *Codification of European Copyright Law: Challenges and Perspectives* (2012), p. 42, with reference to Commission of the European Communities, *Green Paper on copyright and the challenge of technology – copyright issues requiring immediate action, COM(88) 172 final*, Brussels, 07.06.1988: “Community Legislation should be restricted to what is needed to carry out the tasks of the Community. Many issues of copyright law do not need to be subject of action at Community Level. Since all Member States adhere to the Berne Convention for the Protection of Literary and Artistic Works and to the Universal Copyright Convention, a certain fundamental convergence of their laws has already been achieved [...] Any temptation to engage in law reform for its own sake should be resisted”, paras. 1.4.9.-10.
against the legal background of the free movement of goods provisions in the Treaties and the principle of territoriality. Not only copyright, but also other intellectual property rights were examined as to their specific subject-matter in order to justify restrictions to the free movement provisions under the Article 36 TFEU (ex Article 36 TEC) exception for the purpose of the protection of industrial and commercial property. More specifically, the Court elaborated on the elements of the specific subject-matter of copyright and the distinction between existence of intellectual property rights and their exercise, which developed into the principle of Community exhaustion. The role of the Court of Justice in this phase was highly significant as it established basic principles of European copyright law, which were later codified in the copyright acquis. The Court also recognized rights which led to the adoption of vertical harmonization.


289 CJEU, Judgment in Case 78/70, Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co. KG, EU:C:1971:59, In the case the Commission observed that “[t]he Treaty does not intend to prohibit restrictions on competition arising from the existence of industrial property rights or literary or artistic property rights but, in Article 36, it outlines the boundary between the existence of those rights, which is recognized by the Treaty, and the exercise of those rights in a way which is contrary to one of the fundamental objectives of the Treaty.” The Court then argued in para. 11: “Amongst the prohibitions or restrictions on the free movement of goods which it concedes Article 36 refers to industrial and commercial property. [...] it is [...] clear from that article that, although the Treaty does not affect the existence of rights recognized by the legislation of a Member State with regard to industrial and commercial property, the exercise of such rights may nevertheless fall within the prohibitions laid down by the Treaty. Although it permits prohibitions or restrictions on the free movement of products, which are justified for the purpose of protecting industrial and commercial property, Article 36 only admits derogations from that freedom to the extent to which they are justified for the purpose of safeguarding rights which constitute the specific subject-matter of such property.” (emphasis added).

Thereby, the CJEU has given important impulses for the harmonization of EU copyright law and continues to fill the gaps in the current copyright \textit{acquis}.

II. The recent case-law

While in the early days of what can now truly be called a EU copyright system, case-law related to Article 36 \textit{TFEU} and the free movement of goods dominated, recent jurisprudence dealt with the interpretation of the directives that codified the early case-law and further extended the EU rules on copyright. With the dawn of the digital age, copyright was back in the ring and ever since a constant stream of CJEU decisions have spurred academic and popular debate. This new wave started with the introduction of the copyright directives, most notable the \textit{Directive 2001/29}, which has generated the largest number of preliminary references. Until 2015, more than 40 references regarding the interpretation of the various provisions of the \textit{InfoSoc Directive} had been made. The case-law, as far as relevant, will be discussed in the respective chapters.\footnote{For two excellent overviews on the recent case-law of the CJEU in relation to copyright see Matthias Leistner, “Europe’s Copyright Law Decade: Recent Case Law of the European Court of Justice and Policy Perspectives”, \textit{C.M.L. Rev.} (2014), 559-600; Matthias. Leistner, “Copyright law in the EC: Status quo, recent case law and policy perspectives”, \textit{C.M.L. Rev.} (2009), 847-884.}

Here it will be sufficient to briefly outline the most important areas that have been subject to interpretation by the CJEU.

With its jurisprudence the CJEU has helped to define the material scope of application by giving the term “work” a distinctly European interpretation.\footnote{In CJEU, Judgment in Case 158/86, \textit{Warner Brothers Inc. and Metronome Video ApS v Erik Viuff Christiansen}, EU:C:1988:242 the Court rules that the exhaustion of the distribution right (which had not been harmonized at EU level then) could not have the effect that exclusive rights, such as the right to hire-out video-cassettes, would be rendered meaningless by its application. A few years later the \textit{Rental and Lending Rights Directive} was passed, now in its redrafted version of 2006.}

A creation must, pursuant to the case-law of the CJEU, display
some sort of originality in order to be protected as a “work”. The Court also developed the scope of the exclusive rights, in particular those of Article 3. For the right of communication to the public it is not settled case-law that an act of communication must also be directed at a “new public”. The Court also introduced an economic element. The distribution right of the InfoSoc Directive has been defined to relate only to physical objects, a different interpretative approach was taken in relation to the distribution right of the Software Directive. Different L&Es have also been subject to preliminary references, as well as selected questions in relation to TPMs.

An end is not in sight, multiple requests for preliminary rulings are pending in front of the CJEU. Currently, most requests seek clarification on the notion of fair compensation and their mode of operation, but also the question of online exhaustion is looming on the horizon. The recently passed directives on orphan works and collective management will generate further questions with which the Court will have to deal in the foreseeable future.

Derclaye analyzed the case-law of the Court of Justice and tested it against the criticism the Court’s jurisprudence has received in the literature. She argues that the interventionist and integrationist nature of the jurisprudence is marked by inconsistency and leads to a certain degree of legal uncertainty. Depending on the means of interpretation used, the

295 Originally in CJEU, Judgment in SGAE v Rafael Hoteles EU:C:2006:764, also e.g. CJEU, Judgment in FA PL/Murphy EU:C:2011:631, para. 118.
299 See Chapter 3.B.
300 See Chapter 3.C.
Court takes different approaches to the interpretation of the existing *acquis*. At times a strict interpretation is favored, which is occasionally supplemented and complemented with general principles as legal certainty and proportionality.302 With regard to exceptions, the principle of strict interpretation has more recently given space to the principle of effectiveness. This makes any predictions on the outcome of preliminary rulings very difficult and reduces their value as precedents.

Whereas the early case-law initiated the first wave of harmonization, the post-*InfoSoc* case-law has helped to define the contours and shape the substance of the *acquis* through judicial harmonization. The most striking difference between both phases of jurisprudence lies in the reasoning of the Court. In pre-*InfoSoc* cases internal market arguments prevailed. After the *InfoSoc Directive* came into force, the predominant paradigm of EU copyright law it to provide a high level of protection for rightsholders. In a similar way as the early case-law has had significant influence on the existing directives, the younger case-law could also form the basis for future (modest) reforms.303 It has, as will be shown below, uncovered a number of problems, which currently challenge copyright in the EU.

### D. The status quo

In a historical perspective, the intensity of copyright protection has constantly improved. Whereas the first mechanisms for the protection of copyrights were privileges granted to printers and later authors, the current copyright rules in the EU (and its Member States) have been created to the effect that rightsholders have gained more rights than ever before, and their control over acts involving protected material has reached excessive heights. The high-level of protection has been defended with arguments which claimed that strong exclusive rights would foster creative production. But with the change of creative productions in a digital world this approach to copyright can no longer be upheld.

In addition to the disabling effect of current copyright rules, the existing legal framework at EU level is intransparent and difficult to understand, for users as well as for rightsholders. Instead of a true European copyright

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303 Cf, van Eechoud, “Along the Road to Uniformity – Diverse Readings of the Court of Justice Judgments on Copyright Work”, *JIPITEC* (2012), para. 103.
system creators, service providers and consumers are facing a copyright system which is characterized by an increased level of harmonization of national rules, but not by a genuine European copyright law.\textsuperscript{304}

At the international level, two treaties have been introduced recently, but both are only of indirect importance for digital copyright. The \textit{Marrakesh VIP Treaty} will at least force the EU to implement new exceptions into the existing legal framework in the near future. This process will show how such an integration will work and what implication this will have for other areas of EU copyright law.

Near the end of the term of office of the last Commission, the outgoing Commissioner Nelie Kroes underlined, on multiple occasions that European copyright rules required reform.\textsuperscript{305} She urged that copyright must take an enabling, rather than a disabling role: “Today, the EU copyright framework is fragmented, inflexible, and often irrelevant. It should be a stimulant to openness, innovation and creativity, not a tool for of obstruction, limitation and control.”\textsuperscript{306} The current Commission has carried the spirit of Nelie Kroes into its term of office, by putting copyright prominently on its agenda.

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Chapter 3. Elements of a European Copyright Framework for the Digital Single Market

One of the aims of the present study is, however, to define the basic elements of a system of legal rules for copyright in the single market to exploit the richness of creative production; this also includes the use and exploitation of digital content for non-commercial purposes, e.g. for UGC and other private or non-commercial uses as well. It is obvious at the outset that there cannot be just one system in whichever form as the requirements in terms of content and uses differ too much for different types of digital content and uses.\textsuperscript{307} Such a system in the sense of an implementation of copyright rules that are enabling should, however, follow certain overarching principles common throughout the EU. These principles, that should take shape in concrete legislative provisions, will ideally conflict with each other as little as possible.

The current legislative framework has already been discussed above. In a next step four problematic fields will be analyzed that can offer solutions for a European copyright framework. All four of them are elements of the currently existing EU legislative framework on copyright. In their current form, they are, though, obstacles to the free flow of digital works themselves but bear the potential, through change or modification, to make the European digital single market work.

The first is the principle of territoriality, which has been governing the coexistence of IPRs in the European internal market since its beginning. Not a peculiarity of European IPRs,\textsuperscript{308} territoriality has developed some

\textsuperscript{307} One extreme example would be an online music store, e.g. iTunes, that intends to sell individual tracks or albums of artists online. Similar problems, albeit for different rights, arise with online-streaming services for popular music such as Spotify or Deezer; another extreme is a private user who wishes to use a single music track to enhance his private videos with a piece of popular music, and then post it on one of the many online platforms; or that individual uses copyright-protected images in a digital collage or just to illustrate his private website.

\textsuperscript{308} Territoriality is an expression of a copyright system in which territorially limited national states still remain the defining structural elements, cf. Graber in: Frankel & Gervais, \textit{The Evolution and Equilibrium of Copyright in the Digital Age} (2014), p. 241.
unique characteristics in its application to copyright over the years. But when faced with digital content and the borderless markets of the Internet, it has posed severe limitations and significant problems. For copyright, the principle of territoriality remains the defining mechanism and principle on which the legal framework is based and by which it operates.

Second, the importance of L&Es to the exclusive rights granted to authors will be discussed. In its current state the system of L&Es in the EU hinders the free flow of digital content due to the incoherent approach provided for by the L&Es laid down in the InfoSoc Directive, most of which are not mandatory. But L&Es do have the potential to open solutions especially for non-commercial uses of protected material. The last section will discuss the detrimental effect of the current L&E system on the internal market.

The third subchapter looks at TPMs that can be employed by rightsholders to prevent the exercise on unauthorized acts. TPMs add an additional layer of protection to copyright as automated means of enforcement. Rightsholders are protected against the circumvention of TPMs in addition to protection granted for violations of their exclusive rights. The role of TPMs as enabling elements, but also their position within the copyright balance is analyzed.

Finally, a well established institution in the EU single market for the administration of copyright and related rights are Collective Rights Management Organizations, or Collective Management Organizations. CMOs manage rights on behalf of rightsholders, collect licensing fees and redistribute them to the rightsholders. Different CMOs exist for different types of rights and different media (print, audio, film), and traditionally CMOs operate at a national level. The activities of CMOs, in particular their attempts to grant multi-territorial licenses, have recently received much attention from the EU competition authorities. This, as well as recent legislative activities to regulate the activities of CMOs in the internal market will be analyzed.
The territoriality principle, which is a principle common to all IPRs\textsuperscript{309} has the effect that authors cannot solely rely on one right to exclusively enjoy the fruits of their intellectual labors all over the world. Instead, authors hold multiple national IPRs, which are restricted to the respective national territories; and only in the defined territories the respective rights are valid, defendable and enforceable. As described above, modern copyright originates from the system of printing privileges, and similar to those privileges, different national copyrights grant different rights for different periods of time; however, today, national copyright laws are harmonized to a certain extent by international agreements. Territoriality of IPRs is not prescribed or defined in any of the relevant international treaties, but is implied by the international framework that those treaties constitute and this framework in turn relies on territoriality.\textsuperscript{310} The principle has its roots in general public international law as an expression of national sovereign authority.\textsuperscript{311} Sovereign power, as a general rule, does not extend beyond the borders of a state, and accordingly national laws and privileges granted thereunder can only have effects within the territory of the respective state.\textsuperscript{312} In the case of intellectual property, and copyright in particular, it is the respective national legislature which enacts the laws that grant copyright protection for the respective national jurisdiction.

Copyright and neighboring rights, some of which are based on international treaties,\textsuperscript{313} thus exist by virtue of national law and therefore do not extend beyond the national borders of a state. Accordingly, an author from

\textsuperscript{312} In more detail see Goldstein & Hugenholtz, *International Copyright: Principles, Law, and Practice* (2012), pp. 97 et seq, see also Hans Ullrich, “Technologischutz nach TRIPS: Prinzipien und Probleme”, *GRUR Int.* (1995), 623-641, p. 624 and Gaster, “Das urheberrechtliche Territorialitätsprinzip aus Sicht des Europäischen Gemeinschaftsrechts”, *ZUM* (2006), p. 11-12. However, as will be discussed further below, the EU has made efforts to create uniform IPRs for trade marks, designs and, more recently patents, all of which are valid throughout the EU with the same rights conferred upon right-holders in every Member State.
\textsuperscript{313} E.g. *Rome Convention*; *WPPT*; and certain provisions of *TRIPS*.\textsuperscript{314}
country X who created a copyright-protected work in country X, which was published in country X for the first time, enjoys protection for his work by virtue of the copyright law of country X only within the territorial borders of country X; and only by virtue of the Berne Convention in any other state member to the Berne Union (assuming state X has signed and ratified the Berne Convention). In the other Berne Union countries, copyright protection is granted under the respective national laws and an author receives a separate IP (copyright) title in each country, given the respective type of work is protected under the national copyright law. This means that the creator of a work does not possess one global copyright title that is valid in every country of the world, but instead he possesses property titles in many countries, all of which can be slightly different in their effects. These parallel, though partly differing rights relating to one specific work are usually referred to as a bundle of rights.

I. Managing multiple rights

In practice, from the perspective of an owner of a copyright or any neighboring right who, irrespective of the type of work, plans to employ his copyright for his economic benefit by permitting a third party to exploit his work, the coexistence of multiple national rights means that the owner has to authorize the use of the right(s) concerned, e.g. by transfer or by license, for the foreseen use(s) of his work for every country in which the third party intends to exploit the work.

The following three examples describe some of the extremes that the current system of rights-clearing in the EU has created:

Taking as a first example the operation of an online music store. Assuming that the operator of such an online offer limits his activities to


315 Article 5(2) Berne Convention.

the territory of the EU, he has to acquire licenses for the relevant rights in every EU Member State. The rights might lie with the authors of the works the operator would like to exploit, or, more likely, with one of the many different collecting societies.

Second, taking the case of a 14-year-old teenager, who wants to display his skateboarding skills with a video on YouTube, possibly to impress his friends of the same or other gender (which is to say for non-commercial purposes), and wants to underline the effects of his maneuvering and jumping skills by adding his favorite song as background music to the video. He should be as careful as to ask permission to do so (and potentially pay a fee) to all those persons (legal or natural) who are holding or are administering the respective rights for the songs used in those countries in which the video will be available for access (which means many countries), rendering the entire process very much impossible for the individual.

Third and final, the example of an artist who uses samples from existing works, musical or visual, to create a new work by combining existing works of music or art. The works so created might be merely artistic, but also critical of religious, political or other views and opinions. This new creation might be exhibited locally, in different museums in different EU Member States or, if in digital form, communicated to a culturally interested public via commercial or non-commercial websites. This artist, too, will have to clear the rights to the individual works he used to compose his creation to be able to publish his piece of music or art, even for non-commercial purposes.

Against this background, an attempt is made to explore approaches to overcome the limitations territoriality puts on marketing or simply using digital content in a common European Digital Market. Legal solutions will be sought within the current legal framework, and under consideration of the ongoing reform process at EU level. Alternative legal solutions will be considered, by either adapting legal mechanisms to ‘work around’ territoriality, or via a more ambitious approach, to abolish territoriality in the internal market altogether.\textsuperscript{317}

\textsuperscript{317} \textit{Torremans} takes another perspective by asking whether, and if yes under which conditions, considering the TFEUs free movement and competition provisions, it is possible to market digital content as well as embodied copies on a territorial basis, intentionally segmenting the European market, Paul Torremans, “Questioning the principles of territoriality: the determination of territorial mechanisms
II. The principle of territoriality in the EU

In the EU with its internal market, territoriality is the main reason why content-based online services are difficult to establish, and users often find it rather cumbersome to access content throughout the EU. It is at the root of all copyright management problems that manifest themselves in territorial licensing requirements, fragmented online services and user frustration, and in itself contradicts the notion of a single market.

The principle finds its legal basis in a multitude of international agreements that are either directly binding on the EU or indirectly by commitments Member States have made by the conclusion of, or accession to, international agreements. The Berne Convention enshrines the principle in Art 5(2) which states that “[... ] apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.” The Berne Convention is applicable by virtue of Article 5(1)(b) of the 29th Protocol to the EEA Agreement, which provides that all Contracting Parties shall adhere to the Berne Convention before 1 January 1995. This is the date which marked the accession of the EU (then the EC) to the WTO Agreement,
which entails the provisions of the TRIPS Agreement. By virtue of Article 4(b) of the TRIPS Agreement, the EU and its Member States have agreed to adhere to the provisions of the Berne and Rome Conventions. The principle of territoriality has been confirmed by the CJEU multiple times, most recently in Lagardère. 322

Harmonization efforts at EU level have left the territoriality principle untouched, and therefore many of the problems territoriality entails remain unsolved. 323 The effects of harmonization indeed make national copyright laws more transparent and provide for increased legal certainty, mainly for rightsholders, and thereby create a more reliable framework for the protection of copyright in the internal market. 324 What harmonization in this field did not achieve so far is to overcome the digital market-deadlock created by the effects of the territoriality principle. The aims that are pursued at EU level, at least since the more recent policy initiatives, namely EU-wide access to high-quality digital content, cannot be achieved by a mere harmonization of copyright, 325 or even worse, recommendations. It is a matter of fact that harmonization per definitionem cannot do away with territoriality and, therefore, the principle remains a major obstacle for a single market for intellectual property rights. 326

322 CJEU, Judgment in Case C-192/04, Lagardère Active Broadcast v Société pour la perception de la rémunération équitable (SPRE) und Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL), EU:C:2005:475, para. 46: “Thus, it does not purport to detract, in particular, from the principle of the territoriality of those rights, which is recognised in international law and also in the EC Treaty. Those rights are therefore of a territorial nature and, moreover, domestic law can only penalise conduct engaged in within national territory.”


326 Gaster, “Das urheberrechtliche Territorialitätsprinzip aus Sicht des Europäischen Gemeinschaftsrechts”, ZUM (2006), p. 14, Gaster argues in particular that the lack of harmonization, especially regarding limitations and exceptions, constitutes the biggest obstacle in overcoming the territoriality principle.
From the early days of the common market, territoriarity of IPRs stood in the way of the free movement of goods in the Community and the realization of the single market. The territoriarity principle disturbs the functioning of the single market, which is based on the idea that goods move freely between the Member States. Intellectual property rights have been employed to prevent the free movement of goods within the single market with the argument that the importation of goods that ‘carried’ intellectual property rights would violate national intellectual property laws and that importation could therefore be opposed. The Treaties provide for several exceptions to the free movement of goods, one of which allows for restrictions on the free movement of goods justified by the protection of “industrial and commercial property”.

The CJEU has decided that although the existence of national IPR titles is not questioned, the importation of goods can only be prevented if such import would encroach upon the specific subject-matter of the IPR concerned. As a result, IPRs must yield to the free movement principles as long as their specific subject-matter is preserved. In its cases on parallel imports of pharmaceuticals, repackaging and relabeling of products

327 Article 36 TFEU: “The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of [...] industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.”


and by striking down anti-competitive segmentation of national markets, the CJEU has delicately balanced the interests of trademark- and patent holders and the free movement of goods within the internal market. The CJEU has limited the possibility of rightsholders to exercise their rights to a certain extent for the purpose of enabling goods to move freely across European borders. The existence of IPRs, and one indeed might argue that a system of co-existing national IPRs does stand in the way of the free movement of goods, has not been questioned, partly because Article 345 TFEU provides that the property systems of the Member States shall remain untouched by the Treaties. Instead, IPRs may not be exercised to prevent the importation of goods from other Member States if they have been lawfully marketed in any Member State of the EU.

For copyright and related rights seminal jurisprudence exists in relation to embodied works, such as books, CDs, DVDs and vinyl discs. The ever increasing pace of technological invention has outrun legislative harmonization and unification efforts, the latter are being hindered further by political difficulties. The judiciary is trying to grapple with outdated legislation that has been drafted against an absolutely different technological background and that uses terminology and technical concepts, which


333 Whereas the unification of registered IPRs, trademarks, designs and since 2012 patents) was already difficult, establishing a European copyright title seems rather unrealistic at this point in time, see e.g. Gaster, “Das urheberrechtliche Territorialitätsprinzip aus Sicht des Europäischen Gemeinschaftsrechts”, ZUM (2006), p. 14.
do not correspond with the reality of modern day life and business. The obstructing effects of territoriality are augmented if rights for certain uses are held by different persons, or if rights are split by virtue of national laws.334

IV. The Principle of territoriality applied to copyright protected works

Digitization has affected copyright much more than any other IPR. Especially in the EU, where software is not protected by patents but by copyright, digitized content and the territoriality principle clash over the establishment of a digital single market. But even before digitization, tensions between the numerous copyright régimes of the Member States created solutions, which have driven EU copyright harmonization to the state that the EU copyright acquis reflects today. The principle that mitigates between the free movement provisions and the interests of rightsholders is the principle of exhaustion.

1. Basic EU exhaustion

The principle of exhaustion can be traced back to the early case-law of the CJEU in the 1970s in relation to the interface of the free movement provisions of the Treaties and intellectual property rights.335 It was developed to safeguard the functioning of the common market, which was then mainly

334 One approach would certainly be to regulate the allocation of rights by way of legislative intervention with harmonizing effects, see Hugenholtz in: Derclaye, Research Handbook of the Future of EU Copyright (2009), p. 20; see also Peifer, "Das Territorialitätsprinzip im Europäischen Gemeinschaftsrecht vor dem Hintergrund der technischen Entwicklungen", ZUM (2006), p. 15.

335 See CJEU, Judgment in Deutsche Grammophon EU:C:1971:59: “[I]t would be in conflict with the provisions prescribing the free movement of products within the common market for a manufacturer of sound recordings to exercise the exclusive right to distribute the protected articles, conferred upon him by the legislation of a Member State, in such a way as to prohibit the sale in that State of products placed on the market by him or with his consent in another Member State solely because such distribution did not occur within the territory of the first Member State.”; for a brief introduction of exhaustion in general and in relation to contemporary problems of copyright exhaustion see Theo Bodewig, “Exhaustion of intellectual property in the European Union”, in: Toshiko Takenaka, Intellec-
based on the free movement of tangible goods. In essence the principle prohibits the owner of an IPR to prevent the trade of goods that incorporate his right if these goods have been put on the market by the owner of the right or with his consent. In other words, to put it into linguistic proximity to the equivalent American principle, if the relevant goods are first sold with the consent of the right holder or by himself.

If applied strictly, the principle of territoriality would allow a rightsholder to exercise his IPRs with the effect that protected works could not move easily within the single market. By invoking national IPR titles, rightsholders could prevent the import of goods protected by IPRs into the territories of other Member States. This would lead to a fragmentation of the European market, in which marketing of IPR protected goods had to be organized on a territorial basis, preventing the free flow of goods in the EU.

The territoriality principle for IPRs goes fundamentally against the demands, aims and in general the concept of the single market, which requires that goods move freely within the borders of the EU. The CJEU was confronted with this problem very early and developed the principle of exhaustion of rights to strike the balance between the interests of rightsholders and the realization on the internal market. The case-law of the Court has evolved in relation to ‘embodied works’ against the treaty provisions on the free movement of goods. Today, this principle is codified in a number of EU legislative instruments.

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336 Article 26 TFEU.

337 Exhaustion, as a principle, existed already at the national and international level, and this is where the CJU found inspiration to develop the EU dimension of the doctrine. The novelty of the EU doctrine was that it applied to a territory consisting of multiple states, thereby creating a regional, multinational exhaustion area. Exhaustion functioned in this area to enable the free movement of goods within the Community, later the Union.


339 Ibid., p. 15.
The principle of exhaustion for the internal market was employed by the CJEU to balance the policy interest to create an internal market and the interests of rightsholders. On the one side, there existed the idea and the interest to create a common economic area for the territory of the EU, in which goods and services could move freely across the borders of the Member States. On the other side, rightsholders sought to protect their national, territorially limited, IPRs. In order to protect their respective exclusive national IPRs, rightsholders attempted to prevent importation of protected goods by invoking their national IPRs.

The European Treaties only give little guidance on this conflict. The basic provisions for the free movement of goods in the EU are Articles 26 and 28 TFEU, which provide that “the internal market shall comprise an area without internal frontiers in which free movement of goods [...] is ensured”. Article 34 TFEU provides that “measures having equivalent effect [to quantitative restrictions] shall be prohibited between Member States.” Intellectual property rights that enabled right holders to prevent the importation of goods from other Member States were already at an early stage of the case-law of the CJEU considered as such measures having equivalent effect. However, Article 36 TFEU grants an exception to the absolute prohibition of trade obstacles within the internal market to protect industrial and commercial property. In addition,

340 Article 7 Trademark Directive, Article 15 Community Design Directive, Article 21 Community Designs Regulation, Art 13 Community Trade Mark Regulation, Recital 12 and Article 6 Unitary Patent Regulation (Regulation (EU) No 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection, OJ L 361, 31.12.2012, p. 1–8 (Unitary Patent Regulation)), Recital 28 InfoSoc Directive, excluding international exhaustion, with exception to services 29, for distribution right, and Article 4(2), no exhaustion is foreseen in relation to the rights provided in Articles 3 (1) and (2), also Article 4(2) Software Directive, Articles 1(2) and 9(2) Rental and Lending Rights Directive reject the application of exhaustion to acts of lending and rental, but apply exhaustion to related rights.


342 In *Deutsche Grammophon* the CJEU included copyright in the ‘industrial and commercial property’ exception of Article 36 TFEU, CJEU, Judgment in *Deutsche Grammophon* EU:C:1971:59, para. 11.

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In order to solve this conflict of national rules on IPR protection and the realization of the internal market the CJEU in Terrapin\(^{343}\) established the principle of Community exhaustion. Already in Deutsche Grammophon\(^ {344}\) the CJEU had laid the foundation for the principle, without spelling it out, when it distinguished between the existence and exercise of IPRs. The principle found direct application (again without expressly using the term ‘exhaustion’) to copyright in Musik-Vertrieb.\(^ {345}\) Rightsholders are not deprived of their IPRs, but they are not permitted to exercise their rights in order to prevent the importation or re-importation (also parallel importation) of goods from other Member States.\(^ {346}\) The exercise of IPRs may thus be restricted, in conformity with the Treaties and especially Article 36 TFEU, in so far as the specific subject-matter of the relevant IPR is safeguarded.\(^ {347}\) This means that a rightsholder cannot prohibit the importation of any good from another Member State, if that good has been marketed lawfully, by the rightsholder or with his consent, in any other Member State of the EU.\(^ {348}\) This is the general rule for exhaustion in the EU that

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345 CJEU, Judgment in Musik-Vertrieb EU:C:1981:10, in particular paras. 12-5; the Court discusses whether, in the absence of harmonization in the filed of copyright, territoriality should enable rightsholders to object to the importation of sound recordings in other Member States. Concluding on this point, the Court finds that such an effect, which would have enabled rightsholders to partition the market and discriminate on trade between Member States, would go against the fundamental purpose of the EC Treaty.
346 It is argued that the existence of IPRs is closely linked to their exercise, viz. the content of all IPRs, which is the right to exclude third parties from using a copyright, patent or trade mark, is eliminated, and therefore the right itself, when its exercise is restricted, see Bodewig in: Takenaka, Intellectual Property in Common Law and Civil Law (2013), fn. 11.
347 CJEU, Judgment in Deutsche Grammophon EU:C:1971:59, para. 11 and CJEU, Judgment in Terrapin EU:C:1976:94, para. 5, ironically, in both cases the CJEU failed to define the specific subject-matter of copyright (Deutsche Grammophon) and trademarks (Terrapin), which were at the core of the disputes in these cases.
348 Ibid., para. 6.
applies to patents, trade marks, copyright and other IPRs as well.\textsuperscript{349} In a line of case-law the CJEU defined the specific subject-matter for trade marks,\textsuperscript{350} patents\textsuperscript{351} and copyright.\textsuperscript{352}

In relation to copyright and related rights the CJEU has developed exceptions from the exhaustion principle for the rental right in \textit{Christiansen}\textsuperscript{353} and distinguished between the free movement of goods for tangible objects carrying copyright-protected works and the freedom to provide services for TV cable retransmissions; to services in general, the CJEU concluded in \textit{Coditel I}, the exhaustion principle does not apply.\textsuperscript{354}

For the European Union, the CJEU has developed the exhaustion principle to enable the free movement of goods in the internal market. However, the principle is limited to the territory of the EU. Goods brought into circulation in a non-EU Member State, even if the rightholder has consented, do not benefit from exhaustion. Therefore, a rightholder could object to the importation of the object to a EU Member State where he enjoys that right. The principle of international exhaustion, which exists –

\begin{itemize}
\item \textbf{349} For a brief overview of exhaustion for patents and trademarks see e.g. Bodewig in: \textit{Takenaka, Intellectual Property in Common Law and Civil Law} (2013), pp. 405 et seq.
\item \textbf{350} CJEU, Judgment in \textit{Centrafarm v Winthrop} EU:C:1974:115.
\item \textbf{352} The CJEU is rather reluctant to describe the specific subject-matter of copyright and has taken its time to give fragmented indication as to what constitutes the specific subject-matter of copyright: e.g.: CJEU, Judgment in \textit{Infopaq I} EU:C:2009:465, CJEU, Judgment in \textit{FAPL/Murphy} EU:C:2011:631, CJEU, Judgment in \textit{Painer} EU:C:2011:798 and CJEU, Judgment in Case C-393/09, \textit{Bezpečnostní softwarová asociace - Svaz softwarové ochrany v Ministerstvo kultury}, EU:C:2010:816.
\item \textbf{353} CJEU, Judgment in \textit{Warner Brothers} EU:C:1988:242, now codified in Article 1(2) \textit{Rental and Lending Rights Directive}; the Court ruled that differences in substantive law between Member States would permit rightholders to prevent the importation of protected works.
\item \textbf{354} CJEU, Judgment in Case 62/79, \textit{SA Compagnie générale pour la diffusion de la télévision, Coditel, and others v Ciné Vog Films and others}, EU:C:1980:84. para 19: ‘[T]he provisions of the Treaty relating to the freedom to provide services do not preclude an assignee of the performing right in a cinematographic film in a Member State from relying upon his right to prohibit the exhibition of that film in that State, without his authority, by means of cable diffusion if the film so exhibited is picked up and transmitted after being broadcast in another Member State by a third party with the consent of the original owner of the right.’; without referring to the exhaustion principle expressly, the CJEU refused the application of the principle to services.
\end{itemize}
since recently by ruling of the US Supreme Court even in the US\textsuperscript{355} – shall be briefly discussed in the following sections.

2. Regional and international exhaustion

At the international level, the \textit{WCT}, \textit{WPPT} and \textit{TRIPS} address territoriality with little regard to detail,\textsuperscript{356} whereas at EU level the \textit{InfoSoc Directive} restricts the principle of exhaustion to the territory of the EU and the EFTA. Therefore, the EU, as a multinational economic area, constitutes a special case, in which international exhaustion would disrupt the internal exhaustion mechanisms.\textsuperscript{357}

The relevant international treaties reserve the right to the state signatories to these instruments to determine the application of the exhaustion principle. The \textit{WCT} provides in Article 6 that the treaty “shall [not] affect the freedom of the Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or other transfer of ownership […]”.\textsuperscript{358} The same language is used in Article 8(2) \textit{WPPT} in relation to the distribution right for performers and in Article 12(2) regarding producers of phonograms. The official heading of all three paragraphs refer to distribution, but the text itself only cryptically describes the process.\textsuperscript{359} The \textit{TRIPS} Agreement takes an explicit hands-off approach towards exhaustion. While being silent on any substantial effects of exhaustion, the agreement provides that exhaustion will not be a matter for dispute settlement.\textsuperscript{360}

\textsuperscript{355} \textit{Kirtsaeng v. John Wiley & Sons, Inc.} 133 S. Ct. 1351 (2013), albeit only in relation to copyright, see discussion below.

\textsuperscript{356} The treaties leave it to the states signatories to these treaties to decide what model of exhaustion they prefer, see Article 6 \textit{WCT}.


\textsuperscript{358} The terminology used in the WCT is somewhat unclear in comparison to the language used by the CJEU and the various EU legal instruments. Whereas a clear distinction is drawn between the distribution right for tangible copies and the making available right for (digital) services, the WCT refers in Article 6(1) to “the exclusive right of authorizing the making available to the public of the original and copies of their works through sale or other transfer of ownership.”

\textsuperscript{359} Both provisions read in the relevant parts: “authorizing the making available to the public of the original and copies”.

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Regional exhaustion in the EU — legislative certainty

In a line of case-law since the 1960s, the CJEU developed the principle that if a tangible object is marketed with the consent of the right-holder or by the right-holder himself within the territory of the EU, the distribution right is exhausted for the entire territory of the EU as well as the EFTA countries. This is reflected in a number of directives. The InfoSoc Directive provides in Art 4(2) for the exhaustion of the distribution right “in the Community”. Recital 28 of that Directive goes further by stating that the distribution right “should not be exhausted in respect of the original or of copies thereof sold by the right-holder or with his consent outside the Community.” This goes against prior practice of some Member States, notably the Nordic countries, Ireland and Luxembourg. Nevertheless, the EU thereby has established a system of regional exhaustion, under which a rightholder exhausts his rights when exercising his distribution right within a territorially limited area. Any marketing outside this area does not exhaust the rights concerned. The CJEU has confirmed this distinction in Laserdisken, stating that Article 4(2) and Recital 28 InfoSoc Directive preclude national laws that retain international exhaustion.

The Court added that Article 5 InfoSoc Directive cannot be interpreted to the extent that it could be used to construct an exception to the rule in Article 4(2).

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365 Ibid., para. 25; the Court stressed that Article 5 only provides exceptions for the reproduction, distribution, communication and the making available rights. In relation to Article 4 only the distribution right can be subject to exceptions, according to Article 5(4), nothing in the text of the Directive suggests that exceptions can also apply to Article 4(2).
b. International exhaustion in the US – an upset

In the US, a recent Supreme Court ruling has clarified that exhaustion applies to books that are sold abroad and imported to the US. In *Kirtsaeng v. John Wiley & Sons*[^366] a student, Supap Kirtsaeng, who had moved from Thailand to the US to study mathematics imported textbooks, amongst them books published by John Wiley & Sons, Inc. The books had been printed with the publisher's consent in Thailand for the local market and were sold there for a much lower price than in the US. Kirtsaeng then sold the books to fellow students for a profit. Wiley argued that it could oppose the importation of these books under the US copyright code because the first sale doctrine only applied to books brought into circulation in the territory of the US.

The Supreme Court decided that the right to control the marketing of these books had been exhausted by placing them on the market in Thailand because it interpreted the relevant provisions of the US Copyright Act[^367] to mean that if books are marketed anywhere outside the US, and these books were marketed in a way that is in conformity with the provisions of the Copyright Act, the importation of such books to the US could not be opposed by the rightsholders anymore. A minority opinion by Judge Ginsburg argued that historically the Copyright Act was intended to protect rightholders against the unauthorized importation of works produced abroad.[^368] The case, at that time, was even more interesting, because a case before a US District Court was pending that would decide on the application of the US first sale doctrine to digital music. An affirmatory ruling in this case might have blown open the gates for a borderless Internet in terms of access to digital content.


[^367]: Section 109(a) of the US Copyright Act reads: “Notwithstanding the provisions of section 106(3) [granting exclusive distribution rights], the owner of a particular copy or phonorecord *lawfully made under this title* [...] is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.” (*emphasis added.*)

The EU is far from accepting a system of international exhaustion and the CJEU would not render a similar judgment if faced with the same question. International exhaustion would, however, be the first step in establishing a global digital market.

The ruling in *Kirtsaeng*, under the assumption (1) that the rights in digital content could be exhausted and (2) that exhaustion were to apply to acts other than distribution in the narrow physical sense, would mean that someone could ‘market’ or ‘distribute’ digital content in any country in conformity with the rules of the US Copyright Code and a US rightsholder could not oppose the making available of this content for Internet users in the US.

3. Territoriality applied to digital works

The question of whether exhaustion applies to digital content will be answered later. Here it is more important, for the moment, to pursue another train of thought. Territoriality and the rules that implement the principle in our legal frameworks were not drafted to fit the demands of the exchange of digital content. The principle reflects an inherently physical approach. Tangible objects to which territoriality applies and that have featured in cases before the CJEU are vinyl record, books, CDs, video cassettes and other tangible data carriers on which copyright-protected content has been temporarily copied or permanently fixed. But digital content, in the way it is exchanged today, is inherently unphysical.

The lack of a tangible form, which makes an object movable by application of kinetic energy, across-borders, might escape the notion of ‘goods’, which is the manifestation for IPRs that has shaped and dictated the jurisprudence of the CJEU concerning the relation between the free movement provisions and IPRs. Moreover, as a consequence of the legislative codification of the principles elaborated by the Court in Luxembourg, digital content, it seems, cannot be subjected to the principle of territoriality with all its consequences, and in particular so as to the principle of exhaustion. Whether this is for sound legal reasons, or for very pragmatic and practical considerations will emerge later from the discussion of the exhaustion principle.

To briefly summarize: The exhaustion principle provides that once an item that is protected by any intellectual property title, is marketed, meaning sold or put on the market in any other form implying a transfer of
ownership, the rightholder has exhausted his rights to control the further disposal of that particular item by the acquirer.\textsuperscript{369} For the European internal market this means that a rightholder who has put an item protected by copyright into circulation in any one of the Member States, cannot control the further movement of this item anywhere in the territory of the EU. In particular he cannot oppose the importation of that item into other Member States.

The geographical location of a specific tangible item can always be determined, simply by its sheer existence in the sovereign territory of a state, and more abstractly, by its determinable position in space. This is more difficult for digital content. One could resort to the argument that digital content, for the purposes of applying the territoriality principle, is located, in geographical terms, at the place where the storage medium is situated. This can be easily ascertained for data carriers such as vinyl records, audio cassettes, CDs, DVDs, USB-sticks, and personal computers, laptops, tablet-PCs and cellphones on which digital content, e.g. of a private person, can be stored and from which it is accessed, used and potentially reproduced. The situation becomes increasingly more complex, though, with the appearance of online stores for digital content. Whereas the operator of such a store could be established in a Member State of the EU, the server on which the online store is operated might in one case be in another Member State than the one in which the operator is established, or even in a country outside the EU. If a digital file is indeed stored at a server outside the EU, where does the first marketing of that file take place? Is it the place of the location of the server, the place where the operator of the online store is legally established or is it the country in which the customer is located and accesses the online store which is addressed to persons residing in this particular country? Would the place of first marketing be different when a private user ‘buys’ digital content and does not download it to his own computer or other device that enables


the storage of digital content, but stores the file in a cloud network, which uses servers that are located either in or outside the EU. What if a user downloads a song while on vacation abroad and brings that content on his mobile device back in any of the Member States of the EU? And more importantly, does the exhaustion principle apply to any of these cases? Or does it not apply at all, for geographical, or any other reasons?

The point of attachment, which for tangible media is the location of the incorporated copy of a protected work, is thus difficult to ascertain for digital content. Therefore, an uncritical application of the territoriality principle to digital content could lead to unanticipated and unwanted results. The key to the problem might lie in the classification of content and the close link of the territoriality principle, at least until now and certainly from a historical perspective, to the free movement of goods.

In the EU, the offering of digital content has for a long time widely been regarded as falling under the free movement of services provisions, and to services the liberating effect of the principle of exhaustion does not apply. A reason for this distinction is not provided for in the relevant EU legislation. A tentative and preliminary explanation, based on reason, can be sought in the nature of goods and services. Whereas goods embody IPRs and preserve the content perpetually (or as long as the physical embodiment is not destroyed), services are only provided once and cannot be preserved.

Even if one were to consider the marketing of digital content under the free movement of goods provisions of Articles 30-37 TFEU, the natures of digital content and physical goods are so fundamentally different that the same treatment for both would be unjustified. Otherwise, what purpose would the provisions of the free movement of services in Articles 56-62 TFEU serve? But it does seem, on the other hand, quite irritating that the sale of a physically embodied work protected by copyright should be treated differently than downloading the same work from an online music store when the work can be used, read or listened to for an infinite number

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370 The fundamental difference between goods and services is that a particular good, because it exists only once and is therefore scarce, can only be exploited once for commercial purposes; a service on the other side, can be offered for an infinite number of times, each of which carries an individual commercial value. The distinction between goods and services becomes blurred when a ‘digital good’ can be easily reproduced either by the seller or by the customer, scarcity is, at best, artificial.
of times. The distinction between goods and services becomes clearer when the principle of territoriality is mitigated by the principle of exhaustion.

V. Exhaustion of digital content in the EU

The exhaustion principle was not developed with the Internet in mind. In fact, when the CJEU first elaborated the principle, most Europeans were just getting used to a new medium called television. Tangible data carriers such as vinyl records and later video tapes and CDs were the goods that moved within the common market and necessitated the Court to strike the balance between the free movement of goods and IPRs.

These goods were scarce by their nature and therefore limited in numbers, at least legal reproductions thereof; even the making of copies required the commitment of significant economic resources. And the physical embodiments of the copyright-protected works on the data carriers could make a purchaser assume that the good in question were produced and marketed legally, unless of course they were badly made amateur copies which made their illegal nature apparent. Moreover, by making the decision to market protected goods in a confined territory, e.g. Germany and France, the territorial distribution is practically limited to a certain territory, with small amounts of those goods transcending borders to other Member States of the EU. The magnitude of such a territorial distribution spread in relation to goods that embody copyright-protected works via traditional distribution channels (CD stores, etc.) is likely to be rather small.371

371 An exception for pharmaceutical products has to be made in relation to patent and trademark protection. The incentive to sell, and reimport pharmaceuticals cross-border in the EU was created by the large differences in prices for drugs in different EU Member States. Therefore, a large body of case-law on the relation between the free movement of goods and IPRs in the EU Common Market relates to the trade in pharmaceuticals, see e.g. Kur & Dreier, European Intellectual Property Law: Text, Cases and Materials (2013), p. 49, and Chapter 4.4.4.2.
1. Classifying digital content

Digital content looks and feels different. In the absence of a permanent physical data carrier, on which the copyright-protected content is irremovably fixed, a legally marketed original music or movie file can hardly be distinguished from a digital copy of that file by an ordinary user. A simple transfer from one (physical) location to another by shifting the file from one device to another already involves an act of reproduction. The file copy ‘arrives’ at the receiving location, while the ‘original’ remains in its storage place. Both files are identical as to the contents subject to the copyright, only some metadata (mostly hidden) with technological information are unique to each file.

Digital content can be marketed through the Internet on a territorial basis such that online stores for digital content can restrict access to their stores, or only certain parts or repertoires of their stores to users located in certain geographical regions. The rollout of many online offers that market commercial digital content often occurs in several waves. The economically more important markets can thus receive their individual online offers in the first place and only subsequently smaller markets, or those markets where the licensing for the offered content is more difficult, follow.\footnote{See already the spread of Spotify in the EU, Netflix, a provider of on-demand Internet streaming media was only available in Luxembourg in September 2014 after a push of the company to expand its European market, see: Labro Thierry, “Netflix au Luxembourg? Pas tout de suite!”, 02.04.2014 (Luxemburger Wort), available at: http://www.wort.lu/fr/economie/netflix-au-luxembourg-pas-tout-de-suite-52a21be4e4b010cbe9a38126 (accessed: 10.01.2016); further Sophie Curtis, “Netflix completes first phase of European expansion”, 19.09.2014 (The Telegraph), available at: http://www.telegraph.co.uk/technology/news/11109449/Netflix-completes-first-phase-of-European-expansion.html (accessed: 10.01.2016) and Doreen Caraval, “European Bracing for Netflix”, 12.08.2014 (The New York Times), available at: http://www.nytimes.com/2014/09/13/business/media/europeans-bracing-for-netflix.html?_r=0 (accessed: 10.01.2016); still Netflix only serves twelve EU Member States, the service is available in the United Kingdom, Ireland, Sweden, Finland and Denmark since 2012, the Netherlands since 2013 and Austria, Belgium, France, Germany and Luxembourg since 2014: (Netflix, “Netflix Media Center”, (Netflix), available at: https://pr.netflix.com/WebClient/loginPageSalesNetWorksAction.do?contentGroupId=10477&contentGroup=Company+Timeline (accessed: 10.01.2016)).}
2. Distinguishing goods from services

It is important to delineate the distinction between goods and services as fundamental classifications in EU copyright law. The *InfoSoc Directive* states in Recital 29 that “exhaustion does not arise in the case of services and on-line services in particular.” Whether a digital file that is transferred, in the wider sense of the term, is considered as a good or a service can be decisive for the application of Article 4(2) *InfoSoc Directive*. In most national laws, e.g. in German civil law the notion of “Sache”, and in the UK the notion of a “good”, the notions and their respective associated definitions are limited to tangible items that can be defined as objects in space. EU law does not know such a strict limitation of the notion of goods to tangible items. The only indication we find in the case-law of the CJEU that resembles a precise definition dates back to 1968 and provides that goods are “products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions.”

Examples in a number of cases, however, indicate that some degree of tangibility could be required. The Court has confirmed that pretty much everything that can be subject to a commercial transaction, including waste, natural gas and electricity falls in the category of goods indeed, and has ruled that broadcasting signals do not.

If electricity comes within the application of the free movement provisions in relation to goods, it would be hard to argue why digital content should not. In particular the distinction between goods and services as between tangible and intangible ‘things’ seems unjustified when considering the consequences of this classification.

Guibault has suggested to apply a number of criteria in order to define what digital, viz. intangible ‘things’ or goods are, or when they should be

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treated as such.\footnote{For the purposes of the application of the \textit{Directive on Consumer Rights} the notion of goods is defined in Recital 19 Directive 2011/83/EU of the European parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, OJ L 304, 22.11.2011, p. 64-88 (\textit{Directive on Consumer Rights}): “If digital content is supplied on a tangible medium, such as a CD or a DVD, it should be considered as goods within the meaning of this Directive.”} First, permanent access, in comparison to tangible goods, which grant the owner the exclusive right to dispose of a particular object, is proposed as one, and the most important, of three criteria. Compared to a sale, or a simple transfer, which gives the purchaser exclusive and permanent rights over a tangible object, the purchase of digital content that is acquired via download could be treated as a sale of goods, or more consequently classified as such, if the downloader receives a permanent right to use. Second, the ability to store a file on a personal device is important as it gives the user the possibility to use the file autonomously by gaining complete control over the content. This means that the user does not have to be connected to a service, or even to the Internet for the purpose of accessing his content.\footnote{Cf. Lucie Guibault et al., \textit{Digital Consumers and the Law. Towards a Cohesive European Framework} (Alphen aan den Rijn: Kluwer Law International, 2012), p. 39.} Whether storing a file in a virtual cloud locker that is not related to the services that provides access to the content constitutes an autonomous use is still a legal grey area.

These two criteria would classify contents as goods, if a file can be individualized and detached from the service interface that gives the user access to the content. By contrast, access to files would be considered to be a service if users could isolate a file to use it outside of the service offer, in other words, if the user could not dispose of the file in a manner that gives him absolute control of its further destiny.

But even with this set of criteria, or any set for that purpose, which does not enjoy the authority of legislation, electronic files are difficult to classify either as goods or as content that is provided as part of a service. The consequences for legal certainty are described and discussed in the following sections.
3. Exhausting digital content

The rollout phase of an online offer with digital content has been completed for any given territory when the digital content has been marketed legally for the first time by having been made available for download. It could be assumed that it is possible, as this would be the easiest solution – and one might indeed be tempted – to apply the exhaustion principle to digital content by allowing the purchasers of individual content files to resell their lawfully acquired property. At this point, every user of a capable device could download the ‘second-hand’ file anywhere in the EU. Subsequently, similar to tangible CDs and DVDs, it could be supposed that the owner could sell his digital possessions to persons in the territory in which he purchased the files, or even outside that territory by simple transfer of the files from his device to the device of the purchaser.380 There are at least two major objections to such assumption.

The first objection is that uploading the file in the EU, and thereby making it available for download, entails a number of problematic aspects. The question here must be: what is ‘uploading in the EU’? Does it mean that the uploading person or company is located and registered in the EU, or has its primary place of business in a EU Member State; or does it mean that the server on which the file is uploaded is physically located in the EU? And what happens if even only one of these elements or processes is located outside of the EU?

The second objection is that making a download available is not covered by the distribution right, which has been at the heart of all copyright exhaustion cases before the CJEU. Instead, EU legislation distinguishes between the distribution right and the communication to the public right including the making available right. Under the relevant EU legislation, digital content is not ‘distributed’ in the sense of Article 4 of the Information Society Directive, which provides that authors have the right to prohibit the distribution of their original works or copies thereof. The recitals of the Directive expressly limit the distribution right to “work[s] incorporated in a tangible article.”381 The distribution right is exhausted if

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380 In the EU, the exhaustion principle would of course only permit the resale to persons in other EU Member States as EU exhaustion only exhausts the distribution right regionally for the territories of the EU Member States.

the object in question is sold for the first time or transferred otherwise by the right-holder or with his consent. But offering digital content online, pursuant to a literal interpretation of the Directive, is not considered to be a distribution of some sort in analogy to the physical distribution right of Article 4 of Directive 2001/29 but is instead considered a service. As a service, such activities are covered under Article 3(1) of the Directive which states in paragraph 3 that “[t]he rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article.” That is, of course, only if digital files are not considered to be goods.

The text of the law suggests, then, that digital content which is made available via the Internet cannot be exhausted and therefore not be resold or otherwise transferred to any third party. This conclusion is, however, not generally accepted. It is argued that digital content that is distributed on tangible media and content that is communicated to the public or made available by download should not be treated differently and have led to the principle being tested in front of national courts and, subsequently and consequently, in front of the CJEU.

4. FAPL/Murphy – can services be exhausted?

The question whether services can be exhausted in the EU, similar to the exhaustion of goods, was brought up in the FAPL/Murphy\textsuperscript{382} cases. In the first of these joined cases, proceedings were brought to the Court by the Football Association Premier League Ltd. (FAPL) and two of its Greek licensees against operators of public houses and companies that supplied public houses with the equipment to show live football matches. The second case was brought by a pub owner, Ms. Karen Murphy, against a body that enforced rights held by FAPL against individuals in relation to football broadcasts of the English Premier League in England. Both, Ms. Murphy and the defendants in the first case had acquired decoders in Greece, but used them to show English Premier League football matches in their establishments. The rights to broadcast football matches are licensed by FAPL to regional broadcasters who acquire the exclusive right to broadcast Premier League Football matches in the licensed territory. To

\textsuperscript{382} CJEU, Judgment in FAPL/Murphy EU:C:2011:631.
guarantee the limitation of broadcasts to the respective territory, broadcasters must agree to market their decoder cards, with which the encoded broadcast signal is decoded, only in the licensed territories.

The case raised a number of questions, amongst others the question of whether services, such as the broadcasting of football matches, can be exhausted to the effect, that, although licensed on a territorial basis, customers of licensees could receive these services outside of the respective licensed territory.

At the outset, the question was whether, in a case in which a decoder is used to receive a service, provisions on the free movement of goods or the freedom to provide services were applicable. Advocate General (AG) Kokott and the Court agreed insofar as in these cases freedom to provide services was applicable because the decoders were merely a means that enabled the reception of the service, without having, as such, an economic purpose of its own.\footnote{383 AG Kokott, Opinion in Joined cases C-403/08 and C-429/08, Football Association Premier League Ltd and Others v QC Leisure and Others (C-403/08) and Karen Murphy v Media Protection Services Ltd (C-429/08), EU:C:2011:43, paras. 167-170 and CJEU, Judgment in FAAPL/Murphy EU:C:2011:631, paras. 77-84.}

\footnote{384 AG Kokott, Opinion in FAAPL/Murphy EU:C:2011:43, para. 176.} The AG found a “serious impairment of freedom to provide services”\footnote{385 Ibid., para. 184 “Admittedly, some services differ from goods in that they cannot be re-used per se, for example the services provided by hairdressers. With the payment for the provision of the service the economic value is realised, but the service cannot be passed on as such. In this sense, there is actually no scope for an ‘exhaustion’ of the right to the service.”}\footnote{386 Ibid., para. 185; here the AG does not only determine that, in her opinion, downloading files falls under the free movement of services.} which she sought to justify based on the protection of industrial and commercial property. In this context, AG Kokott asked whether the principle of exhaustion applied, recognizing that exhaustion would not apply to certain services due to their nature.\footnote{387 Ibid., para. 188.} Other services, however, are similar to goods in that they can be transferred, once they have been rendered. Computer software and digital music that is downloaded are explicitly mentioned as services that can be “passed on in electronic form.”\footnote{388 Ibid., para. 185; here the AG does not only determine that, in her opinion, downloading files falls under the free movement of services.}

She then linked the question whether exhaustion applies in certain cases to the specific subject-matter of “the rights in question”.\footnote{389 Ibid., para. 188.} The AG, more in passing, mentioned an argument submitted by the FAPL
that services are in general not subject to exhaustion, which she refused by stating only briefly that in order to justify restrictions on fundamental freedoms, the same principles applied to goods and services and accordingly applied the exhaustion doctrine by analogy. This is an argument contra legem and has been branded widely as politically driven.

AG Kokott continued to identify the “rights in question” as the rights to the broadcast, which contains a number of different rights and therefore forms “a package of rights”. The specific subject-matter of that “package” lies in its commercial exploitation. The commercial exploitation, however, does not include the right to maximize profits from the exploitation of the broadcasting rights through exclusive territorial licensing. This, AG Kokott argued, would enable the rightsholders to unduly profit from a fragmentation, and therefore elimination of the internal market.

388 Ibid., para. 182.
392 AG Kokott, Opinion in FAPL/Murphy EU:C:2011:43, para. 190; the Court had engaged in a short discussion whether the subject-matter in question was at all protected under the Information Society Directive, for which purpose they had to constitute original works within the meaning of that Directive. Sporting events in themselves would not enjoy protection as they are not “intellectual creations classifiable as works within the meaning of the Copyright Directive”, in particular football matches lack that characteristic because they “are subject to rules of the game, leaving no room for creative freedom for the purposes of copyright.” CJEU, Judgment in FAPL/Murphy EU:C:2011:631, para 98.
393 AG Kokott, Opinion in FAPL/Murphy EU:C:2011:43, para. 192.
The Court, however, did not fully adopt the reasoning of AG Kokott. Though asking similar questions, it bypassed altogether the discussion on the applicability of exhaustion and related issues as introduced by the AG. Instead, it merely asked whether a restriction of one of the fundamental freedoms is justified for the protection of intellectual property. Weighing these competing legal interests, the Court voted in favor of the free movement principle: The rightsholders were only entitled to appropriate remuneration the Court concluded with reference to Recital 10 of the Information Society Directive. Accordingly, it is not necessary in order to protect the specific subject-matter of “live football transmissions” to partition the internal market and charge different prices in different Member States for decoder cards and the respective services. A restriction to use such devices only within a contractually agreed territory cannot be justified on the grounds of protecting intellectual property rights.

Although the result is thus the same, the different reasonings in the Opinion of AG Kokott and the Judgment of the Court have subsequently led also to different interpretations.

a. Exhaustion and services

The burning question after FAPL/Murphy was whether services can be exhausted in the single market and whether the principle of territoriality would remain intact. The reason for different readings of the judgment lies in the unfortunate construction of the facts of the case. The question of 'exhaustion or no exhaustion' could only arise because the reception of the

394 CJEU, Judgment in FAPL/Murphy EU:C:2011:631, para. 89.
395 Ibid., para. 108.
397 CJEU, Judgment in FAPL/Murphy EU:C:2011:631, para. 117.
398 Both referred to CJEU, Judgment in Coditel I EU:C:1980:84, but distinguished the case on the facts, in Coditel I the specificities of marketing films in different Member States in different time windows would allow a rightholder to prevent the re-transmission of a German cable signal to Belgium in order to protect the specific subject-matter of the right concerned. In addition, contrary to FAPL/Murphy no remuneration had been paid by the Belgian recipients of the signal and no authorization had been given by the rightholders; see CJEU, Judgment in FAPL/Murphy EU:C:2011:631, paras. 119-21 and AG Kokott, Opinion in FAPL/Murphy EU:C:2011:43 paras. 193-9.
football broadcasts was only possible with a physical decoder. This decoder could be purchased in one country and used in another. The judgment did not prohibit territorial licensing of football broadcasts *per se*, it merely stated that an owner of a decoder box can take this box to another country and watch football matches there, possibly even show the broadcasts in a pub or a sports-bar.

Therefore, some commentators welcomed the extension of the exhaustion principle to services, 399 others rejected an application interpreting into the formulation of the judgment of the Court a rejection of the AG's Opinion. 400 In some instances the distinction between goods and services is very much unclear; 401 if services cannot be exhausted, can certain intangible assets be considered as goods for the purposes of exhaustion? After all, AG Kokott had discussed that certain ‘services’ do not differ signifi-


cantly from goods and therefore the application of the exhaustion to one, and not the other, would be arbitrary.\footnote{AG Kokott, Opinion in \textit{FAPL/Murphy} EU:C:2011:43, para. 185.}

That exhaustion does not apply to digital content has long been assumed for yet another reason. Recital 29 of the \textit{InfoSoc Directive} provides that “[t]he question of exhaustion does not arise in the case of services and on-line services in particular.” This short but potentially significant sentence first of all excludes services from the scope of application of the exhaustion principle, in particular online services. With regard to Recital 29 of the \textit{InfoSoc Directive} and a closer look at the argumentation of the Court, which had completely ignored the exhaustion doctrine in its judgment, an interpretation that would extend the doctrine to services cannot be supported. But for \textit{FAPL/Murphy} such an extension of the scope of the doctrine was not necessary to give the internal market priority over exclusive territorial licensing. The Court merely had to limit the specific subject-matter of copyright in order to arrive at the result that the European broadcasting market cannot be compartmentalized.

b. Exhaustion and communication to the public

Neither the Court, nor the AG addressed the question whether the right of communication to the public can be exhausted. First, though, they disagreed whether the showing of football matches in a public house via a decoder box (whether legally acquired or illegally acquired) constituted a communication to the public within the meaning of Article 3(1) of the \textit{InfoSoc Directive}. AG Kokott found that the screening of live football matches did not constitute a communication to the public.\footnote{\textit{Ibid.}, para. 147.} She argued that such a communication, in accordance with Recital 23 of the \textit{InfoSoc Directive},\footnote{Recital 23 \textit{InfoSoc Directive} reads: “This Directive should harmonise further the author’s right of communication to the public. This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting. This right should not cover any other acts.”} required that the public in question is situated in a different place than the place from where the communication originates. AG Kokott
found that place to be the TV screen in the public house\textsuperscript{405} and therefore the public was located indeed at the place where the communication originated.\textsuperscript{406} The Court decided differently holding that the original place where the communication took place was the place of the event that is broadcast (i.e. the football matches)\textsuperscript{407} and that the transmission of live football matches by means of a decoder for display on a TV screen in a public house would therefore fall under the scope of application of the right of communication to the public.\textsuperscript{408}

The Court did not address the principle of exhaustion in this context, assumingly because it is clear that broadcasting constitutes a service and that the right of communication to the public cannot be exhausted. As stated in Article 3(2) of the \textit{InfoSoc Directive}, the rights to communication to the public and making available are not subject to exhaustion. The provision is a codification of the relevant part of the \textit{Coditel I}\textsuperscript{409} judgment of the CJEU, in which the Court ruled that the right of cable retransmission was not exhausted by authorizing the primary broadcast in another Member State. This generalization of the judgment, which was rendered

\begin{itemize}
\item \textsuperscript{405} \textit{Ibid.}, para. 144.
\item \textsuperscript{406} AG Kokott distinguished \textit{FAPL/Murphy} from CJEU, Judgment in \textit{SGAE v Rafael Hoteles} EU:C:2006:764, in which the Court found that a retransmission of a TV signal to hotel rooms did constitute a communication to the public within the meaning of Article 3(1) of the \textit{InfoSoc Directive}, because the signal would reach a public other than that intended to be reached by the original broadcast, see Judgment para. 40.
\item \textsuperscript{408} CJEU, Judgment in \textit{FAPL/Murphy} EU:C:2011:631, para. 203; see Christmann, “‘Murphy’: Zwischen Revolution und Einzelfallentscheidung”, \textit{ZUM} (2012), p. 189.
\item \textsuperscript{409} CJEU, Judgment in \textit{Coditel I} EU:C:1980:84, para. 17: “The exclusive assignee of the performing right in a film for the whole of a Member State may therefore rely upon his right against cable television diffusion companies which have transmitted that film on their diffusion network having received it from a television broadcasting station established in another Member State, without thereby infringing community law.”
\end{itemize}
against the very specific circumstances of the case, but nevertheless found its way into EU legislation, has been criticized.\footnote{Hugenholtz in: Derclaye, \textit{Research Handbook of the Future of EU Copyright} (2009), p. 21.}

5. UsedSoft v. Oracle – software downloads lead to exhaustion

The application of the exhaustion doctrine to online services remained unclear and only in 2012 the CJEU had the opportunity to shed some light on the precise interaction of exhaustion and the online distribution of digital content. The \textit{UsedSoft} case deserves closer attention and a detailed analysis because it was the first case at EU level, and still is until today, that discussed the applicability of the exhaustion principle to digital content downloaded from the Internet.\footnote{However, it is very likely that a preliminary reference will soon be sent to the CJEU regarding the application of the exhaustion doctrine to other types of downloaded content. Most likely this will happen in relation to the resale of e-books, which will be discussed further below.} At the same time, as will be discussed more extensively further below, it is limited to the object of the dispute, computer programs, which are specially dealt with under EU law through \textit{Directive 2009/24} on the legal protection of computer programs.

In \textit{UsedSoft v. Oracle}\footnote{CJEU, Judgment in \textit{UsedSoft} EU:C:2012:407.} the Court was asked about the legality of a business model developed by UsedSoft. The company purchases software licenses from companies that do not use the software anymore. These licenses are then offered for sale to other companies. The ‘second-hand’ purchaser, after purchasing the licensed software, downloads the software from Oracle's company website and installs the software on its main server. Oracle is a developer of software, which the company sells predominantly via the Internet by way of download. The standard license agreement of Oracle states that the purchaser of the license receives against payment the right to use the software for “internal business purposes and for an unlimited period”. This right, the license agreement further states, is “a non-transferable user right”. The software in question is client-server software, for which the licensee acquires the right to store the software permanently on the company server and the individual users can download the software in the main memory of their workstation. The
license further includes a software maintenance agreement under which updates and patches can be downloaded form the Oracle website. Oracle states that in 85% of cases software is distributed via download.

The CJEU received this case via a preliminary ruling from the German Bundesgerichtshof (BGH), which asked three questions: The first question sought to clarify whether the purchaser, relying on exhaustion of the distribution right, can be considered as “lawful acquirer” within the meaning of Article 5(1) of the Software Directive. With its second question the BGH asked whether the distribution right in a software program is exhausted in accordance with Article 4(2) of the Software Directive if the acquirer of a license has downloaded the program from a website onto a data carrier. Finally, the third question asked whether the acquirer of a ‘used’ license can, in order to make a program copy as a “lawful acquirer” in accordance with Article 5(1) and Article 4(2) of the Software Directive rely on exhaustion of the distribution right if the original acquirer is not using the software anymore and has deleted all copies from its servers.

This case is particularly interesting as the Court, in rendering its judgment, partly disagreed with the Advocate General, as it had already done in FAPL/Murphy. Therefore, AG Bot's Opinion is discussed first and compared with the final judgment of the Court in a second step. The very detailed treatment of the AG’s Opinion is instrumental for later attempts to apply the final judgment to other possible cases of reselling digital content online.

a. The Opinion of AG Bot

First, AG Bot rearranged the questions, although the referring court had made question two conditional on an affirmative answer of question one, and question three conditional on an affirmative answer of question two.\textsuperscript{413} The AG thus began by answering question two, which in essence asked whether the exhaustion principle of Art 4(2) Software Directive applies to Internet downloads of computer software.

UsedSoft had argued that Article 4(2) of the Software Directive allowed for the application of the exhaustion principle to online software transfers.

\textsuperscript{413} AG Bot, Opinion in Case C-128/11, \textit{UsedSoft GmbH v Oracle International Corp.}, EU:C:2012:234, para. 27.
First, the expression “copy of a programme” should be understood to include not only a tangible copy, but equally the process of copying. Second, the expression “first sale” should be understood as to go beyond the physical transfer of a tangible object; the criterion to assess whether a sale occurred should take into consideration whether the “ultimate economic objective of the operation” has been achieved, which means whether the purchaser is able to permanently use the software. UsedSoft argued further that the rationale behind the exhaustion principle is to strike a balance between the interests of the right-holder to realize the economic value of his IPR and the free movement of goods. The rightsholder should not be enabled to choose whether the exhaustion principle should apply, or whether it should not, by selecting a specific distribution method. Referring to the application of Article 3(3) and Recital 29 InfoSoc Directive, UsedSoft submitted that both applied only to such services that are made available for immediate ad hoc use and not such services that grant the user a permanent right of use of a one-time, one-off payment.

Oracle argued that the download of copies of computer software did not constitute a sale because such downloads are made under a license agreement which does not only cover the download but also the right to use the software. Furthermore, the license agreement in question included a maintenance agreement and the second acquirer could not receive the original copy, but only a different version, which has been modified by updates and patches. Oracle went on to argue that exhaustion applied exclusively to tangible objects because the principle had been developed to “ensure the free movement of physical copies”. In any case, exhaustion, which only applies to the right of distribution, would only grant the first acquirer the right to resell the medium on which he had downloaded the copy of the program in the very beginning, and a distinction between the physical transfer of a medium and downloading of a computer program is unnecessary in any event, because in both cases the user has to agree to a license agreement before he can use the copy. The last argu-

414 Ibid., para. 30.
415 Ibid., para. 31.
416 Ibid., para. 33.
417 Ibid., para. 34.
418 Ibid., para. 35.
419 Ibid., para. 36.
420 Ibid., para. 37.
ment could be interpreted in a way that even the resale of physical copies of computer programs on CDs or DVDs would violate the distribution right of the author.

AG Bot began his assessment of the second question by underlining the difference in application of the exhaustion principle to different IPRs. He stated that among the rights granted to authors of computer programs under Article 4(1) Software Directive, Article 4(2) provides that exhaustion only applies to the distribution right, and only in such cases when the distribution took place by sale of a copy of the computer program. The concept of ‘sale of a copy’, AG Bot argued further, constitutes an autonomous concept of EU law and must therefore be interpreted uniformly. Contrary to what Oracle had argued, viz. that by concluding a license agreement and a maintenance agreement the download of a computer program from its website constitutes a service rather than a sale, AG Bot found that the downloading of a computer program for permanent use does in fact constitute a sale. To come to this conclusion he declared that “the distinction between sale and rental is the ‘summa divisio’ on which the application or otherwise of the exhaustion rule [...] depend.” By contrasting the concept of rental under Recital 12 Software Directive as the making available for use, for a limited period of time with the concept of sale under Article 4(2) of said directive, which is a “transfer, however it may have been described by the parties, involves the transfer of ownership of a copy of the computer program, for an unlimited period of time, in return for the payment of a one-off fee.” AG Bot admitted that a license for the use of a computer program might contain both, the contract for a sale of the copy as well as a service contract. In order to give effectiveness to the exhaustion principle and to avoid distributors of computer software to divest the principle of all its content by making software available by download under a license agreement, the concept of ‘sale of a copy’ must be given a broad interpretation. This interpretation must encompass all forms of marketing of computer programs that grant the user an unlimited right to use against a one-off payment. Accordingly, the right to use a

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421 Ibid., para. 46.
422 Ibid., para. 48.
423 Ibid., paras. 50-2.
424 Ibid., para. 56.
425 Ibid., para. 56.
426 Ibid., para. 59.
computer program, such as the one in question, constitutes a sale within the meaning of Art 4(2) Software Directive.\footnote{Ibid., para. 60.}

Oracle, supported by the French and Spanish Governments, had further argued that the exhaustion principle is only applicable in cases where the copy of a computer program is transferred on a physical data carrier, downloads of software, therefore, would not fall within the scope of the exhaustion principle. Oracle supported this view by arguing that the act of downloading is in fact an act of communication to the public as defined by Article 3(1) of the InfoSoc Directive, and which cannot be exhausted.\footnote{Article 3(1) InfoSoc Directive.} This, Oracle argues further is supported by Recitals 28 and 29 and Article 4(2) InfoSoc Directive which state that the distribution right is exhausted by the first sale of “that object”\footnote{Article 4(2) InfoSoc Directive.} in the Community, with the exception of “services and online services in particular” This applies also to copies made by users of such services with the consent of the rightsholder.\footnote{Recital 29 InfoSoc Directive, Recital 29 provides further: “Therefore, the same applies to rental and lending of the original and copies of works or other subject-matter which are services by nature. Unlike CD-ROM or CD-I, where the intellectual property is incorporated in a material medium, namely an item of goods, every on-line service is in fact an act which should be subject to authorisation where the copyright or related right so provides.”}

AG Bot refused Oracles arguments and rather stressed that, although Directive 2001/29 can be used to interpret the Software Directive, its Article 1(2)(a) provides that it shall not prejudice the protection granted by the latter directive. The Software Directive does not foresee a right of communication to the public and that the right of distribution under the Software Directive encompasses “any form of distribution to the public”.\footnote{Article 4(1)(c) Software Directive.}

On the interpretation of Recitals 28 and 29 of the InfoSoc Directive, AG Bot argued that the limitation of the exhaustion principle to tangible objects was not exhaustive as the relevant part said that protection under the directive includes the distribution of tangible articles.\footnote{Recital 28 InfoSoc Directive.} This very literal interpretation of Recital 28 is followed by a more purposeful interpretation of Recital 29. AG Bot argued that although the Directive distinguished – apparently – between the sale of goods and online services;
online services include the online sale of goods. Therefore, no distinction should be made between the sale of goods in traditional form or via an online store; any other interpretation would frustrate the application of the exhaustion principle. AG Bot possibly confused the online sale of tangible goods by way of distance sale (comparable to the sale by mail-order catalog) and the ‘sale’ of digital content through an online interface. Be it as it may, the AG found that a distinction between online sales and offline sales under the Infosoc Directive would be unjustified. A justification for the restriction of the resale of downloaded software under Article 36 TFEU on grounds of the protection of industrial and intellectual property in order to safeguard the rights that form the specific subject-matter of copyright was also refused. In referring to FAPL/Murphy AG Bot found that by the first sale of a computer program by way of download, Oracle had already received appropriate remuneration, and a further control or prohibition of resales would not help to protect the specific subject-matter of the copyright.

Interestingly, AG Bot did not directly address Oracle’s argument that under the international framework, in which light the Infosoc Directive must be interpreted, the exhaustion of the distribution right relates only to fixed copies. Instead, he posits that the undefined rights of making available, communication to the public and distribution in Directive 2001/29 must be interpreted in the light of the WCT. The latter defines distribution as “the exclusive right of authorizing the making available to the public of the original and copies of their works through sale or other transfer of ownership” Therefore, any transfer of ownership would constitute an act of distribution.

For the second question the AG thus came to the conclusion that a download of a computer program against remuneration that grants the user unlimited use of that program exhausted the right of the author to distribute that copy. This was already more than one could have hoped

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433 Similarly AG Bot’s argument regarding Article 4(2) Infosoc Directive, Ibid., para. 77.
434 Ibid., para. 83.
435 Ibid., para. 69.
436 Article 6(1) WCT.
437 Ibid., para. 73.
438 Ibid., para. 84.
for, given the pre-existing opinions, based on the existing legal framework, in particular Directive 2001/29, on the relation between the exhaustion principle and the marketing of digital software. The facts of the case, in particular that the objects of (re-)sale were computer programs and not other types of digital works, e.g. music files or digital movies, and that the former are governed by a special legal framework under the Software Directive, and the latter fall under the application of the horizontal harmonization regime of Directive 2001/29, made such an opinion possible. Now, digital optimists might have hoped that the AG would push open the doors for free digital market in the EU, however AG Bot disappointed these enthusiasts and kept the door only half open, but not open enough that downloaded software could have squeezed through.

AG Bot summarized the first and third question to the question whether a purchaser of a ‘used’ license may as ‘lawful acquirer’ within the meaning of Article 5(1) of the Software Directive rely on exhaustion to make another copy of the computer program in order to download the software from the website of the producer. UsedSoft had argued that the exhaustion principle would be divested of all its meaning if an author could prevent the use of the software by prohibiting certain necessary acts of reproduction if at the same time he could not prevent the further distribution of the software.

It further argued that the deletion of the program by the initial owner would safeguard that the software would not be used by two users at the same time. Oracle relied on a strict division between the right to distribute, to which exhaustion applies, and the right of reproduction, to which exhaustion does not apply. It further added that a ‘lawful acquirer’ could only be the person authorized to use the program under a license agreement and that the exception to the reproduction right for uses that “are necessary for the use of the computer program by the lawful acquirer in accordance with its intended purpose” must be defined in accordance

439 See e.g. Lucas in: Bently, et al., Global Copyright: Three Hundred Years Since the Statute of Anne, from 1709 to Cyberspace (2010), pp. 324-5.
442 Ibid., paras. 86-7.
with the relevant license agreement. The rights contained therein, especially the right of initial use, Oracle maintained, could not be split up by the acquirer. Finally, Oracle submitted that it cannot be verified if the initial purchaser of the license has in fact deleted his copies.\textsuperscript{443}

AG Bot began his assessment of question one and three by underlining the distinction between the distribution and the reproduction right. He then continued to qualify the right of use assigned by Oracle under the license agreement to fall under the right of reproduction, as it enables the acquirer to download a copy of the software. In his opinion, the resale of that exact copy together with the right to use would fall under the right of distribution, and, therefore, would be exhaustible. The right of reproduction, however, which is required to download a copy from Oracle’s server, and is contained in the original license agreement, is not exhausted by the transfer of that license and the latter does not entitle the second acquirer to download another copy of the software.\textsuperscript{444} The exception under Article 5(1) of Directive 2009/24 AG Bot deemed not to be applicable as it only related to cases where the lawful acquirer already possesses a copy of the computer program and reproduction is necessary to use the program for its intended purpose, e.g. from the main server of a company to the working memory of the client computer. He denied the application of this exception for the purpose of making a copy of the program to get into possession of such copy. He added, rather cryptically, that the exception can anyway only apply to an acquirer who has contractual relationships with the author, and that can only be the first acquirer.\textsuperscript{445} It is interesting to note that before coming to this final conclusion he played with the thought that a decision to widen the scope of the exhaustion principle, might be justified to “give precedence to the free movement of goods and services”.\textsuperscript{446} However, he ultimately refused the application of the exhaustion doctrine against the wording of secondary EU law and would not extend exhaustion beyond what was “envisaged by the EU legislature” for the sake of preserving legal certainty.

\textsuperscript{443} Ibid., paras. 88-91.
\textsuperscript{444} Ibid., paras. 94-7.
\textsuperscript{445} Ibid., paras. 98.
\textsuperscript{446} Ibid., para. 99.
b. The Judgment of the Court

The Court agreed with AG Bot as to the reply to the second question on whether the download of a computer program from the Internet with the authorization of the author of the program can give rise to the exhaustion of the distribution right. It followed the argumentation of the Opinion in that the download of a copy and the conclusion of a user license agreement form an indivisible whole and that a license agreement that grants the user an unlimited right to use against a one-off payment constitutes a sale, which is an autonomous concept under EU law for the purpose of Article 4(2) of Directive 2009/24.\footnote{CJEU, Judgment in UsedSoft EU:C:2012:407, paras. 35-49.} It further agreed with the AG that Directive 2009/24 is \textit{lex specialis} to Directive 2001/29 and a download of a computer program together with the transfer of ownership must be interpreted as a first sale of the copy of that program, and not as an act of communication to the public under the \textit{InfoSoc Directive}.\footnote{Ibid., paras. 50-2.} By again distinguishing between the general copyright regime and the special legal regime for computer programs, the Court agreed with the AG’s Opinion that the exhaustion of the distribution right is not limited to physical copies because the \textit{Software Directive} does not contain a formulation comparable to Recital 29 of the \textit{InfoSoc Directive},\footnote{Ibid., paras. 53-60.} emphasizing again that, from an economic perspective, a distinction in treatment between computer software on physical data carriers and the sale by download for the purposes of applying the exhaustion doctrine would be contrary to the principle of equal treatment.\footnote{Ibid., paras. 61.} Finally, the Court confirmed the AG’s findings that even though the computer programs are constantly updated and patched, the additions form integral parts of the original program and exhaustion applies to the patched and updated program,\footnote{Ibid., paras. 64-8.} and further that the first acquirer can only sell the full user license and is not permitted to split the license into several user rights.\footnote{Ibid., paras. 69-71.}

Disagreeing with the AG’s Opinion, the Court answered questions one and three to the effect that an acquirer of a used software user license is entitled to download a copy of that program from the author’s website and
that, accordingly, the exhaustion of the distribution right enables a ‘lawful acquirer’ to make copies of that computer program which are necessary for the intended use of the software within the meaning of Article 5(1) of Directive 2009/24.

However, in its reasoning the Court did not engage with the Opinion of AG Bot. In brief words, it stated that the ‘reproduction for intended use exception’ applies to downloads of the program copy from a website and pointed to Recital 13 of the Software Directive, which excludes contractual limitations to “acts of loading and running necessary for the use of a computer program which has been lawfully acquired”.453 It follows that contractual provisions cannot prevent the first acquirer from relying on exhaustion to resell the original copy, however he must make that copy unusable on his own computer.454 A distinction between physical and digital exhaustion is not justified either by the fact that it is difficult to ascertain whether the first acquirer has indeed deleted the original copy from his computer, because bringing a comparable proof for physical copies is equally difficult.455

The Court spent a bit more time on dismissing Oracle’s argument, to which AG Bot had subscribed to, that the exception under Article 5(1) of Directive 2009/24 only applied to license agreements directly concluded with the copyright holder. It argued that if the exception to the reproduction right was only available to the original licensee, this would extend the exhausted distribution right by way of an unjustified exercise of the exclusive right of reproduction.456 Here, the Court made exactly the step the AG had played with in his final remarks, namely that giving priority to the free movement of goods and services, and thus the exhaustion doctrine, could justify a derogation from the wording of secondary EU law.

In the final paragraphs of its judgment the Court stressed that the unity of the license agreement and the download constitute a sale which makes the acquirer benefit from exhaustion. The second acquirer is ‘lawful acquirer’ and thereby entitled to download a copy from the rightsholder’s website as a reproduction of the software that is necessary to use the program.457 It underlined that the original license may not be split into

453 Ibid., paras. 74-6.
454 Ibid., paras. 77-8.
455 Ibid., para. 79.
456 Ibid., para. 83.
457 Ibid., paras. 84-5.

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several licenses,\textsuperscript{458} and by adding a new aspect, that the copyright holder is entitled to “ensure by all technical means at his disposal that [...] the original copy is made unusable”.\textsuperscript{459}

c. The post-UsedSoft excitement

With its judgment in \textit{UsedSoft v. Oracle} the CJEU shook the assumed foundations of the exhaustion principle only one year after the publication of the “Digital Agenda”. The Court made it clear that it would not, in principle, accept a distinction between protected rights that are tied to tangible data carriers and such rights that are associated to downloads from the Internet.\textsuperscript{460} In supporting the relevance of the free movement of goods the Court takes, it can be argued, an extensive teleological approach to rebalance the relation between the rights of the rightsholder and the rights of the user. However, the protection of copyright cannot go beyond the specific subject-matter of copyright, one aspect of which seems to be to receive appropriate remuneration through the first sale of the software.\textsuperscript{461}

The judgment has to be considered with caution,\textsuperscript{462} although some academic reactions to it were euphoric. The biggest concern that must be raised when discussing the impact of \textit{UsedSoft v Oracle} in relation to the application of the exhaustion principle to digital content is its limitation to computer software.\textsuperscript{463} AG Bot as well as the court argued very close to the relevant legal provisions. The Court explicitly stated that \textit{Directive\textsuperscript{464}}
2009/24 is lex specialis in relation to Directive 2001/29\textsuperscript{464} any findings in law are therefore to be read against the text of the Software Directive. However, some findings could be read into the InfoSoc Directive by way of analogy. AG Bot admits, in the end, that this application of the exhaustion doctrine limits its scope, however, under the current legislation, an extension of the principle beyond the wording of Directive 2001/29 would jeopardize the principle of legal certainty.\textsuperscript{465} The CJEU has already contradicted him. Another obstacle to the application of the judgment to other media lies in the interpretation of the InfoSoc Directive in accordance with the international obligations of the EU and its Member States.\textsuperscript{466} In the following paragraphs the arguments for and against an extension of UsedSoft v. Oracle to non-software digital content will be weighed against each other with the help of two cases in front of national courts, which were decided after the CJEU had rendered its judgment.

6. Beyond UsedSoft – exhaustion and other types of digital content?

The question put to the Court in UsedSoft v. Oracle was whether the first purchaser of downloaded software is entitled to resell the software to a third party. The Court answered this question, admittedly with some interpretative acrobatics, in the sense that even if marketed by the original rightsholder under a license agreement, the first acquirer can rely on exhaustion to resell the software. Oracle v. Used Soft was soon to be tested in the national courts. A German and a Dutch court were faced with roughly the same fact pattern
and in both cases exhaustion was invoked by the defendants against claims of copyright infringement in relation to the resale of e-books. The courts arrived at different results in interpreting the judgment of the CJEU.

a. Germany – resale denied

In the German e-book case\textsuperscript{467} the Federation of German Consumer Organisations, that represents all state consumer protection agencies, sued the operator of the website “www.buch.de”, which offers for purchase, amongst other things, books, films, e-books and audiobooks. When purchasing e-books or audiobooks by download the customer has to agree to the general terms and conditions which state in § 10(3) that the customer acquires the non-transferable right to use the content offered exclusively for private purposes in accordance with copyright law. In particular, the customer is prohibited from reproducing the downloads for third parties or make them available publicly, or to transfer them otherwise for free or against consideration, or to resell the downloads or use them for commercial purposes. In § 10(1) of the general terms and conditions the terms agreement for sales contract (“Kaufvertrag”) and delivery (“Lieferung”) are used.

The claimants argued that the limitations imposed upon the purchaser of downloads by § 10(3) of the general terms on conditions were in violation of German consumer protection law\textsuperscript{468} and therefore invalid as the terms and conditions unduly limited the right acquired by contract and derogated, to the disadvantage of the consumer, fundamentally from the exhaustion principle under German copyright law. As suggested by the formulation of the contractual provisions, the consumer, by way of sale, should acquire property and have the ability to further dispose of it, which the general terms and conditions in fact prevented. The right to further sell or otherwise transfer ownership of an object protected by copyright is a fundamental right under § 17(2) of the \textit{German Copyright Act (UrhG)} and cannot be derogated from by general terms and conditions. Therefore, the

\textsuperscript{467} LG Bielefeld, Urteil v. 05.03.2013, Az. 4 O 191/11.

consumer suffered a disproportionate disadvantage *vis-à-vis* the operator of the website.

Further, claimants argued, the general terms and conditions violated the principle of exhaustion\(^{469}\) and the right to reproduction for private purposes\(^{470}\) under German copyright law. The application of the exhaustion doctrine could not be limited to tangible copies but must be applied to digital copies as well. Relevant for the application of the exhaustion principle is whether the object of the contract is a 'tradable commodity' ("*handelbare Ware*"). An interpretation that would make the exhaustion of rights conditional on the tangibility of a copy would run against the intended purpose of the doctrine and the latter should be applicable to digital copies directly or by analogy.

Linked to this argument, the claimant argued that the restriction of the right to a private copy would make any resale under the exhaustion doctrine impossible, as reproduction is a necessary step to transfer digital copies to third parties. To avoid that after a resale a copy would remain with the original purchaser the rightsholder could protect the files with technical protection measures.

With reference to *UsedSoft v. Oracle* the claimant argued that the exhaustion of rights must apply to works in any form and that the ruling by the CJEU must be considered when interpreting the German exhaustion provision under § 17(2) UrhG.\(^{471}\) A distinction between computer software and e-books or audiobooks would therefore not be justified.

The defendants argued that the rights enjoyed by owners of tangible copies cannot be applied to digital copies. Whereas tangible copies give the owner proprietary rights, digital copies only grant a right to use ("*Nutzungsrecht*"). In that case the terms of the contract made clear that the downloaded copy does not create the same rights as a tangible copy, neither does any tangible copy created from the digital file from the user himself. The terms ‘sale’ and ‘delivery’ used in the general terms and

\(^{469}\) § 17(2) UrhG. \\
\(^{470}\) § 53 UrhG. \\
\(^{471}\) The claimant supported this argument by referring to the common origin of the exhaustion provisions in the *InfoSoc Directive* and the *Software Directive*, which is the *WCT*; the common normative basis would not justify a different application of the exhaustion doctrine to different types of digital copies, disregarding that computer programs and other copyrighted works are protected by different legal instruments in the EU.
conditions were only used to facilitate the understanding of the contractual provisions and to avoid technical language. A further transfer of the downloaded files to a third party would violate the reproduction right and, furthermore, the exhaustion doctrine would not be applicable to downloads as it presupposes a lawful tangible copy. The judgment in *UsedSoft v. Oracle*, the defendant argued, could not find application as the argumentation of the Court was based on the provisions of the *Software Directive*. The *Copyright Directive*, which is applicable in this case, cannot be interpreted in the same way as the *Software Directive* and therefore exhaustion, as interpreted by the CJEU in *UsedSoft*, does not apply to e-books or audiobooks. Also, the defendants argued, exhaustion would not extend to the right of reproduction.

In its analysis, the LG Bielefeld (Regional Court, Bielefeld) first sought to clarify the primary purpose of the contract to assess whether the consumer would suffer from a disproportionate disadvantage in the contractual relationship. The primary purpose of the contract, the court found, was to enable the download of the digital file and to listen to or watch it repeatedly as often as desired; this, and nothing more. It pointed out that the exclusion of the right to make private copies for third persons and to resell the file was in accordance with the obligations stemming from the contractual agreement and not at odds with the primary purpose of the contract. The customer would only receive a right to use the file and would, in particular, not acquire property *in rem*, which is furthermore not the purpose of the agreement. German civil law, the court argued, systematically prevents the acquisition of property in intangible items. This would be clear to the consumer at the time of conclusion of the contract from the formulation of the agreement and the technical steps taken to acquire the digital copy.

It is the specificities of the acquisition of digital files via the Internet that distinguishes the rights customers enjoy regarding these files. The relative ease of reproduction, the quality of such reproductions, which are not distinguishable from their originals, the inability to trace down the

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472 LG Bielefeld, Urteil v. 05.03.2013, Az. 4 O 191/11, I.1.b.
473 Ibid., I.1.c.
474 Ibid., I.1.d.
475 Ibid., I.1.e.
476 Ibid., I.1.c.
477 Ibid., I.1.e.
location and the number of copies originating from one particular file and
the possibility for the consumer to retain a copy after transferring a file
make digital files so much different from tangible copies. The average
consumer, so the LG Bielefeld, is aware of these peculiarities of digital
files and can therefore not expect that he enjoys the same rights as
compared to tangible items such as books, CDs and DVDs.\textsuperscript{478} The relative
disadvantage suffered by the consumer would, in any case, be balanced by
the interests of the rightsholder, as expressed through the standard terms
and conditions, which are to safeguard that the digital copy is not
exploited with participation in the economic benefits by the rightsholder.
A further indication of this change in balance is expressed in the signifi-
cantly lower prices of e-books and audiobooks compared to printed books
and pressed CDs.\textsuperscript{479}

With its argumentation in \textit{UsedSoft v. Oracle} the CJEU treated down-
loaded digital files in the same way as physical goods, whatever the
contractual arrangements behind the downloading process are.\textsuperscript{480} The
German court distinguished and found that the formulation of the contract,
which used the terms “sale” and “distribution” would not be in violation
of German consumer protection law. For the aforementioned reasons a
consumer could not possibly expect that he would acquire property in
the digital file. The use of sale-related terminology was mainly to enable
the consumers to understand the terms of the contract and it was obvious from
the terms of the contract that it granted only a right to use.\textsuperscript{481}

The Court did not find a violation of the exhaustion doctrine, a deroga-
tion from which could have been an indication that the consumer would be
at a particular disadvantage \textit{vis-à-vis} the other party. In the absence of an
act of placing the product on the market in physical form as opposed to
downloading intangible copies from the Internet, the rights to control and
further transfer, on a tangible medium or by digital transfer, were not

\textsuperscript{478} \textit{Ibid.}, I.1.e.
\textsuperscript{479} \textit{Ibid.}, I.1.f.
\textsuperscript{480} Cf. Kubach, “Musik aus zweiter Hand – ein neuer digitaler Trödelmarkt. Zur
Zulässigkeit eines Weiterverkaufs digitaler Musik nach dem EuGH-Urteil ‘Used
\textsuperscript{481} LG Bielefeld, Urteil v. 05.03.2013, Az. 4 O 191/11, I.1.g.
exhausted.\textsuperscript{482} With reference to Recital 29 of the \textit{InfoSoc Directive} and German jurisprudence and scholarly opinion, the LG Bielefeld denied digital copies the benefits of exhaustion, certainly for the reproduction right (which is also true for computer software), and also for the communication to the public and making available rights according to Article 3(3) of the \textit{InfoSoc Directive}.\textsuperscript{483}

An application of \textit{UsedSoft v. Oracle} was rejected based on the \textit{lex specialis} nature of the \textit{Software Directive} in relation to the \textit{InfoSoc Directive}. Especially Recitals 28 and 29 and Article 4 of the \textit{InfoSoc Directive} differ significantly from comparable provisions of the \textit{Software Directive}, on which the interpretation in \textit{UsedSoft v. Oracle} was based, so that the finding of the CJEU in that case cannot be applied to a legal scenario based on the provisions of the \textit{InfoSoc Directive}. The European legislator had expressed its intention to treat software download and transfers of other digital files differently by employing different terminology and formulations in the two EU legal instruments, the \textit{Software Directive} would thus not be applicable to e-books and audiobooks. And furthermore, even if exhaustion was applicable to e-books and audiobooks for the purpose of resale, the necessary act of reproduction would not be permitted because an exception comparable to Article 5(1) of the \textit{Software Directive}, which enabled the CJEU to circumvent the inapplicability of exhaustion to the reproduction right, cannot be found in the \textit{Copyright Directive}.\textsuperscript{484}

For these reasons, the German court refused the application of the exhaustion doctrine to digital downloads other than software. The claimants appealed the decision and the OLG Hamm (Higher Regional Court, Hamm) rendered its judgment on 15 May 2014.\textsuperscript{485}

\textsuperscript{482} \textit{Ibid.}, I.2.a.aa.; the copy the consumer created when saving the digital file, which has been made available online by the website operator, on the hard drive of his local computer is, according to the court, covered by the right to use, the court confirms that this is an act of reproduction covered by copyright.


\textsuperscript{484} LG Bielefeld, Urteil v. 05.03.2013, Az. 4 O 191/11, I.2.a.cc.

\textsuperscript{485} OLG Hamm, Urteil vom 15.05.2014, Az. 22 U 60/13.
The Federation of German Consumer Organisations based its appeal on four arguments. First, it argued that by relying on the recitals of the Information Society Directive the first instance court had treated the preamble as if it was binding law.\textsuperscript{486} Second, considering the Software Directive as \textit{lex specialis} would ignore significant developments in the law and that exhaustion was applicable to other types of digital content.\textsuperscript{487} In any case, a differentiation between software and other digital files could not be justified. Third, the court had erred in assuming that consumers did not expect that they could resell audiobooks and e-books. A limitation of the right to resell copies could not be justified in order to prevent multiple resales or pirate copies. Finally, the analysis of the LG Bielefeld would not appreciate the EU law dimension of the case and argued too strictly based on German property law.\textsuperscript{488}

The operator of www.buch.de relied on its prior arguments, especially that EU law required the acquisition of a tangible item ("dinglicher Eigentumsübertrag") for exhaustion to take effect, further the non-exhaustion of the reproduction right would hinder the application of the exhaustion principle in this case. It limited \textit{UsedSoft v. Oracle} to the result that if the first purchaser of a software was allowed to resell the product, the second purchaser was allowed to make further reproductions of the software without infringing the reproduction right.

\textsuperscript{486} The same argument with reference to the ‘modernization’ of the exhaustion in relation to downloaded files in the Software Directive is made by Kubach, “Musik aus zweiter Hand – ein neuer digitaler Trödelmarkt. Zur Zulässigkeit eines Weiterverkaufs digitaler Musik nach dem EuGH-Urteil ‘Used Soft’”, \textit{CR} (2013), p. 282. Whether the EU legislator really intended to abolish this distinction for all copyright-protected works implicitly by omitting such reference in the, in its scope very limited, Software Directive can be argued, technological development and a change in consumer behavior would suggest that Recitals 28 and 29 of the InfoSoc Directive could deserve re-consideration.

\textsuperscript{487} The claimant argued that the provisions of the Software Directive in relation to exhaustion had outdated the relevant provisions of the Information Society Directive, exhaustion therefore applied to digital ‘distribution’ as well as physical distribution.

\textsuperscript{488} Although not explicitly stated in the judgement, this argument probably refers to the wide interpretation of the concept of sale in \textit{UsedSoft v. Oracle}. Indeed, an application of the autonomous concept of sale would probably come to the result that access to e-books, with the possibility to download them on a reader or any other portable or stationary device for an unlimited number of uses constitutes a sale under EU law, cf. CJEU, Judgment in \textit{UsedSoft EU:C:2012:407}, para. 49.
The appellate court maintained that downloading audio files per se does not exhaust the distribution right.\textsuperscript{489} Downloading such files falls under the right of communication to the public under German as well as EU law and in neither case the respective legal provisions\textsuperscript{490} foresee that exhaustion takes effect with the first exercise of that right.\textsuperscript{491} The court brushed away the concerns that the first instance court treated the recitals of the preamble of the Information Society Directive as law by arguing that Recitals 28 and 29 were merely statements of the established fact that downloads do per se not exhaust the distribution or communication to the public rights.\textsuperscript{492} Finally, the OLG Hamm argued that the way of distribution and the differences in pricing between printed books and digital files would signal the consumer that he cannot treat both media in the same way, and that he did not acquire the same rights for digital files and tangible items.\textsuperscript{493} The Federation of German Consumer Organisations withdrew its further appeal to the German Bundesgerichtshof (Federal Supreme Court) in late August 2014 before a judgment could be rendered.

b. The Netherlands – a waiting game

The Rechtbank Amsterdam (District Court, Amsterdam) was confronted with a similar fact pattern in 2014 and handed down its judgment on 21 July.\textsuperscript{494} The claimants were two Dutch publisher associations (“Nederlands Uitgeversverbond” and “Groep Algemene Uitgevers”) and the defendant Tom Kabinet, the operator of the website www.tomkabinet.nl. The website enables individuals to resell e-books that have been

\textsuperscript{489} OLG Hamm, Urteil vom 15.05.2014, Az. 22 U 60/13, II.2.
\textsuperscript{490} Article 3(1) InfoSoc Directive and § 19(a) UrhG.
\textsuperscript{491} Ibid., II.2.a.(2).
\textsuperscript{492} Ibid., II.2.a.(2).
\textsuperscript{493} Ibid., II.3.; not convincingly the court argued that although the price difference might be owed to the savings in the physical medium, the purchaser could not expect to acquire the same rights, however if the only reason why the final product is cheaper is the lack of a physical support, why would one expect to acquire less rights in relation to the ‘object’, tangible or digital, if remuneration for the right, printed on paper or copied on a hard- or flash-drive is essentially the same?
\textsuperscript{494} See for a brief description of the case, Michel Olmedo Cuevas, “Dutch copyright succumbs to aging as exhaustion extends to e-books”, \textit{JIPLP} (2015), 8-10.
purchased from other websites. It was launched on 24 June 2014, and on the same day Tom Kabinet sent a letter to several publishing houses. The letter, which is reprinted in the judgment,\textsuperscript{495} described how the website works and asked the publishing houses for their cooperation. Tom Kabinet explained that it relied on the exhaustion principle to offer its services. To avoid that one particular copy of an e-book is sold multiple times it asks its users for a declaration that they delete their own copy when they upload an e-book to the website. Until the book is sold users retain property in the book and can retrieve it any time. To avoid multiple uploads and resales of the same e-book by one user the websites creates a hash-code with the respective user-book combination. Once the book is sold, Tom Kabinet attaches a watermark to the file so it can be traced later. If infringing uses are detected Tom Kabinet commits to provide information on the infringement to the publishing houses.

Tom Kabinet, relying on statistics on the relation between legal and illegal copies of e-books in circulation, promotes its website as a system to increase the legal share of circulating copies. In it letter sent to the publishing houses, it asked for their cooperation and in turn promised to ‘donate’ part of its revenues (around 0,10 and 0,05 € per sale) to the rightsholders of the original e-books.\textsuperscript{496} Tom Kabinet admitted that its business model is controversial, but hoped for the cooperation of the publishing houses.

On the website, in its General Terms of Use, Tom Kabinet notes that only such e-books may be sold that do not infringe the rights of rightholders. By selling an e-book through the site sellers declare that their copies are non-infringing. When rights violations are suspected Tom

\textsuperscript{495} Rechtbank Amsterdam 21 July 2014, NL:RBAMS:2014:4360, para. 2.4.
\textsuperscript{496} Tom Kabinet underlines that authors do not partake in the revenues of second-hand e-books. By establishing a controlled market, which offers users e-books at significantly lower prices (and in which publishers receive a share in every resold copy) the circulation of illegal copies could be decreased by increasing the attractiveness of legal offers, further positive effects might be felt on the primary market for e-books when consumers know they have the possibility to resell the e-books again (see \textit{Ibid.}, para. 2.5.) As a promotional contribution Tom Kabinet asked publishing houses to provide free copies in limited editions of hundred copies to increase the initial attractiveness of the website, of course with a view from profiting from the downstream resale market, in which profits they would share.
Kabinet can be notified via email.\textsuperscript{497} It is further provided that by using the website to sell copies, it is assumed that after an e-book is uploaded on the website that the seller is not using the e-book anymore and does not retain a copy. It asks the users not to offer any illegal e-books or to sell the same e-book twice.\textsuperscript{498} Tom Kabinet only requires basic information from its users. The user’s email is linked to a username, which is not visible for other users of the website, payments are made through a Dutch online payment service.

With their action the publishers associations sought, by way of injunction, to prohibit the infringements of the rights of authors and publishers by making available and reproducing e-books through the website, alternatively to prohibit infringements by offering a service that enables the sale of e-books without the authorization of the rightsholders. Furthermore, that the defendant ceases and in the future refrains from expressing, in any way, that the resale of second-hand e-books without the authorization of the rightsholders is lawful.\textsuperscript{499}

The claimants first argued that Tom Kabinet could not guarantee that no illegal copies were sold via the website, the watermark-system could not prevent the upload of sufficient copies. By failing to require sufficient identification data Tom Kabinet would give incentives for piracy.\textsuperscript{500} Second, Tom Kabinet could not rely on the \textit{UsedSoft v. Oracle} judgment because exhaustion in digital files was only accepted for computer software under the \textit{Software Directive} and not under the \textit{Information Society Directive}, which is applicable to the resale of e-books.\textsuperscript{501} Third, the CJEU had argued in \textit{UsedSoft} that there are no substantial differences between software distributed on a tangible medium and software downloaded from a website. However, printed books and e-books displayed significantly different characteristics, for example printed books suffer from wear and are published in different formats (hardcover, paperback, and with or without illustrations). E-books, on the other side, are usually only published in one version, but contrary to printed books, have a certain

\begin{itemize}
\item \textsuperscript{497} \textit{Ibid.}, 2.6, reference is made to Article 4. of the General Terms of Use.
\item \textsuperscript{498} \textit{Ibid.}, para. 2.6, reference is made to Article 5 of the General Terms of Use.
\item \textsuperscript{499} \textit{Ibid.}, para. 3.1.
\item \textsuperscript{500} \textit{Ibid.}, para. 3.2.
\item \textsuperscript{501} \textit{Ibid.}, para. 3.2., in this respect the claimants made the already obligatory reference to Recital 29 \textit{InfoSoc Directive}.
\end{itemize}
functionality (increased fonts, ability to make notes).\textsuperscript{502} Most importantly, e-books are usually sold at significantly lower prices than printed books.\textsuperscript{503} Fourth, the copyright implications of the Tom Kabinet business model differ significantly from those of UsedSoft. Whereas UsedSoft merely sold licenses and the acquirer downloaded the computer program from a website, Tom Kabinet requires up- and downloads of e-books, which involves acts of reproduction, which require authorization. Further, offering e-books constitutes an act of communication to the public, which also requires permission.\textsuperscript{504}

Tom Kabinet replied that purchasers of e-books would also be able to transfer those e-books under the exhaustion doctrine. If a publisher decides to market e-books it has the option to apply digital rights management (DRM) measures to avoid illegal copies to come into circulation. However, if e-books are offered DRM-free the purchaser has the right to further transfer them for free or against remuneration. Tom Kabinet pointed out that only such e-books can be resold via www.tomkabinet.nl, which are protected by DRM.\textsuperscript{505} With reference to \textit{UsedSoft v. Oracle} Tom Kabinet contended that most e-books sold in the Netherlands are sold under the General Conditions of the Dutch Home Shopping Organization ("Nederlandse Thuiswinkel Organisatie"), which does not limit the use of digital content in any way. The purchaser of an e-book becomes its owner and, therefore, can dispose of the e-book in whichever way he likes.\textsuperscript{506} Due to factual differences \textit{UsedSoft v. Oracle} would not apply in any case.\textsuperscript{507} Nevertheless, as the CJEU has stated in that case, even if content is acquired under license agreements, the right to unrestricted use together with the download would trigger exhaustion. Also, e-books are not sold at much lower prices than printed books and the rightsholders are remunerated appropriately. Tom Kabinet added that its security mechanisms to

\begin{itemize}
\item \textsuperscript{502} Ibid., para. 3.2.
\item \textsuperscript{503} Ibid., para. 3.2.
\item \textsuperscript{504} Ibid., para. 3.2.
\item \textsuperscript{505} Ibid., para. 4.8.
\item \textsuperscript{506} Furthermore, Dutch consumer law is applicable, accordingly the legal relation between the sellers of original e-books and their customers must be considered as a sales contract and not a license agreement.
\item \textsuperscript{507} Ibid., para. 4.8, Tom Kabinet argued that Used Soft was based on a situation, in which the software was downloaded directly from the rightsholder from its website, the ruling would only apply to cases in which an e-book is downloaded directly from the publisher's website.
\end{itemize}
avoid infringing resales are sufficient and the publishing houses had refused further cooperation to safeguard their own interests. Although illegal activities cannot be prevented, Tom Kabinet did all that could be expected, including a “notice-and-take-down” policy. In addition, it argued that Tom Kabinet itself would not communicate any works to the public because the works were not accessible through its website. Tom Kabinet also does not engage in infringing act of reproduction as it does not upload the files to its website, in any case such activities would not constitute reproductions within the meaning of the Dutch Copyright Act or the Information Society Directive. Finally, the CJEU in UsedSoft v. Oracle had ruled that if a communication to the public had taken place, it would subsequently be transformed to a distribution if the file is downloaded.

The Rechtbank Amsterdam refused the request for an injunction. It agreed with the claimants that UsedSoft v. Oracle relied on the lex specialis provisions of the Software Directive. However, the court did not want to exclude that the conclusion the CJEU made was more widely applicable and not only limited to the resale of software.

It struggled with the argument of the Court in UsedSoft that, one the one hand, concepts used in the Software Directive and in the InfoSoc Directive should be interpreted in the same way, however, on the other hand, the language of the InfoSoc Directive suggests that the distribution right of Article 4 of the Directive is only exhausted when a tangible item is first sold in the internal market. The Dutch court referred to academic literature that considers the possibility that the CJEU intended to extend exhaustion also to other digital files, although it used the exception of Article 5(1) of the Software Directive to establish exhaustion for downloaded software, an exception that does not exist in the InfoSoc Directive. The court then picked up the argument of the CJEU that makes the effects of exhaustion dependent on the functional equivalency of the distribution of tangible items and downloads; put differently: whether the works are sold or licensed. The Court in UsedSoft v. Oracle had argued that if the producer of software receives appropriate remuneration and thereby real-

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508 Ibid., para. 4.8.
ized the economic value of the right, exhaustion should apply to tangible items and digital downloads alike. The Dutch court then suggested that if the purchaser of an e-book downloaded a file from an online bookstore he would obtain the right to resell the e-book to a third person relying on the exhaustion right. The court observed that e-book prices indeed are not much lower than prices for printed books and consideration could be considered sufficient. To safeguard that e-books are not sold twice and that no copies remain with the reseller DRM-measures could be employed and that Tom Kabinet had undertaken all reasonable steps to limit the circulation of illegal copies of e-books through its service.512 The position of German courts that exhaustion cannot be extended to digital files other than software would have no bearing on the proceedings in the Netherlands. Accordingly, the Dutch Court found no reason to find unlawful behavior by Tom Kabinet when the company facilitated the trade in e-books.513

The publisher associations appealed and the Gerechtshof Amsterdam (Amsterdam Court of Appeal) rendered its ruling on 20 January 2015.514 However, due to the interim nature of the proceedings, the court did not consider it appropriate to decide whether exhaustion applies to e-books and left that question to a potential – and very likely – preliminary reference to the CJEU.515 The resale of legally acquired e-books, so the Court of Appeal, could not be prohibited until the current uncertainty has been resolved through a clarification from Luxembourg.516 That being said, the court deviated from the first instance ruling and granted an injunction regarding the sale of illegally reproduced or acquired e-books. It argued that the sole responsibility to safeguard that no illegal copies are brought into circulation rests with Tom Kabinet, the latter’s request to receive

512 Ibid., para. 4.10.
513 Ibid., para. 4.11.
514 See for a brief commentary: Saba Sluiter, “The Dutch Courts apply UsedSoft to the resale of ebooks”, 28.01.2015 (Kluwer Copyright Blog), available at: http://kluwercopyrightblog.com/2015/01/28/the-dutch-courts-apply-usedsoft-to-the-resale-of-ebooks/ (accessed: 10.01.2016), here it is also explained that in summary proceedings Dutch courts are not allowed to order measures that are unlikely to be ordered in the substantive proceedings. This indicates, so the author, that the two Dutch courts in Tom Kabinet were of the opinion that digital content can be exhausted.
515 Gerechtshof Amsterdam 20 January 2015, NL:GHAMS:2015:66, para. 3.5.3.
516 Ibid., para. 3.5.5.
assistance in fighting piracy from publishing houses did not alter the court’s finding.\footnote{517} Because the publishers suffered damage due to Tom Kabinet’s inability to control the circulation of illegal copies of e-books it is in the publisher's interest that Tom Kabinet put an end to any infringing actions.\footnote{518} The court ordered Tom Kabinet to prevent all infringing activities within three days of the interim judgment under penalty of € 1.000 for every day of continuing infringements after the initial deadline, up to a maximum amount of € 300.000.\footnote{519} Instead of shutting down its website,\footnote{520} Tom Kabinet, as a reaction to the judgment, significantly reduced its offer to allow only such e-books to be resold, which source, and legality, could clearly be established.\footnote{521}

c. German-Dutch disagreements

The German and Dutch courts differed in their interpretation of the Used-Soft v. Oracle judgment.\footnote{522} Whereas the German court followed the lex specialis argument that bars the extension of the exhaustion principle to other types of digital downloads, the Dutch courts, in this case of doubt,
favored the accused and saw no reason to grant an injunction for the Dutch publishers associations for legal copies of e-books. Due to the injunctive nature of the proceedings, the Dutch courts might have been a little more restrained in prohibiting Tom Kabinet’s service right away and the case will still have to be decided on the merits. Eventually, it is not hard to predict, that the Dutch or a similar case\(^{523}\) will find their way in front of the Luxembourg Court, which will have to take a final stance on the inexhaustible exhaustion question, and thereby eliminate the adjective at least in relation to the resale of digital files.

7. The uncertain future of digital exhaustion in the EU

European legislation is, to some extent, ambiguous on the issue of digital exhaustion. And even where it explicitly provides that exhaustion does not apply to services, the CJEU has called the classification of digital transfers into doubt with its ruling on the concept of ‘sale’ in *UsedSoft v. Oracle*. With at least one candidate for a preliminary reference on the horizon,\(^{524}\) it is worth pointing out the aspects that would most likely have to be addressed by the CJEU in a potential reference for a preliminary ruling.\(^{525}\)

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523 With the withdrawal of the appeal in the German e-book case it is unlikely that a prohibition of the resale of e-books will again be challenged in the near future, the surrender of the Federation of German Consumer Organisations could indicate that belief in the exhaustion of digital media has dwindled; the Dutch Tom Kabinet case is likely to be the next case with potential for a referral to the CJEU, the next instance for the substantive proceedings should feel obliged to refer the matter to Luxembourg.


a. Application of exhaustion to digital content

Services and sales are the categories which distinguish between the applicability of the exhaustion doctrine and the persisting right to prevent a resale. The CJEU has made this fundamental distinction in UsedSoft v. Oracle and stated that a transaction is a sale when the acquirer of software receives an unlimited right to use, although the contract stated that the software was only licensed. Furthermore, the CJEU established that the concept of sale, for the purpose of applying the Software Directive, has an autonomous meaning under EU law. The German courts interpreted a contract that clearly stated ‘sales contract’ (“Kaufvertrag”) as a contract to license the use of e-books because the resale of the files was expressly prohibited. The CJEU, however, had decided that a license contract for software that includes the provisions of services but still “[makes] the copy usable by the customer, permanently, in return for payment of a fee designed to enable the copyright holder to obtain a remuneration corresponding to the economic value of the copy of the work of which it is the proprietor” must be considered as a sale under EU law. It also stated that only because a contract is called a license agreement this does not mean it could not be a sales contract if the contract grants an unlimited right to use against appropriate remuneration. The concept of sale requires a uniform and broad interpretation to give full effectiveness to the principle of exhaustion.

It should be added that the full effectiveness of exhaustion could only be achieved if the concept of sale was the same under both, the Software and the InfoSoc Directive. A license contract that grants a user the right to read and re-read an e-book as often as desired should therefore be classified as a sales contract and give effect to exhaustion. However, the same contract, as in the German e-book cases, could expressly limit the right to further transfer the digital file to any other user, even to share or to lend it. This was also the case in UsedSoft v. Oracle where the license was non-exclusive and non-

526 CJEU, Judgment in UsedSoft EU:C:2012:407, para. 40; the Court describes the concept of a sale as follows: “According to a commonly accepted definition, a ‘sale’ is an agreement by which a person, in return for payment, transfers to another person his rights of ownership in an item of tangible or intangible property belonging to him.”
527 Ibid. para. 45.
528 Cf. Ibid., para. 49.
transferable. It would therefore seem that if either the German or the Dutch e-book case came before the CJEU the answer of the Court would very likely be that a permanent right to use would constitute a sale, and therefore the respective digital books could be resold by their users.

A digital bookseller could simply circumvent the effects of this extensive interpretation of the concept of ‘sale’ by limiting the right to use to 99 years (by which end copyright of the respective work would have probably expired anyway), or 50 years, or 25 years. For an excessively long license, at which expiry the user will most likely have deceased, it could be argued that this still resembled a sale. Shorter licenses of, for example, 10 years would more likely be interpreted as a license rather than a sale. Because digital formats are constantly changing it is rather unlikely that the same copies of e-books will be kept for more than 25 years.\footnote{529} After all, who keeps all his old CDs when all songs are available digitally on iTunes, and who keeps a well sorted mp3 library when songs can be easily accessed through mobile streaming services?

b. Functional equivalence of tangible and digital works

An argument raised in the Dutch e-book cases is that e-books should not be subject to exhaustion because they have different technical features than ordinary books. Digital texts, compared to printed texts, can be digitally marked, linked, and searched, the font can be enlarged on the screen of the reader, a tablet, a smartphone or an ordinary desktop PC.\footnote{530} In essence, the argument goes, because e-books are different, rightholders should be able to prevent further resale. These arguments were brought in the context of an argument that refused the applicability of UsedSoft v. Oracle to e-books.\footnote{531}

\footnote{529} It is rather likely that technological development will create new formats for music, film and text and that libraries of e-books could only be preserved by format-shifting, in order to avoid a technological lock-in. Cf. Aaron Perzanowski & Jason Schultz, “Digital Exhaustion”, UCLA L. Rev. (2011), 889-946, p. 900.

\footnote{530} Rechtbank Amsterdam 21 July 2014, NL:RBAMS:2014:4360, para. 3.2.

\footnote{531} The Court in UsedSoft v. Oracle had made a distinction between online and offline markets and came to the conclusion that they should not be treated differently as this would separate markets, downloaded software and software sold on data carriers are functionally equivalent, CJEU, Judgment in UsedSoft EU:C:}

https://doi.org/10.5771/9783845278759
This argument, if at all, carries for e-books, but not for digital music or films. Music or video files are not that much different from their embodied counterparts, they can be listened to and they can be watched. And if the owner of the data carrier so whished, songs from a CD can easily be transformed into digital audio files. This is more difficult with paper books, unless an individual has the financial capacity and technical equipment to scan books in such a quality that they can be used in the same way as e-books; and even if one were to go through all the trouble, the quality of the copy would not be the same. And one should not forget the additional ‘functionality’ of paper books, for example, as collector’s items. Whereas first and special editions of books can increase in value over time, it is unlikely that such an increase in value will be a phenomenon for e-books in the near future. If one e-book is sold the publisher can simply sell another digital copy, which has the same properties as any other copy. First editions of a printed book are not available for the original price, once they are sold out. Even if works fall out of copyright, the embodied versions still retain a value depending on the condition and edition of a publication.532

Ultimately, it is a question of whether a different functionality justifies an interpretation of recital 29 InfoSoc Directive to the end that digital content cannot benefit from the exhaustion doctrine. However, the Recital would not justify a distinction between e-books and other types of digital content. It does not refer to the functionality, or any other characteristics of digital content for that purpose, nor does any other provision of the InfoSoc Directive. It merely distinguishes between the provision of services and the distribution of (tangible) works. Therefore, functional equivalence should not weigh heavily as a criterion whether the right to control further transfers can be exhausted.

Unfortunately, the Court in UsedSoft v. Oracle failed to discuss this aspect of the case altogether. Rognstad highlighted its relevance by arguing that the CJEU could have come to the same conclusion in a legally more sound (and less erroneous) way by applying the free move-
ment provisions and to consider whether the resale of digital files falls within the specific subject-matter of copyright.\textsuperscript{533}

c. Market impact

Publishers argue that a market for ‘used’ e-books would destroy the market for ‘new’ e-books. Consumers are less likely to buy e-books directly from the publishers or from online e-book stores for the full price if they can purchase the same e-books for a lower price from a second-hand e-book store. The same could be argued for music, in both cases the ‘used’ work does not suffer from any defects, does not show signs of use, digital files do not suffer scratches on sensitive surfaces and the non-existing dust jacket of e-books cannot tear or be covered with coffee stains. Used digital works remain in exactly the same state as when they were originally purchased. But again the same is true for ‘used’ software that has been downloaded. It works in the same way as original software; all works are flawless copies of one original.

But a specific difference between e-books and software does exist. Whereas e-books can be consumed rather quickly and a small 200 page novel can be easily read over a weekend, a long train ride or a long flight, software is usually used for a longer period of time, unless it does not fulfill the expectations of the consumer. Used e-books, and to a certain degree used music,\textsuperscript{534} can circulate much quicker and establish a secondary market in much shorter time. Even a voluminous new novel can find its way to the second-hand market within a week and create competition for the primary market; if the novel is not satisfactory to the original


\textsuperscript{534} For music the argument could be made that users are consuming an individual music track more often than an individual e-book. This probably has the effect that music finds its way to the secondary market slower than e-books. Moreover, users try to build collections of songs in order to have them available at a later point in time to re-listen to individual pieces and albums, depending on their mood, the occasion, etc.
purchaser it can be offered for resale already when the plot has failed to capture the reader’s attention for more than a few pages. Student textbooks that are available in digital format can become obsolete for the individual student after one semester and be offered for resale to the next generation of students. With centralized e-book second-hand markets, transaction partners for the resale of ‘used’ e-books can be found easier than on the second-hand market for paper editions.\footnote{Although online second-hand bookshops exist, which sell antique and special editions of books, but also recent publications in a used state as well as new editions at fixed prices. Certainly, no effort is required as in \textit{Kirtsaeng} where the books, although purchased new, were shipped by mail to another country.}

From an economic perspective it could be justified to distinguish between software and e-books or digital music. If the primary market is quickly replaced by a secondary market an author or publisher could not be able to realize its economic profits that are protected by the subject-matter of copyright. One resold book could result in the creation of a secondary market with millions of (illegal) copies and the collapse of the primary market.\footnote{These concerns were voiced by the German Publishers and Booksellers Association (Börsenverein des Deutschen Buchhandels) after the appeal in the German e-book case had been withdrawn: Börsenverein des Deutschen Buchhandels, \textit{"Urteil: Gebrauchtverkauf von E-Books bleibt untersagt"}, 28.08.2014 (Börsenverein des Deutschen Buchhandels), available at: http://www.boersenverein.de/de/portal/Archivmeldungen/190547?meldung_id=812840 (accessed: 10.01.2016).}

Such an effect could be prevented by the system put in place by Tom Kabinet that affixes a digital watermark to every book uploaded. Digital watermarks and other verification systems, although most likely to be vulnerable to circumvention measures, could develop into an industry standard to be affixed to digital files by the original vendor. Their acceptance will depend on their interference with the normal use of the works.\footnote{See Chapter 3.C.}

In this way it could be safeguarded that only legal copies find their way to the secondary market. In such a situation it would not make sense to distinguish between software and e-books based on economic arguments.\footnote{Cf. Hoeren & Försterling, “Onlinevertrieb ‘gebrauchter’ Software. Hintergründe und Konsequenzen der EuGH-Entscheidung ‘UsedSoft’”, \textit{MMR} (2012), p. 647.}

It remains the argument that digital resales accelerate the secondary market. In fact, the time that remains to exploit the primary market before the secondary market – with perfect copies – for a particular e-book is established can, under ‘favorable’ circumstances, be
less than a week. The equivalent for physical books would be the markets for hardcover and paperback editions – and only then the used-book markets.

8. Interpretative accommodation of exhaustion under the InfoSoc Directive

Courts have answered questions whether digital content can be exhausted quite differently. It must be admitted that the judgments relied on different legal provisions, but even general arguments as to the functional equivalence of digital content and physical goods varied. A prohibition to resell purchased music, assuming that offers like iTunes will continue to exist, would probably dissatisfy customers. This raises the question whether EU law can be interpreted in a way so as to allow resale for digital files under the exhaustion doctrine.\footnote{Hoeren and Jakopp have argued for an application of exhaustion by analogy under German law, see Thomas Hoeren & Sebastian Jakopp, “Der Erschöpfungsgrundsatz im digitalen Umfeld. Notwendigkeit eines binnenmarktkonformen Verständnisses”, MMR (2014), 646-649, the authors acknowledge that a direct application of the principle cannot be considered as an option, but submit that an application by analogy would make sense under economic considerations and would be in accordance with the principles of the EU common market, p. 647.}

a. Is exhaustion applicable to services?

Exhaustion is denied to digital files with an argument based on Recital 29 InfoSoc Directive which states that “[t]he question of exhaustion does not arise in the case of services and on-line services in particular.” Therefore, any transaction or a contract that does transfer the ownership “in an item of tangible or intangible property”\footnote{CJEU, Judgment in UsedSoft EU:C:2012:407, para. 42 (emphasis added).} is not a sale, but more likely a service and thereby, per definition (of Recital 29), excluded from the application of the exhaustion doctrine. There are, though, two reasons why exhaustion could apply to digital downloads.

First, in interpreting Articles 3(3) and 4(2) InfoSoc Directive, Recital 29 could be ignored, or at least not considered as hard and binding law, but merely as a source of interpretation, however commanding its language
may be. The *Information Society Directive* was drafted almost 15 years ago and digital realities have changed. Today, the distribution of music on physical data carriers does not have the same relevance as it used to have in the outgoing 90s of the last millennium. Downloads have to a large extent replaced CDs and can be considered as their functional equivalent. Admittedly, it is much easier to carry a digital music collection than a bag of CDs, but this does not justify the non-application of exhaustion to non-tangible music files; after all, nobody claimed that CDs could not be resold when they replaced vinyl discs, which were even harder to carry around, not to mention the record player necessary to listen to the media. The interpretation of Recital 29 to the effect that exhaustion is excluded for downloads is fundamentally historical, based on technology available 15-20 years ago. A more teleological interpretation of Article 4(2) could enable downloads to circulate freely even after their first purchase. In order for such an interpretation to function, the classification of downloads as acts of distribution would still be necessary.

Second, a clean application of the provisions of the *InfoSoc Directive* as it is currently interpreted brings downloads within the scope of application of Article 3. In *UsedSoft v. Oracle* the Court implicitly classified a download as an act of communication to the public, though it used the term ‘communication to the public’ interchangeably with the term ‘making

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available’. However, the InfoSoc Directive does not mention the word ‘download’ in relation to the right of communication to the public, nor in any other context. As a matter of fact, it is completely absent from the Directive. Although the right of communication to the public should be understood in a “broad sense”\textsuperscript{545} and the making available right covers “all acts of making available such subject-matter to members of the public not present at the place where the act of making available originates”,\textsuperscript{546} downloading must not necessarily constitute an act of communication to the public. The WCT does not mention downloading either. Therefore, considering the equivalent economic effects of downloads of digital content and sales on tangible media of computer programs, music, literature and other works, the provisions of the InfoSoc Directive could be construed to permit the resale of digital content, in principle. The CJEU has ruled that the concept of a ‘sale’ must be interpreted uniformly when certain conditions are met and services must be distinguished from a sale. Accordingly, if a user acquires an unlimited right to use digital content with the possibility to download the respective files, this could constitute a ‘sale’ for the purpose of the distribution right under Article 4(1) InfoSoc Directive and would be subject to exhaustion under Article 4(2).\textsuperscript{547} Therefore, the user should be allowed to resell the files to a third party without requiring prior authorization from the rightholder. The interpretation should also go as far as to acknowledge that, as the CJEU and national courts have pointed out, the user who resells the file should not retain a copy for his own use.

Or, Article 4(2) could be applied to certain communications to the public by analogy. As already described, the effects for the user of an acquisition of a digital file which content is protected by copyright can, in many cases, be the same in comparison to the sale of physical data carriers. This could justify an application of the exhaustion principle by analogy to certain acts of communication to the public, namely such acts,

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\textsuperscript{544} Cf. CJEU, Judgment in UsedSoft EU:C:2012:407, para. 52; the Software Directive does not make a distinction between the right to distribute a computer program and other acts that ‘distribute’ software; Article 4(c) InfoSoc Directive only refers to “any form of distribution to the public.”

\textsuperscript{545} Recital 23 InfoSoc Directive.

\textsuperscript{546} Recital 24 InfoSoc Directive.

through which a user acquires a permanent right to use and has the possibility to use a downloaded file similar to a situation in which the user would have acquired the same content on a tangible medium.

b. Necessary reproductions

Reproductions are necessary to transfer digital files, even if the total number of files in existence does not increase because the file transferred from the reseller is subsequently deleted from the originating device. The reproduction right is not subject to exhaustion and an express limitation or exception that does permit derogation from the exclusive reproduction right for the purposes of transferring a file from one user to another does not exist under the *InfoSoc Directive*; an exception similar to Article 5(1) *Software Directive* is not foreseen.

The key to the problem might again lie in an analogous application of one of the exceptions of the *InfoSoc Directive*. Article 5(1) of the Directive grants an exception for temporary acts of reproduction with a transient or incidental nature for the purpose of (a) transmission or (b) lawful uses, as long as the reproduction does not have an independent economic significance. The CJEU interpreted Article 5(1) in a way as to allow the browsing of websites because the reproductions on screen and in the computer cache that occur in the process of browsing do not serve any other purpose than to make websites visible on computer screens. In *Infopaq II* the Court argued that acts exempted under Article 5(1) “must not have independent economic significance, in that the economic advan-

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548 An application of one of the exceptions of the *InfoSoc Directive* by analogy is however unlikely to be accepted by the CJEU, in CJEU, Judgment in *OSA EU:C: 2014:110* (paras. 38-41); the Court refused an application by analogy of Article 5(3)(b) *InfoSoc Directive* (cf. Sylvie Nérisson, “CJEU in OSA: a victory for right holders against free use and of CMOs against the European Commission?”, 07.09.2014 (Kluwer Copyright Blog), available at: http://kluwercopyrightblog.com/2014/09/07/cjeu-in-osa-a-victory-for-right-holders-against-free-use-and-of-cmos-against-the-european-commission/ (accessed: 10.01.2016)), and in general, L&Es have to be interpreted strictly; it can be argued however, that CJEU, Judgment in *UsedSoft EU:C:2012:407* has set a precedence in this regards favoring a wider interpretation of exceptions if such an interpretation serves to realize the common market. See also Chapter 3.B.IV.2.

549 CJEU, Judgment in *PRCA EU:C:2014:1195*. 

A. Territoriality and the Demands of the Single Market
tage derived from their implementation must not be either distinct or sepa-
rable from the economic advantage derived from the lawful use of the
work concerned and it must not generate an additional economic advan-
tage going beyond that derived from that use of the protected work.”\(^{550}\)

In \textit{FAPL/Murphy} the Court, without a lengthy discussion, confirmed
that reproductions in the memory of a satellite decoder and on a TV screen
are reproductions that form part of a technological process.\(^ {551}\) It would not
be too far-fetched to consider the transfer of a file from one computer to
another as a necessary technological process for the purpose of Article
5(1) \textit{InfoSoc Directive}. That criterion could therefore be interpreted as
including the reproduction of a file to enable its transfer by the person in
possession of the file to give possession, and ownership, to the acquirer in
the context of a resale under Article 4(2) \textit{InfoSoc Directive}. As demon-
strated above, this could also constitute a lawful use under the exhaustion
doctrine. Because a resale would be permitted, the rightholder would not
suffer any economic damage and a reproduction would not have an inde-
pendent economic purpose. It would simply enable a process that consti-
tutes a lawful use of an existing copy of a work. The CJEU took a similar
approach in \textit{TU Darmstadt v. Ulmer} where it established an “ancillary
right” to the right of communication to the public in order to enable
libraries to digitize parts of their collections and grant the public access to
digitized versions of printed books.\(^ {552}\) The Court made reference to Article
5(5) \textit{InfoSoc Directive}, in the light of which any exceptions to the exclu-
sive right of the Directive must be interpreted, without, however,
extending the scope of the exceptions.\(^ {553}\) The same should, by analogy,
apply for exhaustion, which, in the digital realm, would require an ancil-
lary right of reproduction for users if the principle should not be rendered
meaningless outside the physical world.\(^ {554}\)

\(^ {550}\) CJEU, Order in Case C-302/10, \textit{Infopaq International A/S v Danske Dagblades
Forening}, EU:C:2012:16, para. 50, see also CJEU, Judgment in \textit{FAPL/Murphy
\(^ {551}\) Ibid., para. 165, not discused in CJEU, Judgment in \textit{PRCA EU:C:2014:1195},
para. 25.
\(^ {552}\) CJEU, Judgment in Case C-117/13, \textit{Technische Universität Darmstadt v Eugen
Ulmer KG}, EU:C:2014:2196, para. 43.
\(^ {553}\) Ibid., para 47.

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Such an interpretation is not without problems and would meet resistance from those supporting a literal interpretation. But the CJEU has demonstrated not only in UsedSoft that it is willing to follow a teleological interpretation to accommodate digital processes that find their functional equivalents in comparative transactions in the analog world.\textsuperscript{555}

c. Preventing piracy

Denying users of digital content the benefits of exhaustion has often been supported with the argument that a right to resell digital files would promote piracy. Because illegally reproduced digital files cannot be distinguished, or only with difficulty, from such reproductions that have been brought into circulation with the consent of the rightholder, the resale of digital files is prohibited in order to prevent piracy. Only by rendering any resale, that of legal original copies and illegal copies, illegal, a circulation of questionable reproductions can be prevented or at least enforcement proceedings can be brought against users that bring digital files into recirculation. Under this argumentation, every file which content is protected by copyright cannot be legally acquired unless it is obvious that the rightholder has consented to digital distributions of the file.\textsuperscript{556} Indeed, restricting the circulation of downloaded digital content, assuming this restriction is common knowledge among Internet users, would make every offer for download of protected content at least questionable, if not obviously illegal.

Not applying digital exhaustion to digital files would \textit{ab initio} remove legal uncertainty with regard to digital files and their rightful acquisition with the effect that files not downloaded from iTunes, Amazon or comparable services cannot be lawfully acquired. This is of course intended to

\textsuperscript{469} arguing under German copyright that exhaustion should apply under the condition that the seller deletes his personal copy upon resale.


\textsuperscript{556} An obvious consent can be expressed by distributing files with attached licenses that permit certain uses, or uploading the file to a website that explicitly encourages the files to be shared. At some point, however, this information might get lost and the acquisition, in which form whatsoever, is accompanied by legal uncertainty.
Chapter 3. Elements of a European Copyright Framework

protect the interests of rightholders against illegal reproductions and an erosion of the primary market. But is the protection of such interests justified because rightholders and operators of online music stores can no longer tame the technologies they use to market their content? The second instance court in *Tom Kabinet* has made the distinction, and in the absence on a ruling on exhaustion as a principle, has partly sacrificed the principle to protect the interests of rightholders against pirate reproductions.

Rightholders could, instead of advocating for non-exhaustion, employ TPMs to protect their works against illegal reproductions and safeguard that only such copies are circulating that have been legally marketed. Or rightholders could attach watermarks to their files, as Tom Kabinet in the Netherlands has introduced for second-hand e-books. A similar situation as on the physical markets could be created where the number of ‘originals’ can be controlled by the rightholder. But, of course, rightholders are afraid that TPMs can be circumvented and illegal copies would find their ways on the second-hand market.

Nevertheless, a total prohibition of resales seems unreasonable. In the interest of a balance between the interest of rightholders and users stricter supervision mechanisms that track down illegal files and enable rightholders to take them off the market would more likely be an appropriate measure to prevent and fight piracy, instead of prohibiting resale in particular and denying digital files the benefits of exhaustion in general.

VI. Different continent, same problem: the US

The EU’s stance on digital exhaustion, and to what types of content it applies, is still developing. The texts of secondary legislation and business models that create secondary markets for digital content have collided with mixed results. In the US, similar problems led to litigation before the US District Court for the Southern District of New York. The judgment was handed down in March 2013, only 11 days after the judgment in *Kirtsaeng v. Wiley*. In *Capitol Records v. ReDigi* the defendant operated a digital marketplace for ‘used’ digital music. Users could, by means of software installed on their computers, upload legally purchased


songs, which had been downloaded from an online music store, to a “Cloud Locker”, which is essentially a central server located in the US. Once uploaded, users could access the songs and listen to them and offer them for sale to other users. When a user purchased a song for sale, the seller’s access to the file was terminated and the purchaser could stream the song and listen to it, download it to a personal device and offer it again for sale. Throughout the process there was only one usable song, either on the seller’s hard drive, on the ReDigi server, or, in the end, on the hard drive of the purchaser; at any point in time, only one person had access to the music file. Songs could be purchased by credits that could be gained by selling songs or purchased from ReDigi for money. Credits once acquired could not be exchanged for money. ReDigi earned money by keeping 60% of the sale price of every song, 20% went to the seller and 20% went to an escrow fund for artists. The plaintiff, Capitol Records, alleged copyright infringement because the company held the rights to a number of sound recordings sold via ReDigi’s website.

Judge Sullivan set the tone for the judgment in the first paragraph when he stated: “because this is a court of law and not a congressional subcommittee or technology blog, the issues are narrow, technical, and purely legal.”

It is apparent already from the very beginning, that political considerations would not play a role in front of this ‘court of law’. Accordingly, in denying an application of the first sale doctrine to digital music, upholding the physical limitations of the fair use, the judge concluded: “It is left to Congress, and not this Court, to deem them outmoded.”

ReDigi had based its case on two affirmative defenses, the fair use and the first sale defenses for the infringement of Capitol record’s reproduction and distribution rights.

1. Infringements

Judge Sullivan based his argument on § 106(1) of the US Copyright Act which grants the owner of a copyright the exclusive rights “to reproduce the copyrighted work in copies or phonorecords”. The term “phonorecord”

559 Ibid., at 645.
560 Ibid., at 656.
561 17 U.S. Code, Chapter 1.
is defined in § 101 as “material objects in which sounds [...] are fixed by any method now known or later developed” including “the material object in which the sounds are first fixed.” Accordingly, Judge Sullivan concludes that reproduction is the exclusive right to embody a sound recording “in a new material object (or phonorecord).” With reference to London-Sire Records, Inc. v. John Doe, Sullivan found that downloading a music file from the Internet creates a new phonorecord on the hard drive, of the respective segment on the hard drive of the user. A finding which “is, of course, confirmed by the laws of physics.” A transfer of a digital file, therefore, creates a new physical object at the place of download and infringed the reproduction right of the copyright owner. This finding is not obstructed by the fact that only one physical object, or phonorecord, existed before and after the transfer. The “plain language of the Copyright Act” so Sullivan, would not distinguish between cases in which multiple copies or only one copy exist after a transfer.

He also found that an electronic file transfer violated the right to distribution under § 106(3) of the Copyright Act. ReDigi had not contested an infringement of this right but had asserted that the distribution through its website was protected under the fair use and first sale defenses.

2. Defenses

The fair use defense, which only applies to the right of reproduction, was quickly rejected in this case on all four statutory factors. The first sentence of 17 U.S.C. § 109 (a) reads: “Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.”

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562 Ibid.
565 Ibid., at 650, verbatim: “[...] it is the creation of a new material object and not an additional material object that defines the reproduction right.”, see also B. Makoa Kawabata, “Unresolved Textual Tension: Capitol Records v. ReDigi and a Digital First Sale Doctrine”, UCLA Ent. L. Rev. (2014), 34-78, p. 67.
566 The first sentence of 17 U.S.C. § 109 (a) reads: “Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.”
567 Capitol Records, LLC v. ReDigi Inc., 934 F. Supp. 2d 640 (S.D.N.Y. 2013); under the first fair use factor, the court found that ReDigi’s transfer (up- and download
sale defense, although equally rejected, animated Judge Sullivan to a slightly more intensive discussion.

The first sale defense applies only to the distribution right and would therefore be no cure for the violation of the reproduction right.\textsuperscript{568} On the substance Judge Sullivan noted that, failing a successful fair use defense, the reproductions sold via ReDigi’s website were not lawful within the meaning of § 109(a).\textsuperscript{569} In addition, ReDigi did not transfer possession of “a particular copy or phonorecord” but reproduction of new phonorecords to purchasers of individual songs. However, the fair use defense only applies to the transfer of such original reproduction, that have been “put into the stream of commerce” by the owner of the copyright.\textsuperscript{570} What ReDigi was doing the judge described as “distributing reproductions of the copyrighted code embedded in new material objects, namely, the ReDigi server in Arizona and its users’ hard drives.”

ReDigi had argued that the first sale doctrine should be interpreted in the light of new technological developments and submitted that denying the defense would extend the rights under the Copyright Act to the benefit of Capitol Records.\textsuperscript{571} This argument was rejected based on a literal interpretation of § 109(a), which did not leave room for an interpretation that


\textsuperscript{570} Ibid., at 655.

\textsuperscript{571} Ibid., at 665.
accommodated technological developments that permitted non-physical transfers of files. Sullivan acknowledged that this interpretation would limit the application of the fair use defense to the physical transfer of objects, a fact that would be “unsatisfactory to many contemporary observers and consumers” but he insisted that the text of the provision did not leave room for ambiguity and a more extensive interpretation that would cover the transfer of digital files, involving reproductions “is a legislative prerogative that courts are unauthorized and ill suited to attempt.”

Finally, Judge Sullivan rejected ReDigi’s argument that such a restrictive interpretation would take digital works completely out of the scope of the first sale defense. Sharing his view with AG Bot in *UsedSoft v. Oracle*, he clung to the reasoning that lawful owners of “particular” phonorecords, could still resell digital files on computers, hard discs, iPods or other memory devices, that first sale was in principle applicable to digital files, as long as they were fixed on a material object. Although this might be more onerous and burdensome for the seller, the first sale doctrine with its current formulation, “enacted in a world where the ease and speed of data transfer could not have been imagined” does not leave room to permit the resale of digital files.

3. ReDigi’s consequences – in comparison

The first sale doctrine promotes progress by creating secondary markets that grant the public access to protected works. It helps to preserve economic values for first purchasers and creates legal certainty for transactions. It can be read from Judge Sullivan’s reasoning that he himself deems the unequal treatment of digital files transferred over the Internet and those transferred on a physical medium somewhat artificial; and the burden on the physical transferor is much higher than that on the digital reseller. He resorts to the position that any decisions to withdraw the

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572 Ibid., at 655.
574 Ibid., p. 39.
575 The physical resale involves higher transaction costs: because of the geographical distance between buyer and seller the data carrier must be transported to the destination of the buyer, a distance that is covered much faster and much cheaper with digital transmissions. In addition the seller of a physical object suffers
physical limitations of the first sale doctrine are more appropriately
resolved by Congress and not by a court of law. This comment exposes his
dilemma, which he shares with potential – in the US and in the EU –
resellers of digital files via the Internet, that strict and relatively antique
language in the Copyright Act and in the Copyright Directives prevents
digital resales. One could state provocatively that Sullivan did not dare to
confront the legislator by extending the first sale doctrine to digital files.

a. Sale v. license (goods v. services?)

The CJEU had overcome part of the exhaustion problem in UsedSoft v.
Oracle by making a license agreement a sale. The court in ReDigi did not
need to go to such interpretative lengths. ReDigi had only allowed the
upload of iTunes songs to its Cloud Locker, and Apple had changed its
license agreements eliminating all restrictions on the further transfer on its
files before ReDigi went into business. Music from other online music
stores that maintained such restrictions in their license agreements could
not be resold through ReDigi.

Under US copyright law a user is a licensee when the rightsholder has
specified that the user is only granted a license, which restricts the ability
of the user to transfer the protected work and when the use of the work is
subject to notable restrictions. This interpretation is different from the
findings of the Court in UsedSoft v. Oracle, which goes even further in
interpreting license agreements as sales contracts. The EU Court is much
economically from the degradation of the physical object, whereas a seller
digital files does not have to fear such devaluation of his product; cf. Ibid., p. 39.
576 Vernor v. Autodesk, Inc., 621 F.3d 1102 (9th Cir. 2010), cert. denied 132 S. Ct.
105; under this three-part test the user is granted a license, as compared to a sale,
if the rightsholder has specified that the user only receives a license, if the license
significantly restricts the ability to further transfer work, and if that license
notably restricts certain uses. The test is based on Wall Data Inc. v. Los Angeles
County Sherriff’s Department, 447 F. 3d 769 (9th Cir. 2006), cf. Louise Longdin,
Ian Eagles, & Pheh Hoon Lim, “Sale versus offline and online: can competition
320. The test, it seems, might only apply to software, which distinct nature vis-à-
vis other works has been recognized by US courts, see e.g. UMG Recordings v.
Augusto, 628 F.3d 1175 (9th Cir. 2011), in this case the court found that promo-
tional CDs with an attached sticker setting out license terms, which prohibited the
resale and transfer of possession of the CD could be resold.
more consumer friendly, it seems, and is willing to go beyond the wording of an agreement, though the LG Bielefeld in Germany has ignored this approach and even went further in the opposite direction and interpreted a contract that clearly state “sale” as a license agreement. The latter interpretation would even be hard to reconcile with the US approach.

b. Moving files through time and space

ReDigi’s business model 1.0 failed in front of the courts because it involved moving files from a computer to a server and then to another computer. This moving involved a number of acts of reproduction, acts of reproduction that are constantly taking place on computer hard drives, mp3 players, mobile phones and other devices on which files are stored and used. Many of these acts are covered by exemptions to copyright in the EU and the US. Shifting files from one place to another (space-shifting) is common and necessary to use digital files everyday and everywhere. The absence of a space-shifting discussion in ReDigi has been criticized. Had the court affirmed a fair use defense for the purposes of time shifting the case might have gone a completely different way.

Both, time-shifting, i.e. the making of reproductions to delay the consumption of protected material, and space-shifting, i.e. reproducing material to consume it on a different device, have been discussed in cases before the US courts.

Time-shifting had been considered fair use in the famous *Sony v. Universal* case. Recording TV programs with the Sony Betamax video recorder enabled users to ‘time-shift’ TV programs. Recording TV programs with the Sony Betamax video recorder naturally involved acts of reproduction. The US Supreme Court found that the reproductions were made for non-commercial purposes and that they even served to increase public access to the TV programs that were broadcasted. Political

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considerations that a refusal of fair use would criminalize millions of users seemed to have influenced the court as well.\textsuperscript{581}

Space-shifting, in a very simple example, can be the transfer of a music file from a computer hard drive to an mp3 player. US courts have approached space-shifting based on case-law on time shifting.\textsuperscript{582} In \textit{RIAA v. Diamond}\textsuperscript{583} a court ruled such transfers lawful, without, however, making express reference to fair use, but stating that space-shifting is “paradigmatic noncommercial personal use” in conformity with copyright law.\textsuperscript{584} The court in \textit{A&M Records v. Napster}, drawing inspiration from \textit{RIAA v. Diamond}, in principle agreed that space-shifting was protected by fair use but qualified that the defense would fail if the protected material, by that process, is distributed to the general public.\textsuperscript{585} If space-shifting is used to facilitate uses or access only for the benefit of the original acquirer, fair use would protect the acts of reproduction. The court in \textit{A&M Records v. Napster} referred to a case in which another court had found differently.\textsuperscript{586}

Whereas time-shifting is permitted under fair use, space-shifting suffers from a slight degree of uncertainty with contradictory judgments in \textit{A&M Records v. Napster} and \textit{RIAA v. Diamond}.\textsuperscript{587} But space-shifting could, if found to be covered be fair use, be a huge step toward the legal resale of digital content. The crucial distinction is that of the commercial nature of the use. While in \textit{RIAA v. Diamond} an additional reproduction was

\begin{itemize}
  \item \textsuperscript{581} Cf. Kawabata, “Unresolved Textual Tension: Capitol Records v. ReDigi and a Digital First Sale Doctrine”, \textit{UCLA Ent. L. Rev.} (2014), p 48; Kawabata interprets the Supreme Court to the effect that the latter refused to criminalize mass behavior, leaving the sanctioning of such behavior to the legislative will of Congress, if it so wished. The court in \textit{ReDigi} did the exact opposite by implying that millions of users are criminals, unless the legislator intervened.
  \item \textsuperscript{582} \textit{Ibid.}, p. 51.
  \item \textsuperscript{583} \textit{Recording Indus. Ass’m of America v. Diamond Multimedia Sys., Inc.}, 180 F.3d 1072 (9th Cir. 1999).
  \item \textsuperscript{584} \textit{Ibid.}, at 1079.
  \item \textsuperscript{585} \textit{A&M Records, Inc v. Napster, Inc.}, 239 F. 3d 1004 (9th Cir. 2001).
  \item \textsuperscript{586} \textit{UMG Recordings, Inc v. MP3.com, Inc.}, 92 F. Supp. 2d 349 (S.D.N.Y. 2000); MP3.com ripped CDs to make them available to users that had demonstrated they personally owned the respective CD, users could then access their private CD collection via the Internet from anywhere in the world. The court found a commercial use and therefore denied fair use to MP3.com.
\end{itemize}
permitted under fair use, with the result that two copies existed after the act of reproduction, in ReDigi only one copy remained because the Cloud Locker System had an automated delete mechanism. Nevertheless, Judge Sullivan was not convinced that this would safeguard that no additional copies remained with the seller.

The CJEU merely put the condition that no reproductions remain with the seller post-sale as a condition that exhaustion would take effect. However, in the EU it is then for the national courts to decide in each case whether the seller or the intermediary can guarantee the deletion of relevant copies. This is of course with the reservation that the CJEU only interpreted the Software Directive and this interpretation is, for the moment, limited to the transfer by resale of software.

c. Flexibilities

The CJEU as well as the US courts hide behind the letter of the law. What in effect constituted a clean literal interpretation of the underlying legal provisions, proved to establish a divide between digital content and goods. What both courts seemed to have realized is that systematically this divide does not make sense. It is almost ironic from a European perspective that after ReDigi US commentators called for more flexibility under the first sale and the fair use doctrine. In the US as well as in the EU first sale or exhaustion is part of a wider and larger set of exceptions to the numerous exclusive rights.588 Perzanowski uses the term “exhaustion” as a wider category of user rights that stem from the “lawful ownership of a copy of a work.”589

Based on the rich history of the common law exhaustion approach to a variety of uses, including the resale of lawfully acquired copies, it has been suggested to leave US courts freedom to develop and apply the US common law of exhaustion.590 Because the resale of software is explicitly permitted in the US by § 117 of the Copyright Act, Perzanowski has argued that, due to the similarity of computer software and digital files, exhaustion (in the wider sense) should not only be limited to the redistri-

589 Ibid., p. 912; see fn. 110.
590 Ibid., p. 931; the author interprets the statutory provisions to the effect that they merely “highlight some particularly important exhaustion scenarios”.

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bution and to reproduction for purposes of enabling a proper operation of software, but also to digital files for reproduction and distribution.\textsuperscript{591} User privileges to alienate and reproduce works can be extended to digital files by way of functional equivalency, preserving the traditional benefits of first sale.\textsuperscript{592} Perzanowski maintains that the US common law exhaustion doctrine as a system of user privileges can even enable the transfer of digital files with incidental reproductions for the purposes of that transfer. Exhaustion as a system, in this scenario, supports the distribution-limited first sale doctrine by covering reproductions, vesting US courts with more flexibility.\textsuperscript{593} This, one could say, historical approach to exhaustion, was developed in academic literature in 2011 and Judge Sullivan in \textit{ReDigi} rejected this approach right away with an isolated treatment of the distribution-focused fair use doctrine.

Apparently disillusioned with the \textit{ReDigi} ruling the same author together with Jason Schultz suggested a legislative alteration of the first sale doctrine to allow a higher degree of flexibility, which, it seems, is interestingly influenced by the CJEU ruling in \textit{UsedSoft v. Oracle}, although the authors do not make explicit reference to the case. They suggest to shift “the focus [of exhaustion] from distribution to account for the necessity of copying.”\textsuperscript{594} This is nothing else than an approach that is based on functional equivalency, which the authors frame into two legislative exhaustion standards with the aim to provide exhaustion with more flexibility. For such a flexible rule both authors suggest an approach similar to the fair use standards of 17 U.S.C. § 107, leaving the shaping of digital exhaustion to the courts.\textsuperscript{595}

This approach would make two cumulative distinctions: one between a sale and a license, and one to safeguard that the rightsholder does not suffer any disadvantage. The first test follows the \textit{UsedSoft} approach in that it would find a sale if the user has possession or access for a certain duration (as it seems not necessarily perpetual), if the payment is a one-off

\textsuperscript{591} \textit{Ibid.}, pp. 935-6.
\textsuperscript{592} \textit{Ibid.}, p. 937; this way, the author argues, the benefits of first sale (increased access, preservation, privacy, transactional clarity, user innovation, and platform competition) can be safeguarded.
\textsuperscript{593} \textit{Ibid.}, p. 938.
\textsuperscript{595} \textit{Ibid.}, p. 1551.
payment, and if the characterization of the transaction (as sale or license) is communicated to the consumer. The latter criterion would not refer mainly to the ‘label’ of the contract, otherwise rightsholders would call any contract a license to avoid exhaustion, but would consider the “overall impression communicated to consumers about the nature of the transaction.”596 Again, this is nothing else than what the UsedSoft v. Oracle judgment found in relation to the very same distinction.597 The second distinction, which is to be made only if the first distinction comes to a ‘sale’-conclusion, also has three prongs. The first inquires whether the consumer fully parted with the possession or access to the work, obviously to avoid pirating and an increase in the number of usable copies of the file. The second considers whether the rightsholder is deprived of a fair return, which could be the case if secondary markets are established almost in parallel to primary markets. And third, whether the consumer altered the underlying expression of the work, which constitutes a clear distinction from the original fair use defense that allows reproductions with a certain degree of transformativeness.598 Whereas the first part of the test could safeguard the interests of consumers, the latter test is designed to protect the rights of rightsholders. Both tests leave courts sufficient flexibility, without any further statutory intervention, to adapt and react to technological changes that have brought so much trouble to the existing system of exhaustion in the US, and to strike a fair balance between the interests of rightsholders and those of consumers/users.599 The second part could also form the basis for a legislative extension of the UsedSoft v. Oracle judgment in the EU.

VII. Coping with territoriality

Territoriality presently stands at the beginning of the digital exploitation chain in the EU single market. It requires that licenses are acquired for

596 Ibid., p. 1554, including whether buttons clicked are labelled “buy” or “purchase”, in general, whether the consumer has gotten the impression to purchase the digital content rather than to have limited and restricted use.

597 CJEU, Judgment in UsedSoft EU:C:2012:407, paras. 43-5.


599 Ibid., p. 1557.
every Member State in which digital content is disseminated, by way of
download, streaming or in any other way. Without a license for a given
territory the rightsholder(s) can object to any dissemination of content, file
injunctions and thereby cripple the digital single market significantly. In
addition, territoriality also stands at the end of the digital exploitation
chain because any resale within Member States and across the borders of
Member States relies on the principle of Community (better EU) exhaus-
tion of rights. However, the inconsistent application of the principle by
national courts and the limited scope of *UsedSoft v. Oracle* have created
legal uncertainty. The current situation does not necessarily contribute to a
reliable legal environment that would foster business models that create
offers for the entire EU – which would also mean that such offers are
accessible throughout the entire territory of the Union. It also prevents the
emergence of secondary markets that could extend the cross-border
exploitation chain beyond the first sale of digital content.

1. Territoriality is there to stay

The “Digital Agenda” has clearly expressed the intention to do away with
the detrimental effects of territoriality by creating mechanisms (e.g. multi-
territorial licenses) that alleviate the consequences of a strict application of
the territoriality principle to copyright protected works and other protected
subject-matter. After the recent judgments of the CJEU and those of
national courts, the concept of exhaustion for digital content seems
unstable and is implicitly or explicitly questioned by the courts on
different grounds and with differing results. The limitation that still keeps
the chains of territoriality locked is the legal framework beyond which the
judges did not dare to go, and it can be rightfully argued should not have
wandered.600 But neither the CJEU, nor the Commission have questioned
the foundations of the principle itself.601 It has been confirmed in the case-

600 It can also be argued that courts when tearing down the barriers of, in so far only
national, first sale rules, have been very creative in interpreting the applicable
legal provisions and their motivation has been driven more by purpose than by
legal doctrine.

601 European Commission, , p. 3: The consultation covered a variety of issues
including “the territoriality of copyright and possible ways to overcome territori-
ality” (emphasis added).
law of the Court, not only in relation to the exhaustion doctrine, but also in cases relating to jurisdiction over disputes involving copyright and other IPRs. Although academics in Europe as well as in the US have predicted the fall of the principle, it is more likely here to stay and further play a determining role in the common market. Even for trademarks, designs and patents, for which European unitary titles have been introduced, national titles continue to exist next to unitary IPRs. And beyond the territory of the EU unitary IPRs are territorially limited to the Member States.

602 See e.g. CJEU, Judgment in Case C-170/12, Peter Pinckney v KDG Mediatech AG, EU:C:2013:635 and CJEU, Judgment in Case C-441/13, Pez Hejduk v EnergieAgentur.NRW GmbH, EU:C:2015:28, the CJEU limited the jurisdiction of courts in which a website is accessible to the damage caused by copyright infringement in that country, see also Eleonora Rosati, “‘Intention to target’ is dead, long live ‘intention to target’? A Kat reflects”, 22 October 2013 (The IPKat), available at: http://ipkitten.blogspot.co.uk/2013/10/intention-to-target-is-dead-long-live.html (accessed: 10.01.2016) and Eleonora Rosati, “BREAKING NEWS: CJEU confirms accessibility criterion to determine jurisdiction in online copyright infringement cases”, 22.01.2015 (The IPKat), available at: http://ipkitten.blogspot.com/2015/01/breaking-news-cjeu-confirms.html (accessed: 10.01.2016). In the former case AG Jääskinen had rejected the admissibility of the case and suggested to apply a targeting test in order to determine jurisdiction (AG Jääskinen, Opinion in C-170/12, Peter Pinckney v KDG Mediatech AG, EU:C:2013:400), the latter AG Cruz Villalón suggested to grant jurisdiction to court where the causal event for the infringement took place (AG Cruz Villalón, Opinion in Case C-441/13, Pez Hejduk v EnergieAgentur.NRW GmbH, EU:C:2014:2212).

603 Already after FAPL/Murphy Peifer stated: “The principle of territoriality in the EU is swaying. When will it fall?” (orig: “Das Territorialitätsprinzip wan

2. Exhaustion off-balance

Exhaustion has been the indirect motor of copyright harmonization. It is currently unlikely that it will continue to play this role in the digital common market.\textsuperscript{605} Most relevant cases handed down by the CJEU that revolutionized the free movement of goods which are protected by copyright dealt with exhaustion. It has been argued that by taking digital content out of the scope of application of the exhaustion principle, the absence of the factor that has driven copyright harmonization for the last decades will be felt.\textsuperscript{606} Whether this will be in the form of a decrease in speed of copyright harmonization in the EU or a shift in focus from the free movement of goods to, e.g., competition law under Articles 101 and 102 \textit{TFEU}, is still unclear. Maybe it will even be the legislature that will step up to the plate and develop a visionary and flexible framework for copyright – and its management in the (digital) single market.

In the meantime, it appears, that exhaustion will continue to have enabling effects on goods. For digital files the distinction between exhaustible content and non-exhaustible content is nebulous at best.

a. Physical goods

Exhaustion applies to the distribution right and therefore certainly to physical goods. More precisely, it applies to the particular goods that have been marketed with the consent of the rightsholder. In \textit{Art & Allposters International}\textsuperscript{607} the Court reiterated the established formula that “exhaustion of

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{605} In this sense already in 2006, Peifer, “Das Territorialitätsprinzip im Europäischen Gemeinschaftsrecht vor dem Hintergrund der technischen Entwicklungen”, \textit{ZUM} (2006), p. 5.
\end{itemize}
\end{footnotesize}
the distribution right applies to the tangible object into which a protected work or its copy is incorporated if it has been placed onto the market with the copyright holder's consent.\textsuperscript{608} Traditional distribution of tangible protected works and their resale continues to be subject to exhaustion, which means that legally marketed physical data carriers incorporating protected works can circulate freely within the EU. If, however, a change of medium occurs, the right of distribution applies to the new medium and exhaustion does not provide relief.\textsuperscript{609}

b. Digital files

The situation for digital files is not that clear. The judgment in \textit{Art & Allposters International} was handed down two days after the Dutch second instance court in the \textit{Tom Kabinet} case had postponed the question on digital exhaustion for the next instance, although at the time of the Dutch ruling the Opinion of AG Cruz Villalón in \textit{Art & Allposters International} had already been published.\textsuperscript{610}

The CJEU has opened the door for exhaustion for specific types of digital content. At present, however, exhaustion may be applied only to computer software under contractual arrangements that resemble a sale. Why exhaustion should apply to software and not to other types of digital content is not apparent from a functional perspective; moreover, the result is unsatisfactory in that it grants a privilege for users of computer programs at the expense of users of other types of content that is sold or licensed through the Internet. It is currently unlikely, given the reactions of national courts, in particular in Germany, as well as the judgment in \textit{Art & Allposters International}, that rightsholders must fear that their digital products are being resold.\textsuperscript{611} Even if a digital file is put on the digital market with the consent of the rightsholder this does not mean that this file, or any copies thereof, can circulate freely within the EU.

\begin{footnotes}
\item[608] CJEU, Judgment in \textit{Art & Allposters International} EU:C:2015:27, para. 40.
\item[610] AG Cruz Villalón, Opinion in Case C-419/13, \textit{Art & Allposters International BV v Stichting Pictoright}, EU:C:2014:2214.
\item[611] Cf. also Rosati, “CJEU says that copyright exhaustion only applies to the tangible support of a work”, \textit{JIPLP} (2015), p. 330.
\end{footnotes}
Rulings of the CJEU suggest though, in the absence of any explicit evidence to the contrary, that it might possibly open the door still a bit further to the effect that for selected forms of (digital) content an exhaustion could be allowed while other forms would remain excluded from the liberating effect of exhaustion. Quite remarkably, the jurisprudence of the Luxembourg Court has already given at least certain indications for criteria that might serve to delineate both groups in UsedSoft v. Oracle.

For the future, Senftleben argues that, in the interpretation of the CJEU, the exclusion of a watertight and express digital non-exhaustion provision in the Software Directive is not to be seen as an exception to the otherwise accepted principle that exhaustion does not apply to digital content. Quite to the contrary he argues that the non-applicability of exhaustion under the InfoSoc Directive and the Database Directive are the exceptions to the otherwise applicable principle of the free movement of goods.\footnote{Senftleben, “Die Fortschreibung des urheberrechtlichen Erschöpfungsgrundsatzes im digitalen Umfeld. Die UsedSoft-Entscheidung des EuGH: Sündenfall oder Befreiungsschlag?”, NJW (2014), p. 2926.} This would mean that the inexhaustibility of the distribution right for digital content reflects the intention of the EU legislative and could only be abolished by legislative intervention. Accordingly, the OLG Hamm\footnote{OLG Hamm, Urteil vom 15.05.2014, Az. 22 U 60/13.} was correct and the Dutch first instance court in Tom Kabine\footnote{Rechtbank Amsterdam 21 July 2014, NL:RBAMS:2014:4360.} had erred in its ruling that found the resale of e-books permissible under Dutch national laws as interpreted in the light of the provisions of the InfoSoc Directive.

This interpretation would constitute an upset for users because it would prohibit the resale of digital content other than software and databases under EU law. The very wide scope of application of the InfoSoc Directive, which covers works in general, and is only restricted in its prohibition of exhaustion by vertical directives with a very specific and limited scope of protection, would take the majority of digital content (music, films, e-books) out of the scope of application of exhaustion under Article 4. Reconsidering Senftleben’s argument that the InfoSoc Directive constitutes an exception with regard to exhaustion it could be argued that, quantitatively, this cannot be an exception, because probably the majority of content would rather fall within the scope of application of the InfoSoc Directive than in one of the lex specialis instruments. It would indeed be
rather unusual to consider a provision of a horizontal harmonization directive an exception to an otherwise established rule.

Also, certain products, such as computer games, which have a strong software component but also integrate and create artistic works with an original element in the meaning of the *InfoSoc Directive* as interpreted by the CJEU, could pose problems with respect to the applicable law. Should computer games be considered solely under the *Software Directive*, due to the originality of their underlying source code, or should they be considered as hybrid works under the *InfoSoc Directive* due to their original nature which includes artistic expressions and narratives. In *Nintendo v. PC Box* the Court found that computer games fall within the scope of application of the *InfoSoc Directive* because “videogames [...] constitute complex matter comprising not only a computer program but also graphic and sound elements, which, although encrypted in computer language, have a unique creative value which cannot be reduced to that encryption. In so far as the parts of a videogame, in this case, the graphic and sound elements, are part of its originality, they are protected, together with the entire work, by copyright in the context of the system established by Directive 2001/29.”

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617 CJEU, in Case C-355/12, *Nintendo Co. Ltd and Others v PC Box Srl and 9Net Srl*, EU:C:2014:25, para. 23. Critical on the ruling in *Nintendo v. PC Box* as regards the application of the *InfoSoc Directive* instead of the *Software Directive* to video games: Marcella Favale, “A Wii too stretched? The ECJ extends to game consoles the protection of DRM – on tough conditions”, *E.I.P.R.* (2015), 101-106, pp 105-6. The author argues that it is at least disputable, in the absence of a thorough discussion on the categorization of videogames, whether they fall within the scope of application of either directive. AG Sharpston had addressed the issue in her Opinion arguing that the *Software Directive* is only applicable if the protected subject-matter falls entirely within the scope of application of the Directive, videogames, however, contain elements that go beyond the scope of protection of the *Software Directive* and the *InfoSoc Directive* would, therefore, be applicable, AG Sharpston, Opinion in Case C-355/12, *Nintendo Co. Ltd and Others v PC Box Srl and 9Net Srl*, EU:C:2013:581, para 34. A preliminary reference pending during the proceedings in *Nintendo v. PC Box*, which dealt explicitly with the application of the Software and the *InfoSoc Directive* to video games, has been withdrawn (CJEU, Order in Case C-458/13, *Andreas Grund als Verwalter in dem Insolvenzverfahren über das Vermögen der SR-Tronic GmbH u. a. v Nintendo Co.*
c. It is services, not sales!

The *InfoSoc Directive* exempts services from exhaustion. It is worth recalling here the exact wording of Recital 29: “The question of exhaustion does not arise in the case of services and on-line services in particular. This also applies with regard to a material copy of a work or other subject-matter made by a user of such a service with the consent of the rightholder.” In other words, unless provided by law, protected works that are rendered as services or in the framework of services cannot be resold.

The question that arises here is whether a sale under the *Software Directive* is the same as a sale under the *InfoSoc Directive* – and whether a service under the *Software Directive* is the same as a service under the *Software Directive*, or the *VAT Directive*. Regarding the latter, the CJEU has held in 2015 that the supply of e-books constitutes a service within the meaning of the Directive. In early 2015, AG Bot argued in *Reha Ltd, Nintendo of America Inc.*, EU:C:2014:589, see also AG Sharpston, Opinion in *Nintendo v PC Box* EU:C:2013:581, para. 37 (see fn. 18) and also Favale, “A Wii too stretched? The ECJ extends to game consoles the protection of DRM – on tough conditions”, *E.I.P.R.* (2015), p. 105.

618 The distinction between sale and services is crucial to the understanding of digital exhaustion and the reasons why it (probably) does not apply to services of digital content. The CJEU has held, in interpreting Article 96 and 98 of the *VAT Directive* (Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ L 347, 11.12.2006, p. 1-118 (*VAT Directive*)), that a reduced VAT rate pursuant to Article 98(2) of that Directive, as an exception to the generally applicable rate under Article 96, does not apply to an ‘electronically supplied service’ within the meaning of Article 56(k) of that Directive. Electronic books, the Court argued, are supplied as an electronically provided service, see CJEU, Judgment in Case C-479/13, *European Commission v French Republic*, EU:C:2015:141, paras. 23-34 (on this case see Eleonora Rosati, “Can a decision on the VAT Directive mean that there is no general digital exhaustion under EU copyright?”), 06.03.2015 (The IPKat), available at: http://ipkitten.blogspot.com/2015/03/can-decision-on-vat-directive-mean-that.html (accessed: 10.01.2016). This was also confirmed by a judgment rendered the same day in which the Court relied on Article 7(1) of Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax, OJ L 77, 23.3.2011, p. 1–22, which states that electronic services are “services which are delivered over the Internet or an electronic network and the nature of which renders their supply essentially automated and involving minimal human intervention, and impossible to ensure in the absence of information technology”, CJEU, Judgment in Case C-502/13, *European Commission v Grand Duchy of Luxembourg*, EU:C:2015:143, para. 43,
Training that the notion of communication to the public “must be defined concluded in para. 44 by stating that “the supply of digitised content of books constitutes such a service”. However, this does not necessarily mean that the concept of ‘service’ of the VAT Directive has any implications on the term ‘service’ in the InfoSoc Directive. The Court merely stated that “electronically supplied services, within the meaning of the VAT Directive, are to include ‘services which are delivered over the Internet or an electronic network’ (emphasis added), Ibid., para. 43. The CJEU has stated in CJEU, Judgment in UsedSoft EU:C:2012:407, para. 40: “It follows that that term must be regarded, for the purposes of applying the directive, as designating an autonomous concept of European Union law, which must be interpreted in a uniform manner throughout the territory of the European Union” (emphasis added, see also CJEU, Judgment in Case C-510/10, DR and TV2 Danmark A/S v NCB - Nordisk Copyright Bureau, EU:C:2012:244, para. 34). The interpretation of the respective terms are, therefore, limited to the scope of application of the respective directive. It could be argued that the very basic notion of a sale should have a uniform meaning in the EU with horizontal effect through primary and secondary law, however, a reading of UsedSoft does not support this strict interpretation. In fact, there are good reasons to distinguish the sale of software and the sale of electronic music; and there are reasons to treat both ‘sales’ the same way. If the judgment were to be interpreted that a uniform concept of ‘sale’ existed in EU law in general then the term ‘service’ should also be subject to an autonomous interpretation under EU law. (Arguing similarly, advocating for a transversal meaning of the term “rightholder”, Anita Huss-Ekerhult, “IFRRO Comments regarding the European Copyright Society’s Opinion on Case C-572/13, Hewlett-Packard Belgium v. Reprobel”, 29.09.2015 (Organisations, International Federation of Reproduction Rights), available at: http://ifrro.org/sites/default/files/ifrro_response_to_european_copyright_society_opinion_29sept2015.pdf (accessed: 10.01.2016), p. 3) Still, in this case one could argue that an ‘electronically supplied service’ is different from a normal service; this argument would, however, be hard to defend against the notion of an extensive autonomous interpretation. But there is also a good argument to make based on the object and purpose of the reduced VAT rate under the VAT Directive, which is to enable Member States to apply a reduced VAT rate to “labour-intensive services” (Recital 33). A look into Annex III of the Directive shows that Member States may derogate from the standard VAT rate in relation to, amongst others, the “supply of services by writers, composers and performing artists, or of the royalties due to them”. Although e-books are not sold by artists directly, e-book stores could be seen as mere intermediaries to provide a centralized supply for such books and the rationale to incentivize the provision of “labour-intensive services”. More importantly, whether or not the VAT rate is reduced should not have implications on the right of users to resell their digital content, which they lawfully acquire. In other words, the meaning of the term ‘electronic services’ should be limited to the VAT Directive, and the autonomous interpretation of the term be confined to that Directive. This interpretation should not be used to
in accordance with the same criteria” for the purposes of the InfoSoc Directive and the Rental and Lending Right Directive.\textsuperscript{619} The subsequent question is whether this could also have implications on the term ‘service’ under the InfoSoc Directive. But the meaning of ‘service’ under the VAT Directive should be limited to that Directive, because the reasons to grant tax reduction to certain services are fundamentally different from possible reasons to exclude e-books from the application of the exhaustion Doctrine under Article 4(2) InfoSoc Directive. Whereas the VAT Directive grants partial tax relief to certain “labour-intensive services” including “services by writers, composers and performing artists”, the InfoSoc Directive excludes services in general, and in particular online services from the scope of application of Article 4(2). However, the Directive does not define what services are, and whether the sale of e-books constitutes a service or not.

In UsedSoft v Oracle the CJEU has interpreted the concept of sale and the concept of services \textit{ex negativo}. But this definition bears certain uncertainties. The two defining elements of a sale are, according to the judgment in UsedSoft v Oracle – assuming for the purpose of this argument that the concept of sale is the same under the InfoSoc Directive and the Software Directive – an unlimited right to use and a payment or a fee. Whereas the second element is relatively clear, the first element, the unlimited right to use, is still open to interpretation. One question is whether, for example, a 99-year license would amount to an unlimited right to use; or if 25 years would be sufficient. Considering developments in technology so far, it is unlikely that a computer program that has been sold in 2015 will still be used in 2040.\textsuperscript{620} The resale of mp3 files and other digital formats that might be outdated in the future could equally prevent the resale of content. The realization of economic benefits from resale could in any case be limited to the 10-or-so years succeeding the original

\textsuperscript{619} AG Bot, Opinion in Case C-117/15, Reha Training Gesellschaft für Sport- und Unfallrehabilitation mbH v Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte (GEMA), EU:C:2016:109, paras. 25-35.

\textsuperscript{620} See also Longdin et al., “Sale versus offline and online: can competition law bridge the doctrinal gap?”, \textit{Int. J. L. \\& Info. Tech.} (2014), p. 317.
marketing. Long or unlimited licenses could effectively resemble an unlimited right to use, but in reality the right to use would be limited to a certain duration. In combination with locked-in content and terminated software support a ‘sale’ in the long run might end up as a useless, unnecessary long license.

3. Coping with territoriality, and (maybe) rebalancing exhaustion

Most commentators suspect that the industry will quickly adapt to the limitations of the exhaustion principle by changing their business models. Instead of offering their software for a one-off payment, they will, it is assumed and predicted – the proof is still outstanding – change to models under which the customer is allowed to use a software for an annual subscription fee. This is commonly referred to as ‘software as a service’. For other types of content, e.g. music and films, streaming models already serve to avoid creating copies on user devices, which could give rise to exhaustion. The success of subscription services for digital music and audiovisual content has put ‘traditional’ digital distribution systems under pressure, but they still exist. The notion of owning music, even if only as a file on an electronic device has not perished yet and consumers are willing to pay a price for their digital music collection.

The principle of territoriality will, at least for a while, remain the defining element for a multi-territorial market for protected works and its effects in the digital realms are much more concrete than on markets for physical goods. In order to open up new economic opportunities and give access to users to a variety of digital content. The European legislator can

621 On could reverse the argument that digital files are not subject to decay and posit that tangible media, such as first edition hardcover books and special editions of CDs gain in value over time, whereas digital content, because of its infinite reproducibility will constantly reduce in value. The ability to tough, display and cherish a tangible item makes secondary markets for tangible works significantly more attractive, if only for a small number of aficionados.
play a supporting and enabling role; it has indeed already expressed its intention to assume such a role, and it should do so. This, however, requires a coherent approach in relation, first, to territoriality and, second, to exhaustion. For example, the distinction between e-books and software for the purpose of resale should be reconsidered in its current interpretation. Upholding this distinction on economic arguments does not make much sense, neither does it make sense to argue that online transfers of files increase the chance that copies are retained by the seller, which is more a question of effort and quality of the tracking of the reproduction, but no so much a question of economic effect.

4. Is territoriality upsetting the digital common market?

Territoriality does not serve the purpose of balancing the rights of rightsholders and users. It is rather an effect of the nature of intellectual property as a right granted by states the sovereignty of which is limited to their territory. Exhaustion is an expression of the balance that is struck between the interests of rightsholders and users. By interpreting the scope and application of exhaustion courts can shift this balance.

a. The ‘secondary’ market

In UsedSoft v. Oracle the CJEU corrected the balance in favor of users against the express wording of licensing terms, and, therefore, against the express will of the rightsholder. So far, national courts have denied users the advantages of exhaustion for other types of content than software under the InfoSoc Directive – the Dutch courts are still undecided. The tendency in the jurisprudence of the CJEU seems to point in the direction that exhaustion for digital content is only applicable to computer programs, and other forms of digital media do not profit from the liberating effect of exhaustion. Indeed, the wording of the Directive is too strict and does not provide the normative tools that are necessary to reach a

UsedSoft-like result in a non-software scenario. For the moment, the legal framework takes a restrictive approach on exhaustion for digital goods.

Maintaining a restrictive approach on exhaustion does not only limit the free movement of goods – albeit their digital, and therefore intangible nature – but it also denies certain privileges to users of digital content. The balance could be re-struck if the prices for digital content that is prevented from freely moving away from its first acquirer would be set at significantly lower levels than their tangible equivalents. Users would acquire a ‘right to use’ that is significantly limited, as compared to ownership, at a significantly lower price. The user would get less out of the deal, as would the rightsholder; the balance of interests would simply be re-struck at a lower level at both ends of the deal. Upholding the distinction between transferable media and non-transferable files based solely on the fact that digital files and their tangible counterparts are not functionally equivalent, as the German courts have argued, seems unreasonable. Users who acquire rights that are to a large extent comparable should enjoy comparable rights with regards to transferring these rights to third parties. These rights should not be curtailed based on an argument that digital content is more likely to be illegally replicated. After all, the resale of printed media was not prohibited after the introduction of inexpensive home-printers and scanners. As a general rule, technological developments should not serve as an excuse to limit users rights, in particular if such technological developments have also opened new markets for rightsholders.627 The interests of rightsholders should rather be secured by better rights enforcement mechanisms or by the mechanisms of the market.

627 See also the Oral Statement of John Ossenmacher, founder and CEO of ReDigi, Inc. before the House Subcommittee on Courts, Intellectual Property, and the Internet Hearing on “First Sale Under Title 17”, June 2, 2014, New York, arguing that exhaustion should apply to digital content in the same way as it does for tangible goods. This, he argues is what consumers expect and this is what would constitute one side of a fair balance. Secondary markets do also exist for tangible media and would not harm the original distribution of content. Ossenmacher sees the beginning of the copyright imbalance with the advent of digital technologies and links this to a loss of resale value of billions of dollars to the detriment of consumers. As a result he considers the current US framework under the first sale doctrine outdated. See ReDigi, “ReDigi CEO, John Ossenmacher on Digital First Sale: Report for Congress”, 29 May 2014 (ReDigi), available at: http://newsroom.redigi.com/redigi-ceo-john-ossenmacher-on-digital-first-sale-report-for-congress/ (accessed: 03.12.2015).
b. The ‘primary’ market – establishment and collisions

But the problems of territoriality go much further. So far, the discussion of territoriality and exhaustion has focused on the secondary market for ‘used’ digital content. This aspect is important with a view to increasing the circulation of content. But territoriality also affects the primary markets for digital content. In this study, solutions to license content are discussed. Such solutions require licenses – explicit, implicit or statutory – for digital content that are currently still mainly granted as licenses for specific territories. As a result, markets are fragmented and roll-outs of online business models that are based on digital content are hampered by territorial restrictions. This has created a situation in which some offers are available in some Member States and unavailable in others.

If the re-sale of digital content were to be allowed and licensing remained territorial, would the re-sale of digital content be permitted in such countries in which the original marketing had not been consented to by the rightsholders? The jurisprudence of the CJEU regarding physical goods ‘innocently’ applied to digital goods would make the re-sale of digital music and films possible. But the same arguments which were advanced against the re-sale within the same territories could, in slightly altered form, be advanced against the re-sale across borders. Existing secondary markets could prevent the establishment of primary markets, not only weakening them but making them economically so unattractive that rightsholders would refuse to grant licenses in the first place. Such secondary market would develop almost in parallel if websites that offer used content can offer this content virtually seconds after it has been marketed in another Member State. Weak enforcement mechanisms in some Member States are another argument and the fear of piracy on secondary markets will certainly not serve to encourage stakeholders to support cross-border exhaustion of digital files.

However, it will be difficult to contain used content within the borders of particular Member States for practical reasons. Currently, the two contentious re-sale platforms Tom Kabinet and ReDigi also seem to be accessible from abroad. Although the Tom Kabinet website is only available in Dutch, a foreign user can easily create a user profile and download used e-books. The offer is predominantly available for purchases of Dutch works, with a few English books. ReDigi is currently running a beta test phase with membership only on invitation. There are still practical obstacles that prevent the establishment of pan-European online services for
digital content. These problems do relate to copyright, but also, which should not be forgotten, conscious business choices of service operators.

VIII. Striking the balance

“[C]opyright law’s balance between consumer and creator rights has been structured, in part, around the particular tangible copy.”\(^{(628)}\) Perzanowski and Schultz are not the first to state this, and will most likely not be the last. The emergence of digital technology has disturbed this balance. The inapplicability of ‘analog’ rules to digital content has detrimental effects on users who cannot dispose of their ‘property’, which they have lawfully acquired. Moreover, what many users believe to be their lawfully acquired property might turn out to be nothing else than a right to use with no further value. The balancing effect that exhaustion played in mitigating exclusive rights and user interests has lessened in the digital world and rightsholders are favored because they can prevent the circulation of their works even after the first marketing by foreclosing secondary markets. New ‘original’ copies replace reproductions that would constitute the elements on a potential secondary market. Rightsholders can extend the economic productiveness of a single copy beyond the first marketing. The specific subject-matter of copyright for digital copies and physical copies is not the same anymore.

But new business models that build on digital content have facilitated access to a wider spectrum of music and films, which is beneficial for users. These offers are often cheaper in comparison to the same amount of purchased music. Also it would be physically burdensome to carry a collection of CDs across borders, access to the same content of a given online offer is not guaranteed, or often available only against additional fees. However, access to certain online-offers is based on subscription or is subject to a license agreement and users have to identify themselves, at least with an email address or a Facebook profile, provide personal information and their consumption behaviors are recorded and analyzed so as to allow more effective targeted advertising, music and film suggestions and many other things. A physical sale, or even just visiting a website,
does not enable a seller to accumulate such data as easily as collecting it through digital sales. The license agreements to which users agree when subscribing to such a service are less transparent than the ordinary sales contracts for a CD or a DVD, and ownership of the content a user downloads or streams is not transferred but remains with the rightsholders.

It can be argued that without the exemption of such services from the exhaustion doctrine, users would not be able to enjoy a broad digital offer of music and films, and at the same time the trade-off in ownership rights and retention of personal data would not be to the user’s disadvantage. But these are indirect benefits and disadvantages, and they should not be taken into consideration when analyzing the balance within a copyright system; mitigation of disadvantages by new business models does not help to re-establish the copyright-internal balance of interests between rightsholders and users. Or, argued differently, business models should not substitute legal solutions for the balance of interests between the rights of rightsholders and those of users.

In the EU, the semi-ambiguous wording of Recital 29 InfoSoc Directive and the limited scope of the UsedSoft v. Oracle judgment have created legal uncertainty as to the extent of the current imbalance. In the analog world, territoriality and exhaustion had achieved a just balance between the interests involved. In order to regain such equilibrium in the digital age, a number of clarifications are necessary, whereby legislative clarifications would be preferable over more area-specific jurisprudence, from which comprehensive answers to all issues of territoriality and exhaustion can hardly be expected.

1. Striking the balance for rightsholders

Rightsholders have mainly economic interests and nothing else is at stake under the exhaustion principle. The less users can benefit from exhaustion and resell their purchased digital items, the more likely rightsholders are to create profits on the primary markets – at least in theory. The issue boils down to the specific subject-matter of copyright as developed by the CJEU, which allows rightsholders to reap appropriate benefits from the exploitation of their protected subject-matter. In FAPL/Murphy the Court has stated that copyright does not allow a rightsholder to maximize his profit by relying on exclusive rights, this would not be part of the specific subject-matter of copyright. Rightsholders can, therefore, expect a reason-
able return for their (digital) products. Over-asserting exclusive rights carries the profits earned from selling digital music beyond the limits of reasonableness. If individual persons would have to purchase a ‘new’ digital version, because exclusive rights prevent secondary markets from developing, this would unbalance copyright. Of course, there are reasons to be found in the nature of digital content, which have been mentioned above,\textsuperscript{629} that would justify a restriction of the exhaustion principle, but this should, in order to preserve the interests of rightsholders, not result in an outright rejection of the principle, but rather take the shape of effective control mechanisms. Making sure that rightsholders receive appropriate remuneration for their products can be achieved by employing effective TPMs and strengthening enforcement, it is certainly not necessary to preclude secondary markets. Tom Kabinet has demonstrated that TPMs offer solutions for the uncertain destiny of digital files after they have been marketed for the first time, they can safeguard that files are not infinitely reproduced and resold multiple times.\textsuperscript{630} A non-application of exhaustion to digital files and strict TPMs would punish users twice and fortify rightsholder interests beyond what is required by the specific subject-matter of copyright.

2. Striking the balance for users

The interests of users would take a severe blow if exhaustion did not apply to digital content other than software. Users would have less control over their digital assets and subscription services would loose their benefit once they cease to exist, or the subscription expires. One can only imagine the frustration of an individual user, having paid a subscription fee for an online streaming service when that service ceases its activities and carefully maintained playlists and music libraries disappear; this cannot happen if the user has the right to ‘own’ digital music. It is true that digital

\textsuperscript{630} Cf. Senftleben, “Die Fortschreibung des urheberrechtlichen Erschöpfungsgrundsatzes im digitalen Umfeld. Die UsedSoft-Entscheidung des EuGH: Sündenfall oder Befreiungsschlag?”, \textit{NJW} (2014), p. 2926, the reproductive step is irrelevant, as long as after the reproduction the same number of copies exist as before, so Senftlebens interpretation of the CJEU in \textit{UsedSoft v. Oracle}.

\url{https://doi.org/10.5771/9783845278759}
offers that do not transfer ownership of media to users have other advantages that increase the utility for users, such as easy access, management of huge libraries and access to a great number of individual works. But if users purchase individual e-books or songs for a price roughly in the dimension of that of a work incorporated in a tangible medium, the utility of a tangible item increases significantly.

Another limitation of digital offers which are accessible online is their limited portability across systems and geographical borders due to territorial licensing and geo-blocking.631 Whereas a tangible item can easily be stored “in the seat pocket in front of you”, which is to say it can be taken from one country to another.632

If the InfoSoc Directive denies exhaustion for digital content just because it is considered as a service, but the price structures for digital files continue to resemble those of tangible items, it is hard to agree to that position. In such a case, in order to maintain an adequate balance between rightsholders and users, exhaustion for digital content should be permitted, supplemented by effective TPMs that safeguard that digital files have the same qualities for the purposes of ownership and resale as is the case for tangible goods. The fact that such items do not deteriorate in quality and offer additional functions (search, annotations, increase of font size) should not be the decisive argument. They could easily be rebutted with arguments that appeal to bibliophiles who prefer printed books over e-books – in the end it is probably a matter of taste.

Non-exhaustion for software would probably be more acceptable for most users than non-exhaustion for digital music and e-books. In the end, given the speed of technological development, it is less likely that a particular software will still be used in 25 years – and will then have any resale value for that purpose – than a particular song will be listened to and a particular work of literature will still find readers. The existence of

631 Slight relief can be expected when the proposed directive on geo-blocking (or more positively formulated: “cross-border portability of online content services”) passes through the legislature: European Commission, COM(2015) 627 final.

632 An argument of practicability could be made here, in the sense that it is easier to store a digital library with several hundreds or thousands of books on a storage medium and transport it to another destination, than to relocate a ‘real’ library with leather-bound, hardcover and paperback volumes within the EU; the latter is certainly more burdensome and expensive than the former, whether this should be a consideration in the context of user interests is another question, which the author is hesitant to answer in the affirmative.
second-hand music stores as well as antique book stores gives ample evidence to support this observation.

In terms of territorial effects and the mitigating exhaustion factor, users of digital content seem to be on the lighter side of the scale. In the interest of a healthy copyright system, the balance should be re-adjusted. The following, and final section of this subchapter will summarize in which areas this delicate balance should be re-established.

3. Rebalancing exhaustion

Exhaustion has many advantages in the ‘tangible’ world. These advantages should not be lost on the digital single market. Exhaustion enables access to works that are not available anymore on primary markets by legalizing their resale on secondary markets. It also reduces the prices and creates competition between primary and secondary markets. It incentivizes creative production and encourages authors to create new works for the primary markets. Moreover, and in particular, it grants users privacy because they can resell their possessions without authorization from the rightsholder, and they can purchase items without the rightsholder knowing who the purchaser is. Exhaustion also promotes innovation and creativity by users who have access to works, which they can alter and transform. As a further side-effect, without the requirement to ask for authorization, transaction costs are reduced and, as a result, the prices on the secondary markets fall. Finally, exhaustion also facilitates platform competition, by enabling users to get rid of media linked to a particular technology and switch to newer technologies.633

In the case-law of the CJEU, exhaustion has mainly been justified with the functioning of the single market,634 but technological developments should force us to think deeper into the specific subject-matter of copyright and what limitations to this particular IPR rightsholders must tolerate.

A big impediment to the single market, also in its digital form, is legal uncertainty. Users as well as rightsholders should know what they can do with their digital content and what they can expect others to do with that

634 CJEU, Judgment in Deutsche Grammophon EU:C:1971:59, paras. 7 and 12.
content. This legal certainty should reflect a fair balance between users and rightsholders. Exhaustion as applied to physical goods reflects such a balance, which is rather stable and time-tested. Lessons from physical exhaustion can serve as an orientation how to strike the balance in relation to digital content.

Three considerations should serve as guidelines in order to recalibrate digital exhaustion. First, users should receive more rights the more they pay for their content, and equal rights if they pay the same price for digital and analog works. Second, the risk of publishing content should be borne by the rightsholder. Third, secondary markets should not be precluded.

a. Value for money

The specific subject-matter constitutes the legal border for exhaustion. A rightsholder can be prevented from exercising his IPR as long as the specific subject-matter of a particular right is preserved. The specific subject-matter for copyright is to ensure that the moral and economic rights of rightsholders are preserved. For the purposes of exhaustion, the moral rights can be neglected, what is important are the economic rights. In this regard, the specific subject-matter of copyright is to commercially exploit works and other protected subject-matter, which does not mean that a rightsholder has a right to realize the highest possible profit, but this right should be limited to appropriate remuneration.

In UsedSoft the Court found by way of teleological interpretation that software producers cannot call a sale a license, because it would have the effect of divesting exhaustion of all of its scope. As the Court dealt with digital content in the form of computer software it must have been convinced that there is some room for digital exhaustion in European copyright law. Although the judgment did not use the term ‘balance’ even once, the wording of the Grand Chamber judgment can be read as an appeal to copyright-reason and for a readjustment of the balance within the copyright system. And what is true for computer programs should also

635 CJEU, Judgment in Phil Collins EU:C:1993:847, para. 20.
be true for other digital content, disregarding the corset of Recital 29 InfoSoc Directive. By calling a sale a license and asking for a price that would be appropriate for a sale, rightsholders would be able to maximize their profits, beyond appropriate remuneration.

The balance should be defined by the rights users acquire by sale or license and the price the rightholder receives for the sale or the service. The more rights users acquire the higher the price for the transaction could be set; the lower the price, the less rights users can expect to be granted for the use of a particular work. With regard to the right to resell digital content, the price the first acquirer pays could be an indicative of whether a user acquired the right to resell that item. Other factors must, of course, be taken into consideration as well, e.g. the wording and the provisions of the contract. It can also be argued that digital content that is not functional equivalent to the corresponding tangible item, but offers a higher degree of functionality could be priced higher than the tangible item, even though the digital version cannot be resold. Digitization should not be a justification to increase prices relative to the utility of digital content because reproduction of digital content is easier and can lead to piracy. The value of the utility of works in tangible and digital form should, as a general rule, be reflected in the amount of remuneration paid.

For books the prices for printed books and e-books vary significantly, based on the type of genre, the publication date and the publishing house: on 5 April 2015 the top three books on the New York Times fiction and non-fiction list were priced between € 27,56 and € 14,15 for hardcover versions in the German amazon store. The same books ranked between € 21,90 and € 8,10 for paperback editions and between € 10,99 and € 5,84 for kindle e-books. The most expensive paperback was even more expensive than the respective hardcover edition, but two kindle e-books were priced higher than their paperback editions. The differences between the hardcover and the kindle edition ranged between approx. €15 to a few cents. For music the situation is much clearer, digital downloads are significantly cheaper than pressed CDs. The US Billboard Charts on the same date featured Kendrick Lamar’s “To Pimp A Butterfly” (€ 18,99 for CD/€ 9,99 for iTunes Download, OST: “Empire: Original Soundtrack From Season 1” (€ 17,06/n.a.) and Modest Mouse’s “Strangers To Ourselves” (€ 18,98/ 10,99) at top three places. The prices for downloaded albums were significantly lower on the iTunes store, remarkably, amazons offer for the last album offered a free autorip, by which the songs were automatically stored in amazons cloud locker.
b. Distribution of risk

The risk of unauthorized reproduction has increased with new technologies, and especially with digital technologies. However, the very same technologies have decreased prices for production and distribution of many forms of digital content and increased marketing opportunities for rightsholders. Increased risks and increased infringements have resulted in stronger enforcement efforts as well as the use of TPMs to prevent infringements.

TPMs that are applied to physical data carriers, such as DVDs and CDs do prevent unauthorized acts of reproduction but they do not prevent the resale of the physical data carrier. In other words: TPMs that are applied to physical media preempt an inflationary amount of pirated reproductions of protected works, but they do not foreclose secondary markets. TPMs applied to digital content should therefore, in analogy to physical media, rather be used to enable the marketing of digital content. Rightsholders can be encouraged to make their content available if they can be relatively certain that their works will not be subject to excessive unauthorized file-sharing. TPMs will provide the guarantee that only a certain number of legal reproductions exists, which corresponds to the total number of reproductions made or authorized by the rightsholder. The circumvention of TPMs cannot be excluded, and it is utopian to believe that they will ever bring an end to amateur or professional piracy. Nevertheless, the battle against piracy should not be fought on the back of users. Instead, the application of TPMs should be designed as to allow users to make non-infringing uses; or users should be provided with easy access to the tools to circumvent TPMs for non-infringing uses.639

c. Ownership permits resale

One of the fundamental functions of exhaustion is to create legal certainty on markets. The purchaser of a second-hand item should be certain that rightsholders cannot invoke their rights against any further transfer of an embodied IPR. Legal certainty for the acquirer of an item is created by the notion of ownership, i.e. if a person owns an item this creates the apparent

authority of that person to dispose of that item by sale. Argued the other way around, if a user has good reasons to believe that he acquired certain rights with regard to a particular item of tangible or digital nature, he should consider himself able to dispose of that item by sale. A perceived authority to dispose of an item should be based on a number of factors, such as the terms of the contract but also other circumstances surrounding the acquisition of digital content, e.g. the price paid for the content and the language used by the ‘seller’. If a user purchases an item by clicking on a button labeled ‘buy’ he should rightfully expect that he assumes a position similar to that of a ‘buyer’ of a tangible object, with all rights and responsibilities. This perception should not be invalidated by provisions in the small print.

For downstream purchasers the legitimacy of a purchase can be verified by different means. Tom Kabinet has ‘reintroduced’ scarcity to digital sales by affixing unique watermarks to e-books, thereby safeguarding that piracy concerns are dispersed. At the same time, by making a particular file distinguishable from other perfect reproductions the singularity or uniqueness of that particular file is emphasized, which supports a notion of ownership. Indeed, full exhaustion without transfer-verification would put rightsholders at a disadvantage because they cannot be certain that users honor their part of the bargain, viz. honor their responsibilities not to reproduce digital content infinitely. AG Kokott pointed to the importance of TPMs in her FAPL/Murphy Opinion. The consistent application of TPMs to digital content to the extent that legal certainty for purchasers is created and user rights, in particular with regard to L&Es,

642 AG Kokott, Opinion in FAPL/Murphy EU:C:2011:43, para. 185: “Other services, by contrast, do not differ significantly from goods. Computer software, musical works, e-books, films etc. which are downloaded from the internet can easily be passed on in electronic form. This is also illustrated by the fact that additional digital rights management measures are needed to prevent them being passed on. In these areas such a strict delimitation of the two fundamental freedoms would be arbitrary.”
are safeguarded could rebalance exhaustion and carry the benefits of the doctrine into the digital market.

IX. The future of territoriality and exhaustion

The current discussions at the EU policy level do not foresee any actions in the area of exhaustion or digital exhaustion. Even the “Reda Draft Report” did not mention the principle even once. However, it does refer to a European copyright title under Article 118 TFEU, which would do away with territoriality as a principle for copyright in the EU. Assumption that the introduction of a unitary copyright title might provide for digital exhaustion would probably be too optimistic. The leaked 2014 White Paper considered policy initiatives in the field of exhaustion “premature” and suggested to wait and observe the development of licensing models and technologies. The IPKat listed digital exhaustion as the most important unresolved copyright issue of 2014. However, the “Digital Single Market Strategy” did not address the matter at all.

The “Digital Agenda” has clearly expressed the intention to do away with the disabling effects of territoriality by creating mechanisms (e.g. multi-territorial licenses) that alleviate the detrimental consequences of a strict application of the territoriality principle to copyright protected works. However, in 2013 and 2015 two judgments that dealt with the interpretation of the Brussels Regulation have cemented territoriality as a principle that still governs the way national IPRs take effect. The European Parliament “Resolution on the implementation of the Information Society Directive” reaffirmed the territorial nature of copyright in the internal market while at the same time also calling for an impact

643 European Parliament - Committee on Legal Affairs, 2014/2256(INI), point 4.
assessment on a unitary copyright title.\textsuperscript{649} However, it was criticized that the affirmation of the territorial nature of copyright is in contradiction with the aim of creating a digital market that reaches across borders.\textsuperscript{650} The two positions can only be reconciled if a reaffirmation of the principle of territoriality is an expression of the \textit{status quo}, which can, and should, be changed in the future by the introduction of a unitary title. The 2015 Resolution failed to make this clear.

Exhaustion as a principle that is strictly linked to the notions of sale and ownership, and even more so to the distribution right under Article 4(2) of the \textit{InfoSoc Directive}, might soon prove to be a relict of the past, at least in relation to digital content.\textsuperscript{651} Recent business models are based on subscription services that stream content to the user rather than models which enable the user to download files.\textsuperscript{652} The latter are still popular, but Apple registered a decline in sale of digital music through its iTunes store.\textsuperscript{653}

The future of digital content might indeed lie in access-based models rather than on models based on ownership. The advantage of streaming services is that they are independent of platform and/or format. They are usually accessed via websites or special apps that are available for most operating systems. Streaming or access services could realistically defeat download-based online shops and make exhaustion, at least in part, obsolete. The question of exhaustion does simply not arise for users in relation to such services.

Systematically, however, the distinction between the scope of application of Articles 3 and 4 of the \textit{InfoSoc Directive} and the relevant (\textit{lex

\begin{footnotesize}
\textsuperscript{649} Ibid., para. 28.
\end{footnotesize}
specialis) directives should be clarified, ideally to enable digital exhaustion. A legal distinction between goods and services by means of the criterion of ‘sale’ could then become obsolete. In this process, it could be discussed whether an “appropriate remuneration” standard should not be adopted also to acts of communication to the public, and not only as an expression of the specific subject-matter of copyright in relation to the first (physical) sale.

Territoriality, on the other side, will prevail as long as every Member State maintains a separate copyright system. Only an EU copyright title can eliminate the effects of territoriality in the internal market. This option brings with it many additional problems, and it will be discussed in more detail further below. In the meantime, in order to manage copyrights in the digital common market, one has to find ways to work around, or with territoriality. The exhaustion principle, which used to be the mitigating factor between territoriality and the free movement of goods, faces an uncertain future. The CJEU provided partial clarification with its judgments in *UsedSoft*, very much to the benefit of users. But uncertainty persists in relation to non-software content, not only because of the wording of the relevant provisions of the *InfoSoc Directive*, but also because of the judgment in *Art & Allposters*.

The proposed *Content Portability Regulation* does not question the territoriality principle, and territorial licensing for that purpose. It rather reaffirms the principle by providing a (temporary) legal fiction that enables users to use services to which they have legal access to because they reside in a Member State other than that in which they are entitled to receive that service. The legal fiction created by the Draft Regulation locates all legally relevant acts in the country of residence of the subscriber of the online content service.

With the “Digital Single Market Strategy” exhaustion has disappeared from the political agenda. For rightsholders and users it would be better

655 Article 4, *Ibid.:* “The provision of an online content service to, as well as the access to and the use of this service by, a subscriber, in accordance with Article 3(1), shall be deemed to occur solely in the Member State of residence including for the purposes of Directive 96/9/EC, Directive 2001/29/EC, Directive 2006/115/EC, Directive 2009/24 and Directive 2010/13/EU.”
to clarify whether digital content can be resold. An answer to the exhaustion-conundrum should not be developed by the courts based on particular fact patterns and lex specialis provisions, but must find its basis in a principle-based approach.\textsuperscript{657} One way or the other, permitting re-sale or prohibiting online flea-markets, a clarification should be given high priority for the sake of legal certainty\textsuperscript{658} – with regards to the balance of interests between users and rightsholders, only a clarification of the legal situation can provide a definitive answer.\textsuperscript{659} This must not necessarily be within the legal copyright framework, competition law and consumer

\textsuperscript{657} Martina Gillen, “The software Proteus – UsedSoft changing our understanding of software as ‘saleable goods’”, JRCITL (2014), 4-20, p. 18.


\textsuperscript{659} In the near future, the Court will have the opportunity to bring clarity to a very particular aspect of the exhaustion doctrine expressed in Article 4(2) InfoSoc Directive; in the case Vereniging Openbare Bibliotheken it is asked whether a download for unlimited use is a “sale” within the meaning of the InfoSoc Directive: The precise wording if the question is: “[I]s Article 4(2) of Directive 2001/29 to be construed as meaning that the initial sale or other transfer of ownership of material as referred to in that provision also means making available remotely by downloading, for use for an unlimited period, a digital copy of copyright-protected novels, collections of short stories, biographies, travelogues, children’s books and youth literature? “ (CJEU, Application in Case C-174/15, Vereniging Openbare Bibliotheken v Stichting Leenrecht; interveners: Nederlands Uitgeversverbond and Others); see also Eleonora Rosati, “Dutch court refers questions to CJEU on e-lending and digital exhaustion, and another Dutch reference on digital resale may be just about to follow”, 15 September 2015 (The IPKat), available at: http://ipkitten.blogspot.com/2014/09/dutch-court-refers-questions-to-cjeu-on.html (accessed: 10.01.2016) and Eleonora Rosati, “BREAKING: Dutch court refers questions to CJEU on e-lending and digital exhaustion”, 01.04.2015 (The IPKat), available at: http://ipkitten.blogspot.lu/2015/04/breaking-dutch-court-refers-questions.html (accessed: 10.01.2016). In France, a written question by a member of the Assemblée Nationale (Alain Rodet) directed to the Ministry of Culture and Communication asked whether the government planned to clarify the legal situation in relation to the re-sale of computer games. Rodet argued that consumer would find themselves in the paradox situation that they could resell physical copies of computer games, but not copies they have acquired online, which also require an activation through a user account. The Ministry answered that it supported industry practices and that this change in marketing has led to changed consumer behavior, a decrease in piracy and, as a result, a higher protection of intellectual property. It is notable that the question
protection law could also reasonably be used to strike the balance if they take fundamental rights and freedoms into consideration.\textsuperscript{660} A location of the answer to the exhaustion-question within the copyright system would (if not only for historical reasons) would be systematically sound and therefore the preferable option.

\textbf{B. (Digital) Limitations and Exceptions to Copyright}

Limitations and exceptions relate to uses of works or other protected subject-matter that are permitted without prior authorization and play a pivotal role in every copyright system. They are designed to strike a fair balance between the interests of rightsholders and the interests of the general public by permitting the use of protected material in certain ‘specific’ situations.\textsuperscript{661} The general public includes everyone who is not a rightsholder in relation to a particular work or other subject to an exclusive right.\textsuperscript{662} The notion includes commercial users as well as private users. The former exploit protected subject-matter commercially, the latter use protected works in many different ways for primarily non-commercial

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was posed in November 2013 and received an answer only in August 2015. See Assemblée Nationale, “14ème Legislature, Question écrite\textsuperscript{N°} 42223 de M. Alain Rodet”, 11.08.2015 (Assemblée Nationale), available at: http://questions.assemblee-nationale.fr/q14/14-42223QE.htm (accessed: 10.01.2016).


\textsuperscript{662} A precise definition of ‘the public’ can only be constructed \textit{ex negativo}. The Commission tends to enumerate categories of persons when referring to those who should profit from L&Es, e.g. “The ‘public’ addressed in this Green Paper comprises scientists, researchers, students and also disabled people or the general public who want to advance their knowledge and educational levels by using the Internet.”, European Commission, COM(2008) 466 final, p. 4. In general the ‘general public’ is characterized by a high degree of heterogeneity, therefore, L&Es must cater for a multitude of different interests, which make the compilation of a concrete set of L&Es in terms of a personal and temporal scope so difficult.
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uses. However, such uses can have indirect commercial effects. L&Es curtail the very wide scope of the exclusive rights and thereby help to define the exact scope of exclusive rights. They also permit certain uses by providing ‘free spaces’ in which creativity can develop. In other words, they tell users what they can do with protected works and what they – implicitly – cannot do with them.

If L&Es are an indicator of the balance in a copyright system, the lack of attention paid to the topic as reflected in policy discussions and actions in the recent past is, at best, slightly worrying. The last big push for L&Es that materialized in concrete legislation was the *InfoSoc Directive*, which dedicated the lengthy Article 5 solely to L&Es, Article 6(4) clarified the relation between L&Es and TPMs, and 16 of the 61 Recitals made reference to different aspects of L&Es. Ever since, the topic has appeared here and there, and sometimes not at all. This neglect is highly unsatisfying considering the importance of L&Es as a mitigating factor between the interests of rightsholders and ‘the public’. However, the recent Copy-

663 Hilty, “Vergütungssystem und Schrankenregeln. Neue Herausforderungen an den Gesetzgeber”, *GRUR* (2005), p. 820; Hilty calls this relationship a tripolar conflict of interests, as opposed to a simpler bipolar conflict between rightsholders and users without the distinction between commercial “derivative rightsholders” (‘Verwerter’) and “normal” users (‘Nutzer’); Dreier makes a distinction between authors, rightsholders and “conflicting interests” noting that “the public” represents a “whole set of interests”, Thomas Dreier, “Limitations: The Center-piece of Copyright in Distress”, *JIPITEC* (2010), 50-54, p.12.

664 Ibid., p. 3; also Reto M. Hilty, “Declaration on the Three-Step Test: Where do we go from here?”, *JIPITEC* (2010), 83-86, p. 85, stressing that L&Es to copyright are limitations to the enforcement of copyright and related rights and as a consequence limitations to the scope of these rights.


667 The 2013 Structured Stakeholder Dialogue completely ignored the topic and instead suggested to create licensing solutions for uses with little economic significance, a field, one might argue, that should be left to L&Es. Also ignoring L&Es: European Commission, *Commission communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions. A coherent framework for building trust in the Digital Single Market for e-commerce and online services*, COM(2011) 942, Brussels, 11.01.2012.
B. (Digital) Limitations and Exceptions to Copyright

right Consultation and the subsequent “Reda Report” dedicated significant space to the issue, giving it the necessary impetus to feature prominently in future policy discussions.668

The two reasons that academic literature most commonly refers to as justifications for L&Es are the dissemination of knowledge to advance science and culture and to safeguard and enable the exercise of fundamental rights.669 In these functions they are of fundamental importance for the functioning of the single market.670

I. Limitations and exceptions as part of the copyright system

1. The consent barrier

The basic rule is that the use of protected works and other protected subject-matter requires authorization from the rightsholder.671 In most cases this authorization is given by way of license. L&Es are nothing else than rights to use granted by law, which do not require any authorization from the rightsholder.672 However, they remain the exception to the rule. In many cases, users of protected works who would like to use and re-use such works are unable to acquire licenses for a particular use of a particular work. This would prevent any non-primary uses of protected works, where primary uses are such uses that are directly initiated or authorized by the rightsholder. Acquiring a license can be impossible for a number of reasons. First, it could be impossible for the user to acquire a license due

668 European Parliament - Committee on Legal Affairs, 2014/2256(INI), the topic already featured in the 2014 Consultation, European Commission, , pp. 19-30.
to economic restrictions, e.g. the licenses could be too expensive to acquire. The prices of a particular use might, for some reason, be set to a price that does not reflect economic realities of the intended use. Second, getting a license can be too expensive from a transaction costs perspective. On the one side, a user can be deterred by complicated licensing mechanisms or the sheer number of individual licenses that need to be cleared for a particular use, potentially involving numerous protected works. On the other side, a user’s attempts to clear a license might prove fruitless if the rightsholder does not react to the request, one reason might be that the economic incentive for the rightsholder to react to the license request is just too small. Third, a license might not be granted, although the use has no economic significance for the rightsholder, if the latter opposes the particular use because it could collide with the rightsholder’s non-economic interests.

Another aspect of the exclusivity of copyright and related rights has already been highlighted in relation to the principle of territoriality and the principle of exhaustion with regard to digital transfers. Digital uses often imply a number of exclusive rights. Transferring a digital file from one user to another always implies the reproduction right, posting content online might imply the communication to the public right and the reproduction right as a ‘collateral’ breach of an exclusive right. In theory, all these uses require separate authorization from the respective rightsholders.

Often, the rightsholder might not have an interest to oppose a certain use and in other cases, although a rightsholder might have an interest in objecting to a use of his protected work, other interests could override a rightsholder’s interest. In yet another case, a rightsholder would in principle support the use of his work, but cannot possibly grant millions of licenses for instances in which his works are reproduced or communicated to the public.

It is common to all these scenarios that exclusive rights can create obstacles to bring content online, for commercial or non-commercial purposes. ‘Limitations’ and ‘Exceptions’, as the terms suggest, set limits and create exceptions to exclusive rights in order to strike a balance between the rights of rightsholders and users of protected works. They justify prima facie violations of exclusive rights for selected purposes in the absence of an authorization, viz. consent, from rightsholders. When

673 See Chapter 3.A.
L&Es enable certain uses they do this for a purpose that is in the public interest. Under the regime of the *InfoSoc Directive*, these uses are limited to 21 specific limitations and exceptions to the generally broadly interpreted exclusive rights.

2. The different roles of L&Es

Terminology alone suggests a hierarchy between exclusive rights and L&Es. Whereas exclusive rights enable a rightsholder to ‘exclude’ others from using – in a wider sense – their works and other protected subject-matter, certain ‘uses’ are ‘exceptionally’ exempted from the requirement of authorization (consent) by the rightsholder. The term ‘limitations’, however, could also suggest a different understanding of the functions of L&Es.

L&Es are more than little islands in the sea of exclusive protection of copyright, which prevent private users from drowning in litigation. They serve far more important purposes: First, by defining areas in which certain uses that fall under the often broad definitions of copyright or related rights are allowed, L&Es delineate the scope of exclusive rights, as *Dreier* put it: “limitations and exceptions have become the main instrument in order to determine the exact scope of copyright.” Second, and this is by way of the first purpose, L&Es are indispensable instruments in striking the balance between the exclusive rights of authors and rightholders and other interests that collide with exclusive rights. Considering that exclusive rights are an emanation of a constitutional right to property in many countries and at EU level, this function cannot be underestimated in its effects, and should therefore be carefully applied. A third purpose of limitations and exceptions is to define competitions in downstream markets that rely on existing information and access to protected works.

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675 Peukert, “Intellectual Property as an end in itself?”, *E.I.P.R.* (2011), p. 70, the author argues that an IP regime must limit its own reach in order to integrate conflicting values.
676 Article 17(2), *EU Charter*. 

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The current system of L&Es is one that has grown historically and reflects the development of copyright and related rights over the last two centuries. The new technologies have provided for new exclusive rights and at the same time also necessitated the introduction of new L&Es, and each of these additions has been preceded by a tough bargaining process. Naturally, this evolution prevented the shaping of a coherent system in which exclusive rights and L&Es can interact smoothly without much friction.

For rightsholders, it is argued, copyright serves to fortify their rights and to limit unauthorized uses as much as possible, This interpretation would also be in accordance with the aim of the InfoSoc Directive, which is to provide rightsholders with a high level of protection. A strict application of this approach in the digital world limits the use of protected material to primary exploitations and would bar most secondary uses, or make them conditional on a prior authorization (possibly against consideration) by the respective rightsholder. For many uses of protected material this would have the result, as Gervais puts it bluntly, that “end-users remain just that, end-users.” Users would be mere consumers of content, and digital content in particular, with limited possibilities and opportunities to interact with content and develop their own creativity.

3. L&Es in current EU copyright policy

L&Es are the cornerstones of any copyright systems that lays claim to a legitimate balancing of interests, everything else would just be a legislatively sanctioned monopoly from which authors and related rightsholders

679 Recital 4, and especially Recital 9, InfoSoc Directive; Recital 9 reads: “Any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation.”
680 Ibid., p. 6. Gervais argues further that the traditional role of copyright was not to disable creativity, but to enable it, protection is not the main purpose of copyright but a mere tool to provide incentives for creativity (p. 7). The way copyright is used in the Internet age is not to enable the market to regulate certain uses, but it has been mainly instrumentalized to deny certain markets.
profit for a very, very long time. European copyright has seen some change over the last few years during which two directives were adopted. However, L&Es have been neglected by the European legislator and widely ignored at the policy level except in the Green Paper “Copyright in the Knowledge Economy”. References, if any, are general in nature without much distinction between the different purposes that distinctive sets of L&Es could and should serve. L&Es have resurfaced as a serious policy objective only in the “Public Consultation on the review of the EU copyright rules”. A majority of 42 questions out of a total of 80 in the entire Green Paper were dedicated to the topics of L&Es for a diversity of uses that were categorized in six bigger categories. Since then the subject is discussed with more intensity.

Other policy documents refer to L&Es only sporadically and usually in the framework of a wider reform or overhaul of the EU copyright acquis. It is suggested, in non-binding language, to rethink whether L&Es can clearly be delineated from the scope of exclusive rights and whether they should be updated or further harmonized. But the consultation gives rise to hopes for a more thorough review, although the opinions on whether L&Es require review differ significantly. No clear picture can be deducted from the answers. Whereas users generally and overwhelmingly argue that current L&Es create legal uncertainty and an uneven playing field, right-

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683 European Commission, , pp. 16-30; the document asks for submission on L&Es in relation to access to content in libraries and archives (A.), teaching (B.), research (C.), disabilities (D.), text and data mining (E.) and user-generated content (F.).

684 European Commission, COM(2012) 789 final, under section 3 in the wider context of a review of the EU copyright system, which resulted in the Consultation; European Commission, COM(2012) 784 final, in particular in relation to L&Es to copyright in the digital age (under section 2).
holders argue that L&Es are detrimental to creative productions and should therefore not be extended. 

With the Consultation the Commission finally picks up the scholarly discussion on various aspects of L&Es and gives the issue the prominent position it deserves in the context of a reform of EU copyright rules. In the absence of concrete proposals from the Commission (except for those made in the “Digital Single Market Strategy” and those that might be tabled in the near future), the Consultation was more of a brainstorming than anything else. The agenda for this chapter is dictated by suggestions from scholars as well as the case-law of the CJEU, which of course have policy implications in the wider – and unfiltered – sense.

II. L&Es in the EU copyright system

EU copyright law is widely influenced by international copyright instruments. Its centerpiece has not yet made the change to digital technology. The last revision of the Berne Convention took place in Stockholm in 1967 and extended exclusive rights rather than providing for flexibility with regard to L&Es. Corresponding L&Es would have contributed to a better balance within the system, but only the WPPT extended the three-step test to related rights under the international framework, which did not create new L&Es but rather had a restrictive effect on the interpretation of existing ones. Since then, the Beijing Treaty on Audiovisual Performances merely restated the three-step test in its Article 13(2), which is thereby equally applicable to L&Es for performers of audiovisual performances. The Marrakesh Treaty for the Blind and Visually Impaired has a very limited scope and little direct effect on digital content and its trans-
mission, or any other wider fields of copyright and related rights for that purpose, and still awaits ratification by most Member States. Internationally, EU copyright received little inspiration with respect to L&Es over the last 40 years, with the notable, but very limited exceptions of the WCT and the WPPT.

The evolution of the EU copyright acquis, which started out with vertical harmonization directives, inherently prevented the formation of a coherent horizontal system of L&Es. Instead, L&Es were limited to certain rights, and remain so because the InfoSoc Directive leaves most provisions of earlier directives intact.

Indeed, it is paradoxical that exclusive rights in the EU have been harmonized and all rights contained in the InfoSoc Directive are implemented in all Member States, whereas L&Es are not completely harmonized, but except for one mandatory exception in Article 5(1), none of the other 21 ‘suggested’ L&Es to the reproduction and the communication to the public right, respectively in Article 5(2)-(3), must be implemented by the Member States. This has the effect that hardly any two Member States have the same set of L&Es, at least as they are interpreted by the national judiciaries. As a consequence, full harmonization of L&Es has not been achieved, as a result the scope of exclusive rights is not fully harmonized, and EU copyright harmonization itself suffers from significant deficiencies. A provision in the InfoSoc Directive, or in any other EU directive in the field of copyright that would allow for flexibility to adapt

690 Cf. European Parliament - Committee on Legal Affairs, 2014/2256(INI), para. 36.
691 Article 1(2) InfoSoc Directive.
694 See Lucie M.C.R. Guibault, “Why Cherry-Picking Never Leads to Harmonisation: The Case of the Limitations on Copyright under Directive 2001/29/EC”, JIPITEC (2010), 55-66. Guibault goes a step further than Dreier (see supra) and argues that by design and as implemented, the system for L&Es of the InfoSoc Directive is not “conducive to a sensible degree of harmonisation across the European Union.” The exhaustive list of L&Es of Article 5 of the Directive and their optional nature enable Member States to ‘cherry-pick’ their way through a set of 20 L&Es. Further, the question whether L&Es can be overridden by contract must rather be answered positively, which further limits the predictability of the L&E regime of the InfoSoc Directive. A comparison of four
L&Es to new developments in technology does not exist; instead, existing L&Es have to be applied even stricter to new uses.695

Most directives of the copyright acquis that harmonize substantive copyright law contain L&Es to exclusive rights. The terminology, however, differs. The Software Directive does not use the term “limitations” but refers only to “exceptions”.696 The Database Directive refers to both, “exceptions” and “limitations”. The first term is used in the title to Article 6 (“Exceptions to restricted acts”), which is almost the same wording as the title of Article 5 InfoSoc Directive (“Exceptions to the restricted acts”), but the text of Article 6 then uses the term “limitations”. Article 10 of the Rental Rights Directive only refers to “limitations” in its title as well as the text of the provision. In the absence of any reference to national laws, the terms have to be interpreted autonomously and uniformly. Considering that the two terms are used interchangeably it could be assumed that no qualitative distinction exists between limitations and exceptions.697 However, the Court in its recent VG Wort judgment clarified that exceptions “totally [exclude]” exclusive rights, whereas limitations “merely [limit]” an exclusive right.698 This distinction must also be

selected exceptions regarding their implementation and application in Member States brings the author to the conclusion that not only the systematic deficits of the Directive, but also the varying interpretations of exceptions by national courts, which tend to have too much regards to their national copyright traditions rather than to the harmonized EU acquis, prevent legal certainty to develop; for the last point also see van Eechoud et al., Harmonizing European Copyright Law: The Challenges of Better Lawmaking (2009), p. 105, underlining that already the implementation of selected L&Es has been guided by national traditions in the Member States. See also with regard to the unsatisfactory treatment of L&Es in the InfoSoc Directive: Marie-Christine Janssens, “The issue of exceptions: reshaping the keys to the gates in the territory of literary, musical and artistic creation”, in: Estelle Derclaye, Research Handbook on the Future of EU Copyright, (Cheltenham, Northampton: Edward Elgar Publishing, 2009), 317-348, p. 327.

696 Article 5 Software Directive.
698 AG Sharpston first differentiated in her Opinion in VG Wort, AG Sharpston, Opinion in Joined Cases C-457/11 to 460/11, Verwertungsgesellschaft Wort (VG
valid for the other directives that use the same terminology. The practical relevance for this distinction is, however, neglectable.

L&Es provided in any of the directives apply only to the exclusive rights set forth in the respective instrument. Accordingly, by way of example, the exceptions of Article 10 of the Rental Rights Directive only apply to the rights harmonized by that Directive if Member States choose to implement them. The same applies to Article 5 of the Software Directive, the exceptions of which only apply to the exclusive rights under Article 4(1)(a) and (b) of the Directive. The InfoSoc Directive has by far the widest scope of application, and the longest list of L&Es. Due to its horizontal nature and its broad exclusive rights the Directive remains the main source for L&Es with relevance for digital uses and should be the primary object of consideration of any changes to the system of L&Es. It provides L&Es for the reproduction as well as the communication to the public and making available right.


On that distinction under the Berne Convention see Herman Cohen Jehoram, “Restrictions on copyright and their abuse”, E.I.P.R. (2005), 359-364, p 359. Cohen Jehoram points out that “exceptions” under the Berne Convention “exist in very different formats.” Although he only uses the term ‘exceptions’, he distinguishes between exceptions to certain rights for different purposes, and certain subject-matter that is completely excluded from protection., as a third category he establishes such exceptions that, by way of compulsory license, replace the exclusive right against a right to remuneration.

See accordingly for the distinction under TRIPS, Busche et al., Kommentar: TRIPs – Internationales und europäisches Recht des geistigen Eigentums (2013), Füller/Langeloh, Artikel 13, para. 4.
1. The L&Es of the InfoSoc Directive

Article 5 InfoSoc Directive is the result of negotiations during the drafting process of the Directive that tried to have regard to existing L&Es in the Member States before the Directive came into force. The provisions reflect a number of interests that are certainly worth protecting, but that do not form a coherent body of permitted acts. The compromise that was struck is best illustrated by Article 5(3)(o), the so-called grandfather clause, which permits Member States to retain certain exceptions that existed prior to 2001 for analog uses that are only “of minor importance”.

Article 5(1) contains the only mandatory exception, which means the only exception Member States must implement into their national copyright law. It provides for an exception to the reproduction right for certain temporary acts of reproduction without any independent economic significance. Recital 33 InfoSoc Directive states that the provisions should, in particular, enable acts of caching and browsing. All other exceptions are optional and can be implemented by the Member States at their discretion. The exceptions contained in Article 5(2) are only applicable to the reproduction right, whereas those of Article 5(3) also apply to the right of communication to the public. These two paragraphs contain the controversial core of the Directive, the exceptions to the exclusive rights relate to a multitude of acts and are difficult to categorize. Certain exceptions to the reproduction right can be extended to the distribution right by virtue of Article 5(4) “to the extent justified by the purpose of the authorised act of reproduction.” Article 5(5) has adopted the three-step test of the Berne Convention and TRIPS in a slightly different version.

Aside from the fact that the L&Es of Article 5 InfoSoc Directive lack the flexibility to adapt to new technological developments, the criticism most commonly raised by academics as well as other commentators lies in

701 However, only the Database Directive and the Software Directive provide for an exception to the reproduction right of the lawful acquirer for the intended uses of the respective computer program or database (Article 5(1) Software Directive and Article 6(1) Database Directive, the latter also provides for a set of optional exceptions), which proved decisive in CJEU, Judgment in UsedSoft EU:C: 2012:407, where the Software Directive was applied as lex specialis to the InfoSoc Directive.

the fact that the majority is non-obligatory. Their optional nature alone constitutes a hindrance to effective harmonization\textsuperscript{703} to the extent that this approach neither creates legal certainty for rightsholders or users, nor does it strike a proper balance between their respective interests; and legal certainty is \textit{certainly} in the interest of both groups of stakeholders.\textsuperscript{704}

The two barriers to efficient harmonization erected by the list of 21 optional L&Es are the choices for national legislators whether to implement and how to implement. Already the first barrier is liable to create an incoherent patchwork of exceptions and limitations to exclusive rights in the single market, a patchwork that is difficult to handle for rightsholders and even more for users.\textsuperscript{705} The second barrier can create disparities if the same exception is implemented differently by two or more Member States,\textsuperscript{706} although the room for maneuver Member States enjoy is very limited.\textsuperscript{707}


\textsuperscript{704} Hugenholtz went as far as to state that in the absence of a true harmonizing effect the Directive should be annulled due to lack of legal basis. He highlights Article 5 as the element of the Directive which makes it “a total failure” Hugenholtz, “Why the Copyright Directive is unimportant, and possibly invalid”, \textit{E.I.P.R.} (2000), p. 501; see also on the “worst-case scenario” for L&Es in the EU, Martin Senftleben, “The International Three-Step-Test. A Model Provision for EC Fair Use Legislation”, \textit{JIPITEC} (2010), 67-82.

\textsuperscript{705} Janssens remarks that the implementation process was conducted in a ‘disorderly manner’, referring to the fact that different Member States have implemented different L&Es out of the list of 20 non-mandatory ‘suggestions’, Janssens in: Derclaye, \textit{Research Handbook on the Future of EU Copyright} (2009), p. 330.

\textsuperscript{706} A good example is the private copying exception of Article 5(2)(b) \textit{InfoSoc Directive}, which is not implemented in every Member States (e.g. Luxembourg has to date not introduced such an exception), and even if implemented, the national versions of that exceptions differ significantly, in particular as to the way ‘fair remuneration’ is calculated and collected, and to which media a private-copying levy applies, see for guidance on the interpretation of the private copying exception: (CJEU, in Case C-467/08, \textit{Padawan SL v Sociedad General de Autores y Editores de España (SGAE)}, EU:C:2010:620, CJEU, Judgment in \textit{VG Wort v Kyocera} EU:C:2013:426, CJEU, Judgment in Case C-462/09, \textit{Stichting de
2. The exhaustive list of Article 5 InfoSoc

The large majority of L&Es to copyright and related rights are contained in Article 5 InfoSoc Directive. Recital 32 explicitly states that the exceptions and limitations of the Directive constitute an exhaustive list. Accordingly, Member States are barred from introducing L&Es that are not listed in Article 5 for the rights that form the scope of the InfoSoc Directive.708 Considering the importance L&Es play in a networked society this appears to be a problematic issue, and the harmonizing effect of the Directive has been questioned, not only, but for this particular reason that copyright L&Es are frozen since 2001.709

The exhaustive list disadvantages copyright users in the future, by its very design, but in reality because it is hardly likely that individual exceptions, in order to adapt to changes in society or technology,710 can be introduced quickly in a EU of 28 Member States.711 In the absence of a flexible
mechanism to accommodate new uses without legislative intervention, this constitutes a severe impediment to innovation and creativity.\footnote{712}

3. The dominance of exclusive rights

Exclusive rights are the rule and L&Es are something else.\footnote{713} The term “limitations” surely suggests a stronger position for users in relation to exclusive rights. The function of L&Es to define the very broad scopes of application of exclusive rights can be achieved by limiting the right to exercise the rights in certain circumstances. The term “exceptions” has a slightly weaker connotation as it implies a very broad scope of application that is occasionally interrupted by narrow ‘special cases’ which permit uses that are in the interest of the general public, or at least some members thereof.\footnote{714} This interpretation has not found many supporters in the EU legislature or in the judiciary. Instead, L&Es are in general interpreted narrowly, disregarding the terminology used in the particular context.\footnote{715} The notion of ‘exceptions’ governs the application of L&Es in relation to exclusive rights. Rightsholders assume a dominant position in relation to the public, which has limited room for maneuver to use protected material.\footnote{716} This imbalance is further exacerbated by the possibility to override...
L&Es by technological means or by contract.\textsuperscript{717} Private party intervention can water down L&Es to a bare minimum, or even less, that does not reflect any meaningful balance between rightsholders and the public.\textsuperscript{718}

4. The narrow scope of L&Es

Whereas the general consensus is that L&Es exists to promote free expression and other fundamental rights and enable creativity, the EU has instrumentalized L&Es to safeguard the proper functioning of the internal market.\textsuperscript{719} The EU legislator and judiciary have been focusing on the extension of exclusive rights and neglected the simultaneous adaptation and development of L&Es. As a result, the balance has already tilted to the disadvantage of users.\textsuperscript{720} Recital 31 of the \textit{InfoSoc Directive} states that “[e]xisting differences in the exceptions and limitations […] have direct


\textsuperscript{718} Patricia Akester, “The new challenges of striking the right balance between copyright protection and access to knowledge, information and culture”, \textit{E.I.P.R.} (2010), 372-381, p. 380.


\textsuperscript{720} Peukert, “Intellectual Property as an end in itself?”, \textit{E.I.P.R.} (2011): “Until very recently, the ‘property logic’ worked very well. It conventionalised IP protection as an end in itself. It thereby immunised this legislative policy option against critique that the promises initially mentioned are not fulfilled and that there are severe negative effects.” This argument is supported by Geiger, who argues that the wording of Article 17(2) of the Charter, which seems to provide unlimited protection to intellectual property, escalates the already strong protection of exclusive rights. In opposition to this view, Geiger argues, that intellectual property should be limited by the purpose it should serve and not be, picking up the formulation coined by Peukert, be an “end in itself”, Christophe Geiger, “Intellectual Property shall be protected!? Article 17(2) of the Charter of Fundamental

negative effects on the functioning of the internal market of copyright and related rights. [...] In order to ensure the proper functioning of the internal market, such exceptions and limitations should be defined more harmoniously. The degree of their harmonisation should be based on their impact on the smooth functioning of the internal market.” Digital content is even at a bigger disadvantage, because the InfoSoc Directive prescribes an potentially stricter application of L&Es in relation to “certain new uses of copyright works and other subject-matter.”721

a. Narrow interpretation of L&Es

The jurisprudence of the CJEU in relation to Article 5 of the InfoSoc Directive reflects this approach.722 The Court has constantly held that exceptions to exclusive rights have to be interpreted strictly and narrowly,723 This must be read in conjunction with Recital 4 of the InfoSoc Directive which provides that the harmonized EU framework for copyright should provide for a high level of protection. This is underlined by Recital 9 which reads: “Any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation.”


723 Christophe Geiger & Franciska Schönherr, “Defining the Scope of Protection of Copyright in the EU: The Need to Reconsider the Acquis regarding Limitations and Exceptions”, in: Tatiana-Eleni Synodinou, Codification of European Copyright Law: Challenges and Perspectives, (Alphen aan den Rijn: Kluwer Law International, 2012), 133-168, p. 144; Geiger & Schönherr in: Stamatoudi & Torremans, EU Copyright Law: A Commentary (2014), para. 11.79. Even stricter is the application of L&Es to digital uses, Recital 44 InfoSoc Directive states that “the scope of certain exceptions or limitations may have to be even more limited when it comes to certain new uses of copyright works and other subject-matter.” This is stated in a context which puts the narrow interpretation of exceptions in relation to the international three-step test and the impact of L&Es on the economic interests of the rightsholder in the third step of the test (“do not unreasonably prejudice the legitimate interests of the rightholder”).
Since the judgment in *Infopaq I* 724 this approach is reflected in the CJEU’s case-law in relation to the interpretation of L&Es. In *Infopaq I* the Court stated, in general, that “it should be borne in mind that, according to settled case-law, the provisions of a directive which derogate from a general principle established by that directive must be interpreted strictly” 725 and in relation to copyright in general that Article 5(1) of the InfoSoc Directive “is a derogation from the general principle established by that directive, namely the requirement of authorisation from the rightholder for any reproduction of a protected work.” 726 Such an interpretation, the Court argued, would be supported by Article 5(5), the three-step test. 727 In terms of balancing, the three-step test is used to justify a restriction of the interests of the public in relation to the interests of rightsholders. Griffiths has criticized the reliance on Article 5(5) in order to restrict the interest of the public as a democratic problem and accordingly as incorrect. 728 Although the role of the three-step test is described below, 729 is should be stated already here that the exact meaning of the test is still contested. It is very doubtful, however, that it was only designed to restrict the public interest for the purpose of safeguarding a high level of protection for rightsholders.

The strict interpretation of L&Es has become settled case-law since and was restated in *Painer*, 730 *Infopaq II* 731 and *ACI Adam*. 732 In *Padawan* the CJEU added that a restrictive interpretation of L&Es is also necessary to ensure the functioning of the internal market. 733

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725 Ibid., para. 56.
726 Ibid., para. 57.
727 Ibid., para. 58.
729 See Chapter 3.B.IV.3.
730 CJEU, Judgment in *Painer* EU:C:2011:798, para. 35.
731 CJEU, Order in *Infopaq II* EU:C:2012:16, para. 27.
733 CJEU, in *Padawan v SGAE* EU:C:2010:620, para. 35; see also Eleonora Rosati, “CJEU rules on the notion of parody (but it will not be funny for national courts)”, *GRUR Int* (2015), 102-104, p. 103.
b. A turn of the tide

Two judgments stand against the trend of a restrictive interpretation of L&Es in the majority of case-law. In \textit{FAPL/Murphy} the CJEU qualified the requirement of strict interpretation, without reference to Article 5(5), in order to “enable the effectiveness of [an] exception.” The Court did this with express reference to Recital 31, which states that “[a] fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter must be safeguarded.” When striking that balance, it should be considered that “that exception must allow and ensure the development and operation of new technologies and safeguard a fair balance between the rights and interests of right holders, on the one hand, and of users of protected works who wish to avail themselves of those new technologies, on the other.”

Similarly, in \textit{Deckmyn} the Court, while discussing whether the concept of parody should be restricted by criteria that go beyond the ordi-

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734 On the differentiation between strict and purposive interpretation see Leistner, “Europe’s Copyright Law Decade: Recent Case Law of the European Court of Justice and Policy Perspectives”, \textit{C.M.L. Rev.} (2014), pp. 585-6; describing this process, including the influence of the ECtHR in \textit{Ashby Donald and The Pirate Bay}, Christophe Geiger & Franciska Schönherr, “Limitations to copyright in the digital age”, in: Andrej Savin & Jan Trzaskowski, \textit{Research Handbook on EU Internet Law (Research Handbooks in European Law)}, (Cheltenham, Northampton: Edward Elgar Publishing, 2014), 110-142, pp. 116-20; the authors argue that in the interest of balancing exclusive rights and limitations and exceptions a strict interpretation of the latter would not be justified, certainly not against the background of ever faster technological developments. In relying on Article 17 of the Charter, a reading of Article 17(2) must take into consideration the inherent requirement of balancing property rights against other fundamental rights and the general public interest. Geiger and Schönherr suggest a more balanced reading of Article 5 \textit{InfoSoc Directive} in conjunction with Article 17 of the Charter and argue that “[a] general principle according to which one fundamental right, that is, the right to property, should always be given more weight than competing fundamental rights cannot, in this perspective, be sustained.”


736 \textit{Ibid.}, para. 164.

nary meaning of the term, stated that, although L&Es have to be interpreted strictly, “[t]he interpretation of the concept of parody must, in any event, enable the effectiveness of the exception thereby established to be safeguarded and its purpose to be observed [...].”\(^738\) This constitutes an express rejection of established case-law.\(^739\) The Court continued that the exceptions of Article 5 of the *InfoSoc Directive* seek to strike a balance between the interest of rightholders and those of users of protected subject-matter. Therefore, the application of the exception for the purpose of parody “must strike a fair balance between, on the one hand, the interests and rights of persons referred to in Articles 2 and 3 of that directive, and, on the other, the freedom of expression of the user of a protected work who is relying on the exception for parody, within the meaning of Article 5(3)(k).”\(^740\) An interpretation that includes a balancing exercise in the interpretation and application of L&Es is better suited to create a just and fair balance between the different interests that a copyright system must satisfy. It is worth noticing that *Deckmyn* was a case that had a very strong fundamental rights dimension, which was explored in more detail by AG Cruz Villalón.\(^741\) This dimension might have tempted the Court to deviate from the usual mantra of strict interpretation.\(^742\)

The Court applied a broad interpretation of an exception in *Deckmyn*.\(^743\) The transmission of the content was analog, by distribution (and admittedly on posting a picture on a website), however, the relevance of the judgment for digital content is the Court’s application of L&Es to deriva-

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511-530; see also Sabine Jaques, “Are national courts required to have an (exceptional) European sense of humour?”, *E.I.P.R.* (2015), 134-137.


740 CJEU, Judgment in *Deckmyn* EU:C:2014:2132, para. 27.


742 Maximilian Haedicke, “Beschränkung der Parodiefreiheit durch europäisches Urheberrecht”, *GRUR Int.* (2015), 664-670, p. 669, the author wondered whether this “downstream” balance of interests was restricted to *Deckmyn*, or whether this approach will also be applied in the future to other L&Es

743 Critical in this respect *Ibid.*, who argued that a wide interpretation of Article 5(3) (k) *InfoSoc Directive* could enable rightsholders to prohibit the publication of derivative works with a humorist character more easily, in particular due to the “diffuse” term “discrimination” (p. 669.).
tive and transformative works. It interpreted the autonomous concept of parody widely in order to create a balance between the interests of rightsholders and fundamental rights under the EU Charter, most notably the right to freedom of expression. A strict application that would have created more formal obstacles for the concept of parody and made it significantly more difficult to establish a parody, formally. With the interpretation pursuant to Deckmyn, a parody can take multiple forms and national courts have sufficient room to accommodate different appearances of parody, having regard to national peculiarities within the context of the subjective element of the concept.\(^\text{744}\)

This more flexible and balance-oriented approach was continued in the jurisprudence of the Court in PRCA, echoing more the judgment in FAPL/Murphy than the one in Deckmyn.\(^\text{745}\) This trend reflects a tendency in academic literature,\(^\text{746}\) but also in the case-law of the CJEU\(^\text{747}\) to accept ‘user rights’ as an almost equally positioned counterpart of the interests of

\(^\text{744}\) However, the Court limited the freedom of national courts in relation to the Opinion of the AG, who had suggested leaving the definition of the scope open for national peculiarities, AG Cruz Villalón, Opinion in Deckmyn EU:C:2014:458, para. 58; the Court found that, given the freedom of expression implications of the parody exception, rightsholders can only object to a parody if they have an interest to be disassociated with the message of the parody (CJEU, Judgment in Deckmyn EU:C:2014:2132, para. 31). The AG had been much stricter in this regard, suggesting a rightsholder could only object to a parody which “convey[s] a message radically opposed to society’s most deeply held beliefs” (para. 85).


\(^\text{746}\) L. Ray Patterson & Stanley W. Lindberg, The Nature of Copyright: A Law of User’s Rights (Athens: University of Georgia Press, 1991); Stamatoudi & Torremans in: Stamatoudi & Torremans, EU Copyright Law: A Commentary (2014), para. 11.53; Jane C. Ginsburg, “Authors and Users in Copyright”, J. Copyright Soc’y U.S.A. (1997-1998), 1-20, Ginsburg, however, distinguishes between consumptive ‘user rights’ and transformative uses, the former concerns consumptive uses of an entire work, the latter are uses that adapt a work or only use small parts of an existing work, pp. 2-3, she sees room for transformative ‘user rights’ but denies a ‘right’ to consumptive uses, p. 20.

rightsholders, and which considers L&Es as mitigators between the two sets of ‘rights’. A liberal interpretation of L&Es can fulfill this role better than a restrictive interpretation.\textsuperscript{748}

A distinction between cases that followed a strict interpretation and those that made room for a more liberal balancing of interests is hard to make. The \textit{Deckmyn} judgment could have provided for strong human rights arguments with the right to freedom of expression and non-discrimination at play; with regard to the latter the Court referred to Article 21(1) of the \textit{Charter of Fundamental Rights of the European Union}.\textsuperscript{749}

For digital uses the rulings in \textit{FAPL/Murphy} and \textit{PRCA} are important from a technical perspective. In \textit{PRCA} copies made by consumers in the computer cache and on computer screens when accessing a media monitoring service were covered by the exception under Article 5(1) \textit{InfoSoc Directive} and in \textit{FAPL/Murphy} reproductions made in a satellite decoder and on a television screen were also excepted under the provision. In both cases, the reproductions fulfilled the criteria of Article 5(1): they were transient or incidental,\textsuperscript{750} an integral part of a technological process, had

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\begin{itemize}
  \item CJEU, Judgment in \textit{Deckmyn} EU:C:2014:2132, para. 30; the AG had been much more thorough in his analysis of the role of the Charter in balancing the interests implicated by copyright, he mentioned Article 1 (human dignity), Article 11 (freedom of expression and information), Article 13 (Freedom of the arts and sciences), Article 17 (Right to property), in particular Article 17(2) (“Intellectual property shall be protected.”), Article 21 (Non-discrimination) and Article 22 (Cultural, religious and linguistic diversity), AG Cruz Villalón, Opinion in \textit{Deckmyn} EU:C:2014:458 para. 73 et seq., he focussed his analysis primarily on Articles 11 and 21 and also made reference to Article 10(2) \textit{ECHR}.
  \item In CJEU, Judgment in \textit{PRCA} EU:C:2014:1195 the Court was asked to decide whether copies that were reproduced in the cache of a computer were transient and remained there for a certain amount of time and whether reproductions on a computer-screen were equally relevant reproductions because they ‘spent’ on the screen until the user intervened by closing the browser window or moving to another website. The Court distinguished between transient copies (such as copies on a computer screen) and incidental copies (such as copies in the cache of a computer) and that neither a certain duration renders copies non-transient,
\end{itemize}

the sole purpose to enable lawful uses\textsuperscript{751} and had no independent economic significance.\textsuperscript{752} In both cases the basic service had already been licensed to the service provider and the customer or user could not be required to compensate, in any way whatsoever, the rightsholder for ‘additional’ reproduction; neither could the service providers be required to apply for licenses for such copies that are incidental to transmitting content to their customers. It is important to point out, in contrast to the ruling in \textit{Deckmyn}, that the application of L&Es in both cases related to the transmission of content and not to the content offer itself. Not necessarily a broad, but a less strict and flexible interpretation of Article 5(1) enabled transfers from a technical perspective in both cases.

The change in the Court’s approach to interpret L&Es is to be welcomed because it gives the otherwise inflexible system under Article 5(1) \textit{InfoSoc Directive} the possibility to react to changes in technology and society. Within the borders set by the exhaustive list of L&Es a number of uses, such as critical comments and necessary acts of reproduction can be exempted form prior authorization. But a wider interpretation can only go a certain way and soon the absolute borders of the current system will be reached, and have already been reached for certain uses. In addition, within the balancing exercise, the principles of strict interpretation and effectiveness of exceptions themselves can collide. However, detailed guidance on mitigating this conflict in favor of one or the other, or objec-

\textsuperscript{751} Also in \textit{PRCA} it was held that, although cached copies are not strictly necessary, caching significantly facilitates browsing the Internet, without such copies the Internet would not work as efficiently and quickly \textit{Ibid.} (paras. 35-6).

\textsuperscript{752} This was the problematic and therefore decisive criterion in CJEU, Judgment in \textit{FAPL/Murphy EU:C:2011:631}; the Court argued that “temporary acts of reproduction are not capable of generating an additional economic advantage going beyond the advantage derived from mere reception of the broadcasts”, and the economic value had already been realized by mere reception of the broadcasts (para. 177). An interpretation that would have rendered every act of reproduction an act that would require authorization because it, as a matter of causality, would give access to protected works would have rendered Article 5(1) redundant (para. 175).
tive criteria to solve a conflict are still missing.\textsuperscript{753} It is likely, and most sensible, that the Court will tend to use either interpretation depending on the respective exception, and which interpretation is most likely to help the functioning of the internal market.\textsuperscript{754}

III. Categories of L&Es for digital uses – Content and processes

Before thinking about the precise form of an alternative to the current Article 5 \textit{InfoSoc Directive}, the negative experiences with a closed list of exceptions suggest that the relevant uses which should be permitted in a digital context without authorization, and which therefore should be covered by L&Es, must be discussed. Because an enumeration of such uses would only repeat the mistakes of the past, it is instrumental to classify uses in categories; this approach is less likely to become outdated in the near future, but is certainly not fully future-proof. The 2008 Green Paper “Copyright in the Knowledge Economy” had isolated a few individual exceptions, and was criticized for this approach.\textsuperscript{755} The policy documents that followed did not go beyond the proposals of the 2008 Green Paper but usually only referred to L&Es as a problem that needed fixing, without ever explaining how this should be achieved. Scholarly

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\textsuperscript{755} Geiger et al., “What Limitations to Copyright in the Information Society? A Comment on the European Commission’s Green Paper ‘Copyright in the Knowledge Economy’”, \textit{IIC} (2008), pp. 417-8; the authors criticized the partial approach of the Green Paper and called for a “general review of the exceptions and limitations in the knowledge society”; they made four concrete recommendations: to provide a mandatory list of L&Es, the efficacy of these L&Es must be safeguarded by effective provisions regarding TPMs, the introduction of an open norm that leaves rooms for technical and social change, and a guide for the interpretation of the three-step test, the group also suggested to have a “truly fundamental debate on the whole system of exceptions and limitations”.
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literature has suggested a number of categories and classifications for L&Es in general and L&Es for digital uses in particular.756 At the same time, concerns have been expressed as to the limits of classification, namely in cases in which certain L&Es fall under more than one out of a list of several classifications.757 This is not necessarily harmful if a consensus can be reached that as long as a certain activity falls within one of the categories it merits protection and should be exempted from any authorization requirements. Expressed through legislation, categories for L&Es should cover the most important activities and be sufficiently broad to enable uses of protected subject-matter that enable content on the Internet.

The digital economy, or a digital single market, requires two types of L&Es not to obstruct a good and broad offer of content on, and the free flow of information through the Internet. This section will focus on two particular types of uses that will serve as examples. Of course, many other forms of uses and re-uses that could be solved by L&Es are imaginable.

The first type L&Es relates to offering content on the Internet. Many uses, that are primarily of a commercial nature will not need an exception.

756 Categorizations have been suggested by a number of authors, e.g. Hilty, “Declaration on the Three-Step Test: Where do we go from here?”, JIPITEC (2010), suggesting limitations for (a) uses with minimal economic significance, (b) uses for the purpose of freedom of expression, (c) uses to promote social, political and cultural objectives, and (d) uses to enhance competition, the author bases himself on the “Wittem Project”; other limitations have been suggested for particular purposes, e.g for e-lending (Dusollier, “A manifesto for an e-lending limitation in copyright”, JIPITEC (2014)) and data mining (Ian Hargreaves et al., Standardisation in the area of innovation and technological development, notably in the field of text and data mining. Report from the Expert Group (2014), p. 68); another set is composed of L&Es for the exercise of fundamental rights, public interest, market failure and practical considerations (Geiger & Schönherr in: Savin & Trzaskowski, Research Handbook on EU Internet Law (Research Handbooks in European Law) (2014), p. 127, citing: Bernt P. Hugenholtz, Fierce Creatures. Copyright Exemptions: Towards Extinction? Paper presented at the IFLA/IMPRIMATUR Conference Rights, Limitations and Exceptions: Striking a Proper Balance, Amsterdam, 20-31 October (1997); also Geiger & Schönherr in: Stamatoudi & Torremans, EU Copyright Law: A Commentary (2014), para. 11.95: suggesting education, information and expression as guiding principles.

because the permission to market content can be acquired through a license. It would also be difficult to justify L&Es for such purposes because these uses could create market competition.\textsuperscript{758} Much of the content that can be accessed today is not licensed but created by individuals and posted online directly; this content does not compete with other content and the license is implied by the fact that the author himself makes the content available; in this case an authorization is not necessary. Another significant volume of content relies on existing works. The works are either simply reposted, unchanged or unaltered, with different motives. Content can be reposted on a small-scale basis for better accessibility, and content can be posted to give a larger public original access to those works. Or, users change and transform existing works and post the new creation to video-hosting sites, social network platforms and the like. These are, of course, stark generalizations of what one can find on the Internet, content-wise.

Works that are posted in their entirety can or cannot compete with originals of the work that are marketed commercially. If music or films are exchanged through p2p-networks or other exchange networks the acts protected by exclusive rights should require an authorization, as the reproductions, which are often of a high quality, compete with ‘traditional’ marketing channels and deprive rightsholders of benefits they would enjoy if it were not for ‘pirate copies’. In other circumstances complete works can be used to illustrate or to make a point, the purpose is not primarily to grant access for a consumptive use, but to pursue different goals, that might fall into the realm of exercising fundamental rights. Then there is of course a large grey area, in which uses are neither purely consumptive, nor do they fall squarely in the scope of application of fundamental rights. Many such uses are economically uninteresting for rightsholders and they would probably condone such uses. In the absence of reasonable licensing solutions, L&Es that enable the use of third-party content can legalize and facilitate diverse online-offers.

The second type of L&Es relates to transferring files over the Internet and consuming them by means of a technological processes. Because the Internet relies on multiple acts of reproduction, which would usually, if exclusive rights were applied strictly, all require authorization, exempting

acts that only serve to transfer information from one computer to another from the scope of copyright protection are necessary to make the Internet work and to realize attractive business models for users and to create a digital single market.

Both types of L&Es must apply to the reproduction right, whereas the communication to the public and making available rights must only be subject to exceptions for the use and re-use of content. This distinction has already been made in the InfoSoc Directive under which the exceptions of Article 5(1)-(2) apply only to the reproduction right and those of (3) apply to both, the reproduction and the communication to the public right.

1. Fundamental rights

Some L&Es do not only serve to enable uses that are in the interest of users as consumers, e.g. uses that relate to the enjoyment of a work or other protected subject-matter. Some uses serve even higher purposes, not in the spiritual sense, but in the sense that they enable users of works and other protected subject-matter to exercise fundamental rights. The fundamental right that first comes to mind is the right to freedom of expression protected under Article 10 ECHR and Article 11 of the EU Charter.\(^{759}\)

Most L&Es contained in Article 5 InfoSoc Directive can have effects on the right to freedom of expression, which includes the freedom to receive and impart information. The exceptions under the InfoSoc Directive that do have direct effects on the freedom to express opinions are the exceptions for press reporting, for quotations for purposes such as criticism or review and for the purpose of caricature, parody or pastiche.

Both European courts have addressed the conflict between copyright and fundamental rights under the Convention\(^{760}\) and the Charter\(^{761}\) in

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recent years. L&Es have not always been part of the equation. The only case that necessitated the Court to address the relation between the right to freedom of expression and one of the exceptions of Article 5 InfoSoc

760 The ECtHR rendered two notable judgments in ECtHR (5th section), 10 January 2013, case of Ashby Donald and other v. France, Appl. nr. 36769/08 and ECtHR (5th section) of 19 February 2013, case of Fredrik Neij and Peter Sunde Kolmisoppi (The Pirate Bay) v. Sweden, Appl. nr. 40397/12. In both judgments the Strasbourg Court found against the right to freedom of expression, which it balanced against the (economic) interests of the rightsholders in each case. In both cases the ECtHR rules against a violation of the right to freedom of expression, noting in both cases that reproductions and communications to the public were made for commercial purposes and that the national governments had a wide margin of appreciation in balancing copyright infringements and the right to freedom of expression including the right to receive and impart information (ECtHR (5th section), 10 January 2013, case of Ashby Donald and other v. France, Appl. nr. 36769/08, para. 40) In Ashby Donald the Court referred in particular to the fact that by publishing photographs taken at a fashion show the defendants did not take part in a public discourse and therefore did not enjoy a higher degree of protection (Ibid., para. 39). For comments on both cases see Dirk Voorhoof & Inger Hoedt-Rasmussen, “ECHR: Copyright vs. Freedom of Expression”, 25.01.2013 (Kluwer Copyright Blog), available at: http://kluwercopyrightblog.com/2013/01/25/echr-copyright-vs-freedom-of-expression/ (accessed: 10.01.2016); Dirk Voorhoof & Inger Hoëdt-Rasmussen, “ECHR: Copyright vs. Freedom of Expression II (The Pirate Bay)”, 20.03.2013 (Kluwer Copyright Blog), available at: http://kluwercopyrightblog.com/2013/03/20/echr-copyright-vs-freedom-of-expression-ii-the-pirate-bay/ (accessed: 10.01.2016), especially with regard to the privilege of political speech over commercial speech see Geiger & Izyumenko, “Copyright on the Human Rights’ Trial: Redefining the Boundaries of Exclusivity Through Freedom of Expression”, IIC (2014), pp. 321-2. The ECtHR clearly sees the application of exceptions to exclusive rights as part of the wide margin of appreciation of Member States and does not further elaborate on the relation between L&Es and the right to freedom of expression in either case.

761 In Scarlet Extended v. SABAM and SABAM v. Netlog the Court found excessively broad and indiscriminate monitoring and blocking obligations imposed on ISPs in violation of the freedom to conduct a business; in relation to the right to freedom of expression the Court merely stated that injunctions with a very broad scope “could potentially undermine freedom of information since that system might not distinguish adequately between unlawful content and lawful content with the result that its introduction could lead to the blocking of lawful communications.” (CJEU, Judgment in Scarlet Extended EU:C:2011:771, para. 52 and CJEU, Judgment in Case C-360/10, Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV, EU:C:2012:85, para. 50). In UPC Telekabel Wien the Court confirmed the two judgments adding that injunc-
Directive was Deckmyn v. Vandersteen. However, the Court limited its analysis to a bare minimum, whereas AG Cruz Villalón had conducted a more intensive analysis.

The wide scope of the right to freedom of expression and the importance that is assigned to it make it applicable to a multitude of scenarios. Most opportunities to clarify the relation between the right to freedom of expression and filtering and monitoring injunctions, blocking of websites but also de-linking of sensitive information have been ignored by the Court. The relation was addressed by the ECtHR in both its judgments but only explored superficially, which was owed to the infringement-heavy factual backgrounds of the proceedings. The Strasbourg Court, however, usually grants Member States a very wide margin of appreciation to balance the right to freedom of expression and the property rights of rightsholders under the Convention, an approach which, albeit unexpressed, the Luxembourg Court seemed to have followed. An express reference to Strasbourg case-law would have been all that is necessary to clarify the questions raised by the CJEU’s omissions. With potentially more complicated – read: political, cultural, religious and, to sum up, controversial – cases to come in front of both courts, the “wide

762 On the matter of L&Es the Court in Ashby Donald stated that the interpretation of exceptions to copyright is a prerogative of the national courts and subject to review are only the effects such an interpretation has on the fundamental rights protected under the Convention, ECtHR (5th section), 10 January 2013, case of Ashby Donald and other v. France, Appl. nr. 36769/08, para. 23.
765 In Handyside the ECtHR stated that “[f]reedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man.” (ECtHR (Plenary), 7 December 1976, case of Handyside v. the United Kingdom, Appl. no. 5493/72, para. 49).
768 CJEU, Judgment in Case C-131/12, Google Spain SL und Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González, EU:C:2014:317.
margin of appreciation”-mantra could soon be deserted in favor of one of the conflicting rights concerned.

When such cases come in front of either court in a more complicated constellation of conflicting fundamental rights the question will arise which fundamental right should be given priority. Ducolombier and Peukert have questioned the equality of property rights and the right to freedom of expression,769 in particular Peukert supports a fixation of the relation between (intellectual) property rights and other fundamental rights at the legislative level.770 Future legislation could incorporate indications as to the relation between different fundamental rights and copyright.

2. Commercial vs. non-commercial uses

In cases in which exclusive rights are limited in their exercise or in which certain uses are exempted from copyright protection, the uses that are thereby permitted should not primarily pursue economic interests. But it cannot be excluded that uses which are permitted under Article 5 InfoSoc Directive also serve economic purposes; or uses that are not intended to serve economic purposes develop into an economically beneficial activity.

The second and the third prongs of the three-step test in Article 5(5) InfoSoc Directive make reference to the normal exploitation of a work771

769 Peukert in: Geiger, Research Handbook on Human Rights and Intellectual Property (2015), pp. 135 et seq; see also Peggy Ducolombier, “Interaction between human rights: Are all human rights equal?”, in: Christophe Geiger, Research Handbook on Human Rights and Intellectual Property, (Cheltenham, Northampton: Edward Elgar Publishing, 2015), 39-51, the latter recognized the instability and insufficient sophistication of the hierarchy (pp. 49-50), with all its shortcomings the authors sees the hierarchy as the starting point of the a balancing of other interests and factors involved, giving rights higher in the hierarchy a head start over lower-ranked rights.


771 Senftleben, Copyright, Limitations and the Three-Step Test: An Analysis of the Three-Step Test in International and EC Copyright Law (2004), p. 268, the normal exploitation concerns opportunities on an actual or potential market, which has a considerable practical or economical importance; niche markets that are usually not exploited would probably not fall under this criterion. A normal
and the legitimate interests of the rightsholder. In relation to a commercial or economic interest this can be interpreted as meaning that certain uses of protected works are *prima facie* of a commercial nature and should therefore not be subject to exceptions or limitations that could compete with the primary commercial exploitation of the protected subject-matter. Indeed, the rationale for most permitted activities under Article 5(2) and (3) are either fundamentally non-commercial, or require that compensation is paid to the author for the loss of a commercial opportunity; whether the rightsholder could have possibly realized this opportunity does not play a role. Pursuant to this interpretation, exceptions to exclusive rights are only permitted – and can, therefore, only be enacted by the legislature – if their economic impact is marginal or compensation is paid.

Some uses serve commercial purposes but are subject to overriding interests such as fundamental rights or the general public interest (e.g. mass-digitization of libraries and archives). In such cases, it can be argued, the rightsholder must accept a limitation of his right in order to enable free speech, news reporting or other exercises of fundamental rights or public interests.

The crucial task in all these cases is to determine the economic impact of activities that constitute *prima facie* copyright infringements. The exploitation of the work, Senftleben argues, does not cover all economic opportunities, but it should be limited precisely to preserve the balance in copyright law (p. 183), but should preserve the “economic core” copyright (p. 193).


Although not in relation to L&Es the argumentation in CJEU, Judgment in *Art & Allposters International* EU:C:2015:27 underlines that in the jurisprudence of the CJEU on the interpretation of exclusive rights economic considerations play a significant role, in particular with regard to economic exploitation opportunities; also CJEU, Judgment in *SGAE v Rafael Hoteles* EU:C:2006:764 (para. 39 and CJEU, Judgment in *SCF* EU:C:2012:140 (para. 97), in both cases economic considerations were taken into consideration by the Court.


E.g. the exceptions under Article 5(3)(c) and (k) if the medium in which the work is reproduced is run for profit, also Article 5(3)(j), which explicitly makes reference to other commercial uses that are to be excluded.
CJEU has shown tendencies to define the scope of exclusive rights by reference to the economic impact of potentially infringing acts. These arguments could be used to suggest that the economic impact of activities should be considered when deciding whether certain activities should be permitted uses as a limitation or exception to copyright. The economic impact must then be weighted against other interests that collide with the interests of rightsholders. A general yardstick expressed in numerical terms would not pay justice to the diversity of uses and the magnitudes of their conflicts with exclusive rights. However, some economic consideration should not be completely excluded.

3. User-generated content

User-generated content as a form of content is a very wide notion and difficult to define, and a legal definition does not exist. It is rather a collective term that includes a large variety of content. A description


777 A definition provided by the OECD reads: “i) content made publicly available over the Internet, ii) which reflects a certain amount of creative effort, and iii) which is created outside of professional routines and practices”, OECD, Participative Web and User-Created Content: Web 2.0, Wikis and Social Networking (Paris: OECD Publishing, 2007), p. 9. However, the study itself admits that no binding definition exists. Arguing that different definitions of UGC are “politically contingent and ideologically constructed”, Kristofer Erickson, “User illusion: ideological construction of ‘user-generated content’ in the EC consultation on copyright”, Internet Policy Review (2014), 1-19.

778 Christian Alexander Bauer, “User Generated Content – Urheberrechtliche Zulässigkeit nutzergenerierter Medieninhalte”, in: Henning Grosse Ruse-Khan, Nadine Klass, & Silke von Lewinski, Nutzergenerierte Inhalte als Gegenstand des Privatrechts: Aktuelle Probleme des Web 2.0, (Heidelberg, Dordrecht, etc.: Springer, 2010), 1-42, the author, in the absence of a legal definition (p. 3) suggests a definition with essentially three elements: (1) intentionally created digital content, which (2) is made available through the Internet without any editorial control, and (3) is not professionally produced and not published for commercial purposes. The author identifies four categories based on the type of media (text, image, audio, visual), within these categories he distinguishes between the purpose of the respective content (pp. 6-9). See also in more detail and with further references to German literature: Christian Alexander Bauer, User Generated Content: Urheberrechtliche Zulässigkeit nutzergenerierter Medieninhalte Springer, 2011), pp. 24-5. See also Jean-Paul Triaille et al., Study on the
that does not run the risk to exclude certain activities would define UGC as all content that is created by private individuals primarily for non-commercial reasons as part of an interactive act of communication. This can include text-based blogs and forum posts, image-, sound- and video-collages, literally anything that is created and published by users. UGC that is original and is based entirely on a user’s own creativity is unproblematic from a licensing perspective, it becomes problematic when such content relies on other content, which has been created by somebody else, disregarding whether this content itself is user-generated content, or whether this content is commercial content. A ‘use’ of third party content must not necessary mean an alteration of a protected work, but a decontextualization of that content that goes beyond a mere reproduction in a different digital location.\footnote{779}

When UGC incorporates existing works, the author is in principle required to request permission for the several acts implied by the creation and dissemination of the derivative work. Some types of UGC can be covered be existing L&Es under the parody or quotation defenses, other types do not easily fit within one of the categories of Article 5 \textit{InfoSoc Directive}.\footnote{780} But podcasts, amateur websites, audiovisual artwork, sampled or mashed music, tweets can be protected by fundamental rights. Most UGC will be covered by the right to freedom of expression, including the right to impart and receive information, as trivial as this content might be. It might, if directly tested against competing copyright claims, find itself on the losing side due to a lack of critical message transported by the content. The ECtHR has ruled in favor of copyright over the right to freedom of expression in two instances, however, none of the cases concerned works that displayed any of the characteristics usually associated with UGC, but more importantly, none of the uses of protected

\footnote{779 Simple reproductions are most likely covered by the quotation exception of Article 5(3)(d) \textit{InfoSoc Directive}, which is, however, limited to quotations “for purposes such as criticism or review” of works that have been lawfully made available to the public. The 2008 Green Paper suggested that Article 5(3)(d) could be interpreted broadly, due to the non-exhaustive formulation (‘such as’) of the exception, European Commission, COM(2008) 466 final, p. 20.}

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material were deemed necessary in a democratic society.\textsuperscript{781} Whether entertainment, or non-critical sharing of information are necessary in a democratic society, and would, therefore, justify copyright infringements would be for the two European Courts to decide, but it is certain that no corresponding exceptions exist at EU level.\textsuperscript{782}

The freedom of speech implications of UGC should justify an exception of some sort for creative uses, and creativity should be defined broadly, not only including works of a high artistic value. But the interests of rightsholders, especially authors, cannot be ignored, in particular as regards their interests based on moral rights.\textsuperscript{783} The CJEU has touched this issue indirectly in Deckmyn and found an elegant way around moral rights – in relying on a fundamental rights argumentation.\textsuperscript{784} But fundamental rights should not be the direct touchstone for UGC, it should rather be a legis-

\begin{itemize}
  \item \textsuperscript{781} ECtHR (5th section) of 19 February 2013, case of Fredrik Neij and Peter Sunde Kolmisoppi (The Pirate Bay) v. Sweden, Appl. nr. 40397/12; ECtHR (5th section), 10 January 2013, case of Ashby Donald and other v. France, Appl. nr. 36769/08.
  \item \textsuperscript{784} CJEU, Judgment in Deckmyn EU:C:2014:2132, paras. 25-9; see also Rosati, “Just a Laughing Matter? Why the CJEU Decision in Deckmyn is Broader than Parody”, C.M.L. Rev. (2015), pp. 523-8, the author makes the argument that the legitimate interest to be disassociated with the work that is the object of a parody could go as far a to touch on moral rights, which are not harmonized at EU level, also from the same author: Eleonora Rosati, “Has the CJEU in Deckmyn de facto harmonised moral rights?”, 08.12.2014 (The IPKat), available at: http://ipkitten.blogspot.com/2014/09/has-cjeu-in-deckmyn-de-facto-harmonised.html (accessed: 10.01.2016). A further argument could be made regarding an extension of the interest to be disassociated in relation to other exceptions, in other words, is the fundamental rights argumentation based on the parody exception translatable to
\end{itemize}
lative determination of the balance between copyright and (other) fundamental rights. This could take the form of an exception for certain (transformative, adaptive, derivative) uses of protected works as an addition to the list of L&Es in the InfoSoc Directive.\textsuperscript{785} UGC can only develop and thrive (legally) if users have legal certainty what they can do with third-party content, and legal certainty should be the guiding principle when drafting a provision, in whichever form, that is aimed at enabling UGC.

4. Copy-reliant technologies

Increasing transmission speeds, reproduction technology and data storage capacities have created an infrastructure that enables digitization and processing of large bulks of data. Certainly the input, but also the output of digitized data required the reproduction of whole works or parts of works. This data, and information on this data, can be made available to every user of the Internet. Mass-digitization ofcopyrighted works can serve a number of purposes, it can be used for primarily economic purposes and for primarily non-economic purposes; often the distinction is not very clear.

Services that require a great number of reproductions, so-called “copy-reliant” services, face the problem of clearing licenses for all acts of reproduction that the service requires for input as well as output of data. If not impossible, acquiring licenses for all copyright-relevant acts is at least impracticable.\textsuperscript{786} Licensing requirements either drive transaction costs to


acquire licenses to a prohibitive amount, or make a service the object of potential lawsuits, exposing the operator to a significant legal uncertainty.

But services that analyze and structure vast amounts of data are certainly beneficial for the general public, which by means of such services receives access to an otherwise practically inaccessible wealth of information and data – more importantly in a systematic way. The operator, in many cases, will receive some kind of remuneration for the service, be that directly through subscription fees, or indirectly through advertisement. But there are also publicly funded initiatives to grant the public access to works and information that rely on the reproduction of large amounts of works.\footnote{One example that is also referred to by the European Commission is Europeana (www.europeana.eu), an online portal that gives users access to Europe’s cultural heritage.}

Services that are copy-reliant, or rely on mass reproductions to establish and operate their offers can be distinguished. Common to all copy-reliant services is that they require the input, and this means reproduction, of large amounts of data, a significant amount of which is protected by copyright. This data can be either normal websites, which are cached by Internet search engines, or tangible books that are scanned in the framework of the Google Books project. In both instances, in order to make the data systematically accessible, it must be reproduced and fed into searchable databases. The distinction between such services can be made at the output level. Whereas, on the one hand, some services merely provide metadata, viz. information about the content (e.g. name of the author, year of publication, etc.), some services, on the other hand, provide access to the input data by communicating the works to the user, either completely or in shorter extracts.

In the US, such services have recently been the subject of litigation. The digitization of protected works was tested under the US fair use defense. In \textit{Authors Guild v. HathiTrust}\footnote{\textit{Authors Guild v. HathiTrust}, 902 F. Supp. 2d 445 (S.D.N.Y. 2012).} the court found in favor of the defendant because the service’s full-text search allowed systematic access to a great number of books, enabled the participating institutions to preserve their collections, and gave print-disabled persons access to works they could otherwise not access. The court found that all three uses to be transformative under the first fair use factor, which, together with the third and fourth factor, outweighed the negative assessment by the court of the
second factor. In relation to the service offered by HathiTrust, Judge Baer stated: “I cannot imagine a definition of fair use that would not encompass the transformative uses made by defendants' [mass digitalization project] and would require that I terminate this invaluable contribution to the progress of science and cultivation of the arts that at the same time effectuates the ideals espoused by the [Americans with Disabilities Act].”

The judgment was largely confirmed on appeal in 2014.

In the Google Books case HathiTrust was confirmed based on the same arguments after a first settlement agreement had been rejected. Judge Chin, having found Google’s use of scanned books was “highly transformative”, confirmed the fair use defense invoked by Google and underlined the beneficial nature of the project by stating: “Indeed, all society benefits” The judgment of the Southern District Court of New York was upheld by the US Court of Appeals for the Second Circuit, the US Supreme Court refused to hear the case in April 2016, ending a saga that lasted for 11 years. Already before the rulings in HathiTrust and Google

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789 In detail, the Court found, with regards to the second factor, that the nature of the majority of the copied works, would weigh against a finding of fair use, because approx. 76% of the works were works of fiction. However, the second factor was found not to be dispositive due to the transformative nature of all three uses. With regard the third factor the court found that although the entirety of the works were copied, this was necessary to enable the transformative uses; their usefulness would have been reduced if lesser amounts would have been reproduced, in particular full-text search and reproduction for print-disabled persons. For the forth factor the court ruled that none of the uses caused harm on the primary markets for the works in question. 

790 Ibid., at 464.

791 Authors Guild v. HathiTrust, 755 F. 3d 87 (2d Cir. 2014).


Books, Sag had argued that the fair use doctrine should enable non-expressive reproduction for copy-reliant technologies.\textsuperscript{795}

In the EU, the German Federal Court of Justice found that certain uses, which are beneficial for rightsholders and users, and that require the reproduction of protected works, are allowed under German copyright law. The court reasoned that rightsholders who put their works online, in this case images, grant an implied license to operators such as Google for its image search to reproduce their works for an image search engine. Rightsholders that do not want to have their works accessible through Google’s Image Search could employ technical means to prevent the indexing of their images. In the absence of an applicable exception under German copyright law the court found a rather creative way to ‘legalize’ reproduction of images that had been uploaded by the rightsholder or with his consent.\textsuperscript{796}

\textsuperscript{795} Matthew Sag, “Copyright and Copy-Reliant Technology”, \textit{Nw.U.L.Rev} (2009), 1607-1682, Sag argues that the US fair use doctrine should accommodate non-expressive uses for several reasons. He suggests that copy-reliant technologies that copy “routinely, automatically, and indiscriminately” and that “do not communicate the author’s original expression to the public do not generally constitute copyright infringement.” (pp. 1608-9). With reference to four case studies for which US courts have affirmed the fair use defense for copy-reliant technologies (pp. 1616-24) he embeds non-expressive use as a principle in general copyright law, arguing that extending the rights of rightsholders to non-expressive uses “would constitute a significant departure from existing copyright principles”. (p. 1639) Sag further demonstrates the compatibility with non-expressive uses with the fair use doctrine (pp. 1645-56) and supports his arguments with consideration regarding transaction costs and opt-out mechanisms.

\textsuperscript{796} The German BGH rules in 2010 that Google’s image search was lawfully showing thumbnails of images because by posting images online the rightsholder had given implied consent to the use of his images by online search engines, BGH, Urteil v. 29.04.2010, I ZR 69/08, paras. 28-38, the BGH refused the application of an exception to the communication to the public and the making available rights (paras. 21-7). This court argued that the rightsholder, which was also the author of the image in question, had consented to the use of her images by a search engine with the act of uploading them on her site without disabling access to the images for search engines by technological means (para. 36). The BGH extended this judgment to images that had been uploaded with limitations for certain search engines, but had been reproduced on other websites with the consent of the rightsholder, BGH, Urteil v. 19.10.2011, I ZR 140/10, paras. 26-7.
Other national courts found equally creative ways to enable Google’s Image Search.\textsuperscript{797}

In 2015, the Libraries and Archives Copyright Alliance published the London Manifesto, which in point 9 demanded “[a]n automatic right for libraries, archives and museums to mass digitise their commercially unavailable research collections, and give online access across the whole of the EU without liability to compensate rightholders.”\textsuperscript{798} Indeed, an exception for technological transformative uses does not exist under EU copyright law.\textsuperscript{799} In the absence of a relevant limitation, Article 5(2)(c) InfoSoc Directive comes closest by permitting Member States to implement exceptions “in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage”. This provision, however, does not cover mass digitization as it is limited to ‘specific acts of reproduction’ and does probably not extend to systematic and indiscriminate reproductions for the purpose of making the works or their non-expressive data available to the public.

\textsuperscript{797} The Paris Court of Appeal found that Google, although its reproductions and their subsequent making available to the public were infringing, could not be held liable as an 'innocent intermediary' because the rightsholders had not notified Google that they wanted their works to be excluded from the search index (Cour d’Appel de Paris, 26 January 2011, La Société Des Auteurs des Arts Visuels et de L’image Fixe Visual Auteurs (SAIF) v. Google France SARL and Google Inc.); in Spain the Supreme Court also rules in favor of Google by declaring that Google Image search promoted 'societal goals' under the Spanish constitution in connection with the general principle of \textit{usus innocuus} and an enabling interpretation of the three-step test, the court stated that a reliance on exclusive right to disable online services such as Google Image search would constitute an abuse of rights, (Sentencia n 172/2012, 3 April 2012, Tribunal Supremo, Sala de lo Civil, Magakini.com v. Google Spain); see also Borghi & Karapapa, \textit{Copyright and Mass Digitization} (2013), pp. 39-43.


Mass-digitization creates advantages for the general public by opening up knowledge and culture to large parts of society, it is undoubted that online archives and full-text searches of library repertoires are beneficial for any given society. However, from a systemic perspective, it is questionable whether these benefits justify a derogation from the established copyright paradigm that uses of protected works, in particular their reproduction, require prior authorization. Both, European and US courts, have made the justification of mass-reproduction dependent on opt-out mechanisms instead of requiring opt-in mechanisms. This question lies at the heart of the balancing exercise when discussing the justification for an exception for mass digitization of protected subject-matter.

National courts have resorted to different interpretative constructions to ‘legalize’ mass-digitization. Already the fact that three national courts in Europe found three different arguments to enable the same service indicates that the current legal framework for mass digitization in the EU is far from satisfactory and does not create legal certainty for service operators. But the judgments of these courts in favor of copy-reliant technology confirms a trend in the US that such uses are reconcilable with existing copyright law. Google is probably one of the few companies that can afford basing a business model on legal uncertainty because it is able to compensate for the lack of legal certainty with sufficient financial capacities. For other companies this situation constitutes a severe barrier to offer services that rely on massive reproductions as the foundation for their business models.

5. Technological processes – facilitating the Internet

Today's L&Es have been drafted during the first years of the digital economy with little foresight to what technological developments and new business models might bring about in the future. In the defense of the

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801 Ibid., p. 5, with further references. One of the reasons why the settlement reached between Google and the Authors Guild was rejected was that the agreement included an opt-out option for authors who did not want to have their works included in the Google Books project, instead Judge Chin suggested an opt-in procedure, which would eliminate most of the concerns addressed in the judgment, Authors Guild Inc. v. Google Inc., 77 F. Supp. 2d 666 (S.D.N.Y. 2011).
former legislators, it is hard to predict in which direction technology will develop at any point in time and how a future legal framework must be tailored in order to respond flexibly (or at all) to changes in technological reality. Indeed, modern business models and digital network environments operate differently from what anyone could have imagined. And they require different L&Es than the distribution chains and communication structures of the outgoing 20th century. \(^{802}\)

The technological processes underlying new digital business models have immense implications on IPRs, copyright in particular. The increasingly wide scope of copyright protection, especially the right of reproduction, which applies to all kinds of reproductions, no matter their factual or economic significance, requires L&Es to function as the broker between rightsholders and users to enable uses of and access to protected material. But also the right of communication to the public and the making available right need exceptions so that the full potential of the Internet can be realized. \(^{803}\) An Internet which would require authorizations from rightsholders for every transfer of a file or every link to protected content would soon be paralyzed.

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803 See e.g. CJEU, Judgment in *Svensson an Others* EU:C:2014:76 on linking, CJEU, Judgment in *PRCA* EU:C:2014:1195 on on-screen reproductions and CJEU, Order in *BestWater* EU:C:2014:2315 on framing, the latter case was decided by order of the Court, instead of a ‘proper’ judgment as in the two preceding cases. At this time, it can only be assumed, the Court thought it to be sufficiently established that basic functions of the Internet do not require permission from the rightsholder. In *BestWater* the Court found that the communication to the public right had not even been infringed, the question whether framing of content was covered by an exception was not even discussed, in *Svensson* the Court also found no infringement of the right because linking did not communicate the work to ‘a new public’, but the CJEU at least rendered a judgment, however, without requesting an Opinion from the Advocate General. In *PRCA* the Court, again without consulting the Advocate General, did find a *prima facie* infringement in form of a reproductions, similar to *FAPL/Murphy*, however found these reproduction covered by Article 5 *InfoSoc Directive*. 
IV. Adapting L&Es for digital uses

Within the limits of the current list of mainly non-obligatory L&Es, the courts of the Member States and the CJEU have demonstrated approaches to interpreting L&Es that range from literal, over teleological, to slightly acrobatic. By either constructing consent, as the German courts in the Google Image Search cases, or by declining liability and declaring copyright enforcement in certain cases an abuse of rights as French and Spanish courts did, the fundamental problem of adapting L&Es to technological developments has been widely ignored at the national level. The CJEU has circumvented the problem by taking certain activities out of the scope of the exclusive rights under the InfoSoc Directive.\(^{804}\) However, spontaneous judicial activism is not the appropriate way to show digital uses their place in copyright law. Not least because the balancing of interests should not be left to the judiciary alone but should remain – at least in part – a prerogative of the legislative.\(^{805}\) The judiciary, in order to safeguard legal certainty, foreseeability and the democratic legitimacy of copyright, should only be permitted to intervene within precisely defined limits.

A number of options are available to the legislator to adapt the current system of L&Es in the EU to accommodate digital uses for a variety of purposes. First, the current list of L&Es in Article 5 InfoSoc Directive could be extended to include new uses with particular importance for the digital single market. Second, and least intrusively, the current list of L&Es could be maintained, but their interpretation could be altered to include similar uses. Third, Article 5(5), which contains the three-step test, could be re-interpreted to enable an extension of the exhaustive list oft Article 5(2) and (3). Fourth, the current system could be abandoned and replaced by an US-style fair use provision, with all its advantages and disadvantages. Fifth, an open norm could be included in Article 5 that would implant flexibility into the currently rather rigid system. Each of these options is discussed in the following.


1. Extension of L&Es

There exist a number of activities that could form the subject of a limitation or exception to copyright, which, after thorough consideration, might be accepted as being an expression of a proper balance between the conflicting interest of rightsholders and users. There might also be public consensus that any such exception should form part of the copyright acquis, and the easiest way to enable a particular activity would be to amend the InfoSoc Directive and insert an exception to that effect in Article 5. There are, however, a number of concerns with regard to this procedure.

a. Creating a dangerous precedent

Introducing one new exception into Article 5(2) or (3) InfoSoc Directive would most certainly provoke stakeholder groups to suggest further amendments. Once the legislative process for an amendment of the InfoSoc Directive has started, the scope of a potential amendment could escalate into a political bargaining process that would have effects beyond the one exception that should be included. The Directive itself is the historical precedent for a bargaining process that resulted in an unfortunate compromise. It is also difficult to justify which of the many suggestions for an extension of the exhaustive list should be introduced by way of amendment. Whereas already the current list of L&Es lacks a systematic structure, further extension would create further arbitrariness in the list of L&Es; the currently incoherent system of L&Es would suffer from even more incoherency. Arguments to deny certain exceptions inclusion into the list would become immensely difficult to make in the future. Politically, a partial extension of the currently 21 exceptions would open a Pandora's Box that would spill out exceptions without providing for a future-proof solution.

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808 The opposite case could also be imagined: any opposition to a systematic solution, or blockades of certain exceptions to force other exceptions into the canon.
b. Expected repetitions

The current demands for amendments to Article 5 are partially owed to legislative inactivity since 2001 in the field of L&Es. Indeed, the process that led to the current list of exceptions was not conducted with much foresight and already begged for future amendments. The choice to declare the list exhaustive in Recital 32 is, therefore, even more surprising. Once opened for discussion and with one round of legislative extension concluded a precedent is set for further revisions of the list. Such a precedent could lead to more frequent additions to the ‘shopping list’. It is very unlikely that any of the existing exceptions would be deleted in this process, but, commanded by some kind of economic legislative drafting (and also aesthetic drafting) a consolidation to several exceptions into one, or at least fewer, would seem reasonable. This would also have the potential to further reduce legal certainty with regard to existing L&Es because their decontextualization could also change their interpretation and their scope.

c. Continuing inflexibility and uncertainty

Two objectives of a reform of Article 5, or L&Es in general as they currently stand, should be to achieve some degree of flexibility combined with legal certainty – for the future. Flexibility and legal certainty with regard to L&Es means that users and businesses can anticipate whether certain uses correspond to any existing L&Es, and whether the intended use is legal or would violate the rights of a third party. A system of L&Es of Article 5, could lead to a political blockade of any reform of Article 5 of the InfoSoc Directive.

should also be able to accommodate uses which were not foreseen at the drafting stage of relevant legislation. At the same time, rightsholders must be able to oversee which uses of their protected subject-matter are allowed by law, which are permitted and give rise to claims for remuneration, and which uses can be objected. An exhaustive list of specific activities can neither provide this flexibility, nor legal certainty.

Historically, changes to EU copyright law have often been a reaction to rulings of the CJEU, which have been, and still are, considered the driving engine of copyright harmonization. The EU legislative should avoid that such a trend is established for L&Es, because ex-post legislative intervention is not a demonstration of flexibility and does not create legal certainty. Instead, it should try to enact legislation that can react flexibly to changes in technology, user behavior and business models and that is drafted in a way that this flexibility is easy to apply not only for the courts of the Member States, but also for rightsholders and users. Such legislation must provide ex-ante legal certainty to the extent that it incentivizes new uses and exploitations of protected works and subject-matter. Waiting for legislative intervention, which is regularly a time-consuming process with all too often uncertain outcomes, fails to meet the demands of a rapidly developing digital market. And legal reaction, in any case, is less effective in providing legal certainty than farsighted legislative action.

d. The uncertainties of implementation

And then there is the crux of Article 5(2) and (3) InfoSoc Directive. Once adopted by the EU legislator, the individual exceptions still have to be implemented by Member States. This poses several problems. First, only because a limitation is added to Article 5 this does not mean that Member States are...
States are obliged to implement it. Second, if Member States decide to implement a new limitation this will also take its time. Member States have to send the new addition to their national copyright laws through their respective legislative procedures, thereby extending the gap in legal certainty created through the legislative process as a reaction to technological or other developments. Third, except for Article 5(1), all other L&Es are non-mandatory and can be implemented at Member States’ discretion. Starting to include new L&Es that are \textit{ab initio} binding on the Member States would imbalance the \textit{InfoSoc Directive}. The newly added L&Es would form a superior class of permitted uses because they are binding. In this case, all other L&Es should be elevated to mandatory exceptions.

Legislating this process at the national and EU level would cost not only time, but it could jeopardize harmonization efforts in the area of L&Es so far. Although unlikely, existing exceptions could be redrafted or deleted with severe consequences for legal certainty. The piecemeal-approach the EU has taken so far could be extended into the future and “cherry-picking” would be detrimental for the coherence of EU copyright law. The current list of 21 exceptions should better be left untouched, if it is not to be truly reformed. A reform cannot take place in occasional additions whenever it is realized that an exception for a certain activity is direly needed. A reform must take a systematic approach to L&Es that makes these important elements a flexible and constructive tool to mitigate between the interests of rightsholders and users.

2. Altered interpretation

Without touching Article 5 \textit{InfoSoc Directive} – and not trying to change anything in this provision would certainly be the fastest way – a possible approach to give L&Es some degree of flexibility is to interpret Article 5 and its different components differently than it has been interpreted in so

far. Above, an emerging trend in the case-law of the CJEU has been discussed, which paired the traditional mantra of narrow interpretation of L&Es with an approach that seeks to guarantee the effectiveness of every single limitation or exception of Article 5(2) and (3). But this approach cannot bring new uses that are not foreseen in the exhaustive list of 21 L&Es within the scope of Article 5 InfoSoc Directive, and it can, therefore, not liberate new, uncovered uses from the requirement to seek prior authorization from rightsholders.

In addition to an effectiveness-oriented interpretation of existing L&Es it could be conceivable to employ interpretative means to include uses in an interpretation of Article 5 InfoSoc Directive that have not been expressly foreseen by the legislature. Integrating novel uses by analogy within the canon of L&Es would be one way to make the provision more flexible than it currently is.

a. Wide interpretation

A first step to make the most out of the existing acquis would be to interpret the existing L&Es widely. Within the scope of the 21 exceptions an extensive interpretation would make room for more flexibility. In the absence of concrete legislative proposals, one way to deal with new technologies is to interpret the ‘old’ exceptions flexibly.

However, Recital 44 InfoSoc Directive stands against a wider interpretation of L&E in particular regarding modern communication technology. It states that L&Es should be interpreted “in accordance with international obligations” and makes reference to the three-step test. With regard to the “electronic environment”, the Recital provides that L&Es should “reflect the increased economic impact that such exceptions and limitations may have”. For this reason “certain exceptions or limitations may have to be


even more limited when it comes to *certain* new uses of copyright works and other subject-matter.*\textsuperscript{814}

The wording of Recital 44 suggests a ‘technological’ limitation to the scope of Article 5, which is however very much unclear as to whether it applies to ‘Internet uses’ in general, or only to ‘certain’ uses. Read together with the reference to the three-step test and the reminder of the EU’s international obligations (which also include the three-step test in various copyright treaties) the wording suggests to interpret the scope of L&Es with respect to “the new electronic environment” rather narrowly.\textsuperscript{815}

In addition to this restriction, each of the 21 L&Es finds the borders of its scope in its respective wording. The scope of every single exception can not be stretched indefinitely. For example Article 5(2)(b) could not be interpreted widely to include reproductions made by a search engine operator as a search engine operator is very unlikely to qualify as a “natural person” making reproduction for “private use”, neither is a search engine operator “the press” in accordance with Article 5(3)(c) as this would require some editorial activity. Similarly, a non-critical piece of UGC made by a private person, which is uploaded to a website would most likely not qualify as private use due to a lack of – precisely – private use. Given its lack of critical commentary it would also fail to qualify as a parody under Article 5(3)(k); it could be argued that a mashup could constitute a pastiche (the definition of which has not been established under EU law, the term would certainly make for an equally interesting preliminary reference as the term ‘parody’), but putting Recital 44 in the equation would probably sweep electronic sound collages out of the scope of application of this provision. Interpretation can only go a certain way, the exhaustive list of L&Es in Article 5 has manifested a limited number of situations in which reproduction and communication to the public of protected works or subject-matter is permitted. Beyond this closed list, in a not so strict interpretation of

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\textsuperscript{814} (Emphasis added).

Article 5 and its accompanying recitals, there is no room for more user freedom.

b. Extension by analogy

Instead of a wide interpretation of L&Es, interpretation by analogy could extend the scope of Article 5 *InfoSoc Directive*. An interpretation by analogy would have the advantage that uses that are comparable – but not essentially the same – to those listed in Article 5 (2) and (3) *InfoSoc Directive*, or uses that serve similar purposes, could be exempted from prior authorization. Analogous interpretation provides for flexibility while preserving the object and purpose of the norm, which is to limit exceptions to exclusive rights to a restricted list of permitted uses. Interpretation by analogy does not allow the extension of a norm without limits but seeks to fill gaps that had not been foreseen by the legislator. In *Krohn* the CJEU stated that a norm can be relied upon if the situation is similar to that covered by the rule and if the legal instrument containing that rule “contain[s] an omission which is incompatible with a general principle of Community law and which can be remedied by application by analogy of those other rules.”816 An application by analogy, therefore, must fulfill two conditions: a similar situation comparable to that covered by the rule to be applied by analogy, and a lacuna in the law, the existence of which would be incompatible with a general principle of EU law.

There exist a number of uses for which an exception or limitation is expressly contained in Article 5 that are comparable to uses in the “electronic environment”. Similarity does not mean exact congruence, giving an application by analogy in the first step room for maneuver. Certain forms of UGC, albeit not critical or satiric (often not very artistic) could be compared to parodies or caricatures, e.g. Internet memes. Blogs, video-blogs, podcasts or similar content produced by individuals, if they do not already fall within its scope of application, are comparable to activities covered by Article 5(3)(c) *InfoSoc Directive*. It is certainly not difficult to find comparable uses to one of the recognized L&Es, depending on how far the term 'similar situation' can be stretched. Considering the technolog-

ical development since the adoption of Directive 2001/29/EC, cases of digital uses similar to analog uses should not be too hard to find.

A lacuna for a given use might exist de facto in the current system of L&Es because for many uses no specific exception exists. The intention of the legislator as expressed in Recital 32, however, was to legislate exhaustively with regards to L&Es in the InfoSoc Directive. If there exists a gap in the InfoSoc Directive for certain uses this is not a case of non liquet, but an expression of legislative intent. This legislative intent is underlined by Recital 32 and further fortified by Recital 44. It could be argued that the gaps that are uses created by new technological developments have evolved after the InfoSoc Directive was passed, and these gaps would not have occurred if the legislator had been aware of future technological developments during the drafting process. But the rather precise wording and the absence of a flexible norm that would allow the adaption of Article 5 to new uses is a good argument against unforeseen lacunae. And it cannot be assumed that the legislator in 2001 was unaware of the possibility of technological development.817

An interpretation by analogy of one of the exceptions has not been expressly suggested in a case before the CJEU and it is unlikely that the Court would agree to an extension of Article 5 InfoSoc Directive by analogy to any exception listed in paragraphs 2 and 3.818 And even if an interpretation by analogy would be permitted, it would fail to provide legal certainty. In particular rightsholders would suffer with regard to their interest to anticipate which uses they can prohibit, which uses require prior authorization, and which uses they have to accept as a limitation to their exclusive rights.

A second level at which an interpretation by analogy would fail, especially as regards the element of a legislative gap, is the level of national implementation. Because the list of exceptions in Article 5(2) and (3) is non-obligatory, and Member States can choose which elements from the

817 Especially reading Recital 5, InfoSoc Directive; which reads: “Technological development has multiplied and diversified the vectors for creation, production and exploitation. While no new concepts for the protection of intellectual property are needed, the current law on copyright and related rights should be adapted and supplemented to respond adequately to economic realities such as new forms of exploitation.”

818 However, national courts have on occasion interpreted L&Es by analogy, cf. Geiger, “Flexibilising Copyright – Remedies to the Privatisation of Information by Copyright Law”, IIC (2008), p. 194.
list to implement, an exception that is provided by the *InfoSoc Directive* might not be implemented into national law. The intention of the national legislator was obviously not to implement that particular exception and the absence of that exception reflects sovereign discretion of the (non-)implementing Member State. If the CJEU were to apply an interpretation by analogy of an exception that has not been implemented by a Member State from which a request for a preliminary ruling is received the delicate balance of competences between the EU and its Member States would be disturbed. Such an intervention would potentially make all exceptions of the *InfoSoc Directive* quasi-mandatory.\(^{819}\)

The absence of exceptions for certain uses that enable the exercise of fundamental rights, such as the right to freedom of expression including the right to access to information, could, however, be incompatible with the general principles of EU law. Under EU law general principles include fundamental rights under the *ECHR* and the *EU Charter*.\(^{820}\) Since the Treaty of Lisbon, the latter obliges EU organs to have regard to funda-


c. Limits of non-restrictive interpretation

The Interpretation of current L&Es has its own limits. First, it is not clear whether an extensive interpretation or an interpretation by analogy is at all possible, more likely it is not. Furthermore, in the case that some sort of extensive interpretation beyond the express wording of an exception were to be allowed it would fail to achieve at least one of the goals pursued, namely to provide legal certainty. Extensive interpretation of L&Es would neither provide legal certainty for rightsholders and authors, nor would it provide legal certainty for users. The former could not foresee in which...
cases they are allowed to enforce their rights, the latter could not be certain when a particular use of protected subject-matter is permitted. And finally, extensive interpretation still finds its boundaries in the word of the law, in the sense that legal text can only be stretched to a certain extent. Completely new uses would still fail to succeed due to any legal basis, which is still necessary for an extensive interpretation. A norm is therefore required that enables either the legislature or the judiciary to extend the exhaustive list of L&Es of Article 5 \textit{InfoSoc Directive}.

3. The three-step test

The three-step test is frequently suggested as the element that could create more flexibility within the otherwise rigid system of Article 5 \textit{InfoSoc Directive}. The test is already contained in Article 5(5) of the Directive which would make legislative intervention largely unnecessary. The different proposals, their context, and their potential to add flexibility to L&Es are discussed after an analysis of its current application in the jurisprudence of the CJEU. The case-law of the Court in relation to the three-step test can give valuable indications how the courts of the Member States should apply the test – this is, of course, if the case-law of the Court itself follows a coherent approach to the application and interpretation of the test.

Ideally, the three-step test is applied uniformly, in structure and in substance, in the Member States of the EU. Its formulation in the different directives and subsequent implementation into the laws of the Member States bears the potential, though, for diverging applications and interpretations. For example, in some Member States, namely those that have implemented the test as such,\footnote{Cf. Goldstein & Hugenholtz, \textit{International Copyright: Principles, Law, and Practice} (2012), p. 37; Shapiro in: Lindner & Shapiro, \textit{Copyright in the Information Society: A Guide to National Implementation of the European Directive} (2011), p. 36.} it could be used to widen the scope of L&Es. Yet, in other Member States that have implemented the test with a similar formulation it could be used to narrow the scope of L&Es. As an effect, this can enable the provision of a particular digital service in one Member State, whereas in another Member State the same service offered through the Internet would be found to infringe copyright. Therefore, it is
necessary to analyze how the CJEU has used the test in its case-law and to discuss which conclusions can be drawn from the jurisprudence for the role of the three-step test within the EU copyright system. Before, in order to understand the test, its origins are roughly traced back to its ‘invention’ in 1967.

a. Origins of a ‘flexible’ norm

The test first appeared at the international level in the 1967 Stockholm conference for the revision of the Berne Convention.826 The Stockholm conference saw the first formal recognition of the reproduction right under international copyright law, the three-step test was a compromise struck between representatives of the common law and civil law copyright traditions to settle the question of L&Es. Whereas the common law tradition predominantly relied on a fair use-style limitation, continental legal systems mainly employed limited lists of more or less precisely formulated exceptions. The original version of the Berne Convention reads: “It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.”827 This formulation was drafted to enable members of the Berne Union to ‘shelter’ existing L&Es while at the same time prevent the excessive introduction of new L&Es into national laws; Senftleben referred to this double function of the three-step test as the “dualism inherent in the three-step test”.828

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827 Article 9(2) Berne Convention.
In a different context the test reappeared in the 1994 TRIPS Agreement. The Berne Convention served to protect literary and artistic works, enlisting the three-step test only for this purpose. In TRIPS the test was put in a trade-related context.\textsuperscript{829} Whereas the primary goal of the Berne Convention was to protect the right of authors\textsuperscript{830} by establishing minimum standards, TRIPS sought to reduce trade barriers by harmonizing international IPR standards.\textsuperscript{831} The object and purpose of both treaties significantly differs, which can have implications, as is argued below, for the interpretation of the test under Article 31 VCLT.\textsuperscript{832} However, TRIPS also integrated the Berne three-step test by reference through Article 9 TRIPS.\textsuperscript{833} The difference is that the TRIPS test also applies to other exclusive rights, and not only to the right of reproduction.\textsuperscript{834}

Another significant difference between Article 9(2) Berne Convention and Article 13 TRIPS lies in the third step of the respective tests. The Berne Convention referred to “authors” as those subjects whose rights should not be unreasonably prejudiced, in the TRIPS Agreement the term author was replaced by “right holder”. The distinction chosen by the drafter of TRIPS underlines the trade-based focus of the Agreement vis-à-vis the author-centric approach of the Berne Convention.

\begin{itemize}
\item \textsuperscript{829} Ibid., p 83, at p. 84: “[The Berne Convention’s] idealistic underpinning differs significantly from the trade-based approach [of TRIPS].”
\item \textsuperscript{830} “The countries of the Union, being equally animated by the desire to protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works [...]”, Preamble of the Berne Convention.
\item \textsuperscript{831} “Desiring to reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade;’”, Preamble of the TRIPS Agreement.
\item \textsuperscript{832} “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”, Article 31(1), Vienna Convention on the Law of Treaties, open for signature on 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) (emphasis added).
\item \textsuperscript{833} Senfleben continues to clarify that Article 20 Berne Convention subjects the TRIPS Agreement to Article 9(2) Berne Convention, because its purpose is to prevent derogations form Berne standards, Senfleben, Copyright, Limitations and the Three-Step Test: An Analysis of the Three-Step Test in International and EC Copyright Law (2004), p. 88.
\item \textsuperscript{834} Ibid., p. 90.
\end{itemize}
Advances in technology, mainly the spread of the Internet as a means for communication that enabled new ways for the exploitation of protected works and other subject-matter, led to the conclusion of the *WCT* and the *WPPT*. Both treaties included the three-step test as a restriction to L&Es for the rights newly introduced by the treaties.\textsuperscript{835} The *WCT*, because it concerned copyright proper, also made reference to the *Berne Convention* in Article 1 and Article 10(2). As a special agreement to the *Berne Convention* within the meaning of Article 20 of the latter, the *WCT* leaves the provisions of the Convention untouched. Article 10(2) must therefore be considered as merely declaratory and as a commitment to the three-step test under Article 9(2) *Berne Convention*.\textsuperscript{836} Special regard must be had to the Agreed Statement on Article 10, which underlines that Article 10(2) neither extends nor limits the scope of application of Article 9(2) *Berne Convention*. Article 10 *WCT*, however, permits to extend L&Es present in their national laws to adapt to the digital environment.

The three-step test itself has been considered a rather inflexible instrument that unduly privileges rightsholders, but the way it has been integrated in international and national instruments shows the flexible use of an idea introduced by the *Berne Convention*. In relevant international instruments the test has proven to be a popular provision that has extended its scope of application as a guideline for L&Es to the reproduction right, to a general condition for L&Es to all sorts of exclusive rights. It has become so popular that the *Marrakesh Treaty* includes five variations of the test, four by reference to the different version of the test in the *Berne Convention*, the *TRIPS* and the *WCT*.\textsuperscript{837} For the purpose of the present

\textsuperscript{835} Cf. Article 10(1) *WCT*, and Article 16 *WPPT*, the latter permits for the same L&Es to the rights introduced by the treaty that are granted for copyright in literary and artistic works.

\textsuperscript{836} See also Article 1(4) *WCT*, by virtue of which Articles 1-21 *Berne Convention* are included in the *WCT*.

analysis, a more thorough analysis of the test in the EU copyright \textit{acquis} will suffice.\footnote{For a full analysis of the test under international law, including its application by the WTO Dispute Settlement Panel in United States - Section 110(5) of the U.S. Copyright Act: Report of the Panel, WT/DS/160/R (June 15, 2000) see, Senftleben, \textit{Copyright, Limitations and the Three-Step Test: An Analysis of the Three-Step Test in International and EC Copyright Law} (2004), see also Goldstein & Hugenholtz, \textit{International Copyright: Principles, Law, and Practice} (2012), pp. 376-8.}

b. The three-step test in EU copyright

Today, the three step test is incorporated in all directives that provide for L&Es to exclusive rights; this was not always the case.\footnote{Cf. Senftleben, \textit{Copyright, Limitations and the Three-Step Test: An Analysis of the Three-Step Test in International and EC Copyright Law} (2004), pp. 245-6, pointing out that the original \textit{Rental Rights Directive} did not contain the test, which was only included in the Directive by Article 11 \textit{InfoSoc Directive}, Senftleben argues that the test has reached the status of a “regulatory instrument”.} The formulations of the test in EU copyright instruments differ, amongst themselves as well as from the formulations in international multilateral instruments.\footnote{On a differentiated analysis of the test in (amongst others) the different copyright treaties see Andrew F. Christie & Robin Wright, “A Comparative Analysis of the Three-Step Test in International Treaties”, \textit{IIC} (2014), 409-434, the authors come to the conclusion that the \textit{WCT} does offer, as opposed to the other versions of the test, more room for L&Es beyond the test, but that the copyright tests are in general more restrictive than those for other IPRs (p. 430).} Whereas the latter employ language similar to the \textit{Berne Convention}, which limits exceptions to the reproduction right to “certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author”\footnote{Article 9(2) \textit{Berne Convention}.} the \textit{InfoSoc Directive} states that “[t]he exceptions and limitations [of Article 5] shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.”\footnote{(Emphasis added).} A similar formulation is contained in the \textit{Rental}
Rights Directive.\textsuperscript{843} The older Database Directive\textsuperscript{844} and Software Directive\textsuperscript{845} again read differently, stating that the respective exception “may not be interpreted in such a way as to allow [their] application to be used in a manner which unreasonably prejudices the rightholder’s legitimate interests or conflicts with [a] normal exploitation” of a computer program or a database. The Database Directive and the Software Directive still make reference to the Berne Convention in relation to the three-step test, the InfoSoc Directive does not contain such an explicit reference,\textsuperscript{846} nor does the Lending and Rental Rights Directive. It should also be remarked that the three-step test in the Software Directive only applied to acts of decompilation under Article 11 and not to other L&Es under Article 10.\textsuperscript{847}

With the introduction of the test in the InfoSoc Directive not only did the language of the test change, putting the focus of the test on the application of L&Es.\textsuperscript{848} This also changed the addressees of the test, at least partially. Therefore, a matter that is widely discussed in the literature is whether the test is addressed to the legislature, as it is the case with the Article 9(2) Berne Convention, or to the judiciary.\textsuperscript{849} The test in the Berne Convention and subsequent international agreements was clearly addressed to the parties of the agreements, the governments of states in their role as legislators. The formulation of the test in the InfoSoc Directive (“shall only be applied”) raises doubts whether the addressee of the test has not changed, or whether the circle of addressees has been extended and now includes the legislator as well as national courts.\textsuperscript{850}
The introduction of the three-step test into the European copyright acquis had one more significant consequence: it subjected the test to the interpretation of the CJEU. Because of its importance for most types of digital content the discussion here is limited to Article 5(5) InfoSoc Directive. Geiger, in 2007, predicted the three-step test to “undoubtedly be at the center of most of the litigation concerning the limitations of copyright in the years to come.”851 This prediction has not necessarily materialized. Instead, as regards references for preliminary rulings, national courts have understood the test as a means of interpretation852 and the Court, if asked, has not given its interpretation a prominent position in its judgments. The infrequency with which national courts abstain from referring questions regarding the test can either be a testament to its widespread understanding, or that it is being ignored by the judiciary.

If reference is made to the three-step test by the CJEU the approaches chosen are not consistent. In general, the Court seems to prefer a narrow reading of the test and subjects the legislator to the test when implementing L&Es from the InfoSoc Directive into national law. The test is also used as a means to interpret individual exceptions or limitations, the intensity of that review and at which level that review should take place are debated.

In Infopaq I, the CJEU was asked, as the last of 13 questions, whether a number of reproductions conformed with the conditions of Article 5(5). It stated that exceptions and limitations, as derogations from the general principle of prior authorization, must be interpreted strictly, especially, because L&Es must be interpreted in accordance with Article 5(5).853 Having found this, the Court did not consider it necessary to address the test explicitly, siding with the judgment in FAPL/Murphy, which saw the conditions of the test satisfied if the criteria for the respective exception

invoke the test against an abuse of L&Es, Herman Cohen Jehoram, “Is there a hidden agenda behind the general non-implementation of the EU three-step test?”, E.I.P.R. (2009), 408-410, p. 410.


852 Cf. e.g. CJEU, Judgment in Painer EU:C:2011:798, para. 43, in question 2 and 3 of the request the referring court asked how certain provisions of the directive “in the light of Article 5(5) thereof” have to be interpreted.

Such a strict adherence to the text of the Directive, which Member State courts must take into consideration when interpreting their national laws, would limit flexibility at the national level. This interpretation further implies, that when devising the list of L&Es in Article 5 InfoSoc Directive, the EU legislator was mindful of the conditions of the three-step test as part of its international obligations.

Different from Infopaq I, the Court in PRCA applied a more restrictive reading of the three-step test. After finding that on-screen and cache copies fulfill the conditions of Article 5(1) InfoSoc Directive, it further asked whether the conditions of Article 5(5) were met. According to the Court, in addition to meeting the respective conditions of the relevant exception, “those copies must also satisfy the conditions laid down in Article 5(5) of Directive 2001/29”. When applying the test to on-screen and cached copies, it mentioned each stage of the test. Then, however, it continued with hardly any analysis of the respective stages, or mentioning the standards for the test for that purpose, and found all three criteria satisfied. It should be remarked that it did not follow the structure of the test as laid down in Article 5(5), but after confirming that the reproductions satisfied the first stage (certain special cases), went on to test the third element (no unreasonable prejudice to the interest of the rightsholder), before briefly addressing the second stage of the test (no conflict with the normal exploitation of the work). Why the Court did not follow the structure of the test in the order of its elements, it did not say.

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854 See also: CJEU, Judgment in TU Darmstadt EU:C:2014:2196, paras. 33-4, AG Jääskinen stated that the balance Article 5(5) InfoSoc seeks to establish “is achieved either where the author and the user agree on the purchase or licensing terms or where the beneficiary of the exception complies with the restrictive conditions laid down by the national legislature when it transposes that directive.”, AG Jääskinen, Opinion in Case C-117/13, Technische Universität Darmstadt v Eugen Ulmer KG, EU:C:2014:1795, para. 24. Also similar, considering the test as a means of interpretation that must be taken into consideration when interpreting national law, AG Cruz Villalón, Opinion in Case C-463/12, Copydan Båndkopi v Nokia Danmark A/S, EU:C:2014:2001, para. 96. Also in CJEU, Order in Infopaq II EU:C:2012:16, paras. 55-7.


In *Deckmyn* the Court did not refer to the test at all, however the Advocate General made reference to the test when it addressed issues for which the referring had not sought for clarification. Whereas other AGs had commented on the scope of the test without being explicitly asked, AG Cruz Villalón indicated that the test has an implication on the question how the parody defense under Article 5(3)(k) as implemented into national law has to be applied. However, he abstained from commenting, stating only that “[t]he determination of whether or [the] conditions [of the test are] satisfied [...] is a matter which [...] will fall to the national court.” The Court did not mention the test at all. However, from the Opinion of the AG it can be inferred that he sees the application of the test as part of the task of the judiciary in applying the parody exception.

AG Jääskinen opined in *Stichting de Thuiskopie* that the test is primarily aimed at the legislator, but “when interpreting national provisions, national judges will have to do so in light of [the three-step] test, to the extent that national laws are ambiguous or leave room for different results.” Accordingly, the AG refrained from an interpretation of the exception himself. However, the Court discussed the test, albeit only the third criterion with regards to two questions referred in relation to fair compensation due to rightsholders for private copies made by users.

There is no consistency in the application of the test in the jurisprudence of the CJEU. Whereas the Court in *Deckmyn* did not address the test in absence of an express question, it elaborated, albeit only very briefly, on the three criteria of the test. In *FAPL/Murphy*, confirming *Infopaq I*, again without being asked explicitly, the Court simply stated,  

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858 This is in accordance with CJEU, Judgment in *Painer* EU:C:2011:798, para. 110, according to the Court, Member States are limited by the three step-test when defining the scope of L&Es that are implemented from the *InfoSoc Directive* into national law. See also to this effect: CJEU, Judgment in *OSA* EU:C:2014:110, para. 40, see AG Sharpston, Opinion in C-351/12, *Ochranný svaz autorský pro práva k dílům hudebním, o.s. (OSA) v Léčebné lázně Mariánské Lázně a. s.*, EU:C:2013:749, para. 35.  
860 CJEU, Judgment in *Stichting de Thuiskopie* EU:C:2011:397, paras. 21, 33.  
without any analysis whatsoever: “suffice it to state that [...] the acts also satisfy those conditions.”862 The paragraphs referred to contain an analysis regarding the criteria of Article 5(1) InfoSoc Directive, which seems to imply that whenever the condition of an exception or limitation are met, the conditions of the three-step test are also satisfied.863 This raises the question what role the Court assigns national courts with respect to the application of the test, and whether the Court in EAPL/Murphy was at odds with the subsequent decision in PRCA. At best, the consensus is that the test is directed at both,864 the legislator and the national judiciaries, which have to apply the test when implementing L&Es into national law and applying these exceptions in national courts, respectively. Such a double function of the test is not per se to be seen negatively, because it provides flexibility on two levels. Member States retain a certain margin of discretion to implement the 21 exceptions of the InfoSoc Directive, and national courts still have a corrective instrument by interpreting a national exception in the light of Article 5(5); an implementation of the test into national law is, furthermore, not necessary and it should not make a difference whether national law expressly refers to the test or not.865 The corrective instrument in the hand of judges, if the test is interpreted literally in sequence of the steps as they appear in the formulation of the InfoSoc Directive, can limit the scope to the detriment of users.866 But it has been argued that judges can employ the test for the benefit of users, if the test is interpreted to introduce flexibility for L&Es. At this point, the jurisprudence of the CJEU cannot be employed to argue for a flexible role of the

862 CJEU, Judgment in EAPL/Murphy EU:C:2011:631, para. 181 (emphasis added).
three-step test; Geiger suggested that academia should support the judiciary in arriving at a more balanced interpretation of the test.\textsuperscript{867} A number of suggestions to rebalance the test are described below.

c. The untapped potential of the three-step test – making the test work

In its current application in the EU the three-step test “does not ensure a fair balance between all interested parties”.\textsuperscript{868} Instead, it privileges rightsholders, whose interests are at the heart of the test in its current formulation and application. However, with a few modifications the test could achieve its aim, which is expressed in the third of the three steps, to create a balance between the competing interests of rightsholders and users. A number of suggestions have been made in academic literature how the three-step test could be re-interpreted to allow for more flexibility in an otherwise rather rigid system of L&Es in the EU. They include suggestions for a reverse reading\textsuperscript{869} of the test and proposals to read (and apply) the test in a holistic manner, giving each element the same weight and consider them together.\textsuperscript{870} A significant contribution to the debate has been made by a group of academics in 2008 with the publication of a declaration on “A Balanced Interpretation of the ‘Three-Step Test’ in Copyright Law”. Based on this declaration and reactions to the initiative as well as further academic commentary, an application of the test could

\textsuperscript{867} Cf. \textit{Ibid.}, p. 489.
be achieved that creates more flexibility in accommodating novel uses of protected works and other subject-matter within the European system of L&Es. This section focuses on three possible adjustments.

i. Application by the judiciary

First, the judiciary should be the most important, though not necessarily the first addressee of the test. Only if applied in the courts the test can develop flexible solutions to an ever-changing technological landscape. This is not to say that the test should not scrutinize new exceptions, but it should establish a proper balance between competing interests, those of rightsholders and those of the general public, on a case-by-case basis. To leave this crucial task only to the legislative would mean to have a system of L&Es that lags behind technological developments and is incapable to strike a fair balance against the background of market realities. Concerns that an interpretation of the three-step test by the judiciary would violate the fundamental democratic principle of the separation of powers should be taken seriously.\textsuperscript{871} It is the legislative that must make political choices with regard to the scope of protection afforded to intellectual property, and the legislative must limit the protection of intellectual property for the public interests. Legal certainty, \textit{viz.} foreseeability, should be the goal of the legislator when defining the scope of property protection, foreseeing every possible specific case in which intellectual property should be limited because of an overriding interest is a task that the legislative cannot possibly fulfill. To make the law flexible and to make it keep up with technological developments, judges should be ‘burdened’ with the task to interpret the balance within a certain margin of discretion left open by a test that describes the balance, without specifying it. This is currently the situation, however, with the effect that judges can only limit the scope of L&Es. When interpreting any of the 21 exceptions, the three-step test in its current form serves as an interpretative aid, if it is not applied directly

by virtue of national law,\textsuperscript{872} to limit the application of an exception.\textsuperscript{873} The precise formulation of the test must of course play a role, and it is admitted that an interpretation based on the current wording of the \textit{InfoSoc Directive} probably prevents a flexible interpretation by the judiciary. With some changes, the test could be the balance scale for copyright in the EU. Equipped with safeguards against an overly wide interpretation of the test, it should not be harmful to entrust the judiciary with the administration of the balance within copyright.\textsuperscript{874} Drafted in proper legislation, judges would not be elevated to quasi-legislators, but in applying the test would only fulfill their task to interpret and apply the law to changes in society and technology.

\textbf{ii. Each step revisited}

Third, some potential to make the test contribute to a better balance in copyright lies in the definition and application of the three elements of the test. The application of the test in the EU, if legal certainty is indeed pursued as a policy goal, should rely on a uniform interpretation of all three steps, whether they are analyzed in sequence, or whether the three steps are perceived as a holistic, interdependent system that must be balanced in itself. In particular, two elements of the test have attracted academia’s curiosity. The first step (“certain special cases”) is used to justify the European system of enumerated exceptions and to discredit the US fair use doctrine, which allegedly does not fulfill this step. The second step (“which do not conflict with a normal exploitation of the work or other subject-matter”) has created controversy on the meaning of “normal exploitation” and whether this element should also include non-economic considerations. The third step (“and do not unreasonably prejudice the legitimate interests of the rightholder”) is widely considered to be the

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\item \textsuperscript{872} Geiger, “The Three-Step Test, a Threat to a Balanced Copyright Law?”, \textit{IIC} (2006), p. 690.
\item \textsuperscript{873} See also Richard Arnold \& Eleonora Rosati, “Are national courts the addressees of the InfoSoc three-step test?”, \textit{JIPLP} (2015), 741-749, arguing that, even when the thee-step test of the \textit{InfoSoc Directive} is not implemented literally by national legislation, national judges must apply the test when deciding whether or not a particular exception applies.
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balancing element in the test’s structure. At the international level, the test has been interpreted by a WTO Panel with regard to Article 13 *TRIPS*.\(^{875}\)

The interpretation will serve as guidance for the discussion and will be critically reflected. A direct application of the WTO Panel Report to other formulations of the three-step test bears a number of problems, not the least because of different formulations and different purposes of the respective legal instruments.\(^{876}\)

The first step, although considered to be rather insignificant by some authors,\(^{877}\) is often used against any sort of flexibility that resembles an open norm. In interpreting the three-step test in Article 13 *TRIPS*, the WTO Panel applied a literal interpretation of the first step, finding that the formulation “certain special cases” does not refer to exceptions with a “special purpose”.\(^{878}\) The term must be interpreted as meaning that a limitation under national law must be “clearly defined and should be narrow in its scope and reach.”\(^{879}\) The Panel’s interpretation that limits L&Es to certain *and* special cases, quantitatively and qualitatively, can be criti-

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\(^{875}\) United States - Section 110(5) of the U.S. Copyright Act: Report of the Panel, WT/DS/160/R (June 15, 2000).


\(^{879}\) *Ibid.*, para. 6.112; the Appellate Body ruled that “an exception or limitation should be narrow in quantitative as well as a qualitative sense” (para. 6.109), limiting L&Es to niche uses with little economic significance. Gervais criticized the Report not only for its ignorance of Ricketson’s perspective on the interpretation of Article 1 *TRIPS*, but also for its logical insufficiencies with regards its
cized, taking into account that technological developments that can transform a quantitatively insignificant use into a qualitatively significant use.\textsuperscript{880} Opposing this reading of the test, the drafters of the “Declaration on a balanced interpretation of the ‘Three-Step Test’ in copyright law” supported an interpretation that does not prevent the inclusion of “open ended limitations and exceptions, so long as the scope of such limitations and exceptions is reasonably foreseeable”.\textsuperscript{881} A strict literal interpretation of the test should be avoided, if for no other reason then because the most meticulous and precise legal drafting cannot possibly foresee every situation to which L&E should apply.\textsuperscript{882} The first step should, because absolute legal certainty in times of constant technological change is an impossibility, not be decisive. If relevant at all, it should avoid an erosion of copyright protection and limit L&Es to cases that are defined by the second and the third step. An open norm can, if formulated carefully, limit the application of L&Es to cases with a “special purpose”, which could be expressly mentioned in the provision, or in a declaratory statement accompanying the text. A right-out rejection of an open norm should not be based solely

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\textsuperscript{880} Instead, the consequences of advanced reproduction technology, which is available for broader masses of individuals, provides arguments for a purpose-centered reading of the first step, which was, however, explicitly rejected by the WTO panel.
\textsuperscript{882} The statement by the WTO Panel that “there is no need to identify explicitly each and every possible situation to which the exception could apply, provided that the scope of the exception is known and particularised. This guarantees a sufficient degree of legal certainty” was not very helpful because it did not define the standards for a norm to provide sufficient legal certainty, United States - Section 110(5) of the U.S. Copyright Act: Report of the Panel, WT/DS/160/R (June 15, 2000), para. 6.108.
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on the 2000 WTO Panel Report, references to fundamental rights as guiding principles for L&Es could be considered ‘certain’ enough to jump the (in this interpretation) low hurdle of the first step.

The second step of the test is much contested as to its scope and content. It provides that L&Es may not conflict with the normal exploitation of the work. The obvious question here is what a ‘normal’ exploitation of a work is. From the wording of the second step, which does not differ significantly in the relevant international instruments, it can be deduced that a normal exploitation is every use that does not constitute an abnormal, or unusual exploitation. Already the term unusual cannot necessarily be equated with the opposite of normal, but in any case this distinction only leads to a circular argument. The WTO Panel Report shall again serve as a first point of orientation. The report of the Panel stated that forms of normal exploitation are, “in addition to those forms of exploitation that currently generate significant or tangible revenue, those forms of exploitation which, with a certain degree of likelihood and plausibility, could acquire considerable economic or practical importance.”

This formulation poses a number of problems in a digital environment. Would an exception, which is adopted at a certain point in time at which certain ways of exploitation for protected subject-matter are foreseeable,
and some ways of exploiting protected subject-matter are not, have to be interpreted to only include such ways that were reasonably anticipated, or anticipatable (conservatively or more visionary) at the time the exception was drafted? Or would the three-step test, applied by the judiciary, be used to readjust L&Es within their temporal context? The private copy exception is as a good example in this context. Whereas it was not very difficult to foresee that a CD could be reproduced for private purposes at the time the InfoSoc Directive was drafted, the introduction of online music streaming services was certainly more difficult to imagine, and anticipate from the perspective of the lawmaker. Today, it is possible to rip songs directly from legal streaming sites, an activity, that probably falls under the private copy exception. However, applying the exception of Article 5(2)(b) to stream-ripping could collide with the “normal exploitation” of digital content because next to the market for streaming services a market for the download of music files exists. In general, the criterion, if interpreted in accordance with the WTO Panel Report, poses problems for future L&Es and can potentially unbalance their application. Interventions by the judiciary, if permitted and accepted, could help to mitigate the ‘damage’ caused by outdated L&Es to new uses.

There have been other suggestions on how to interpret the second step. Senftleben argues that “normal exploitation” refers to the exploitation on potential markets with considerable economic or practical importance. These markets are those on which the majority of exploitation takes place and from which the major sources of income are derived. It is one of the characteristics of the Internet that most uses can be monitored rather easily. For this reason most uses that can be monitored can also be

887 Other uses, such as making a copy available through p2p file-sharing falling under the communication to the public and making available right under Article 3 InfoSoc Directive.
Subjecting every possible exploitation from which any economic benefit could be derived under the second step would render the concept of L&Es meaningless in a digital environment, as it would be limited only to uses, which cannot be monetized under any circumstances.

Lucas opined that the second step should be restricted to economic considerations, opposing arguments that advocated for an inclusion of non-economic considerations into the second step. For an exclusion of non-economic considerations it can be argued that such considerations lie at the heart of the third step. Proponents of an interpretation of the second step that would also include non-economic considerations have underlined that some uses that might be monetized, should not be monetized for public policy reasons. These arguments came mainly from the US, and read against the background of the fair use doctrine, which does not know rights to use against remuneration, their concerns can be understood. Indeed, a sequential reading of the test, which would find an exception impermissible if the third step failed, purely economic consideration based on a strict standard could render the test rather meaningless. And Lucas prefers a sequential reading, reserving non-economic consideration for the last stage of the test. In the EU, L&Es exist that prescribe that remuneration must be paid for uses that are permitted without authorization. The “Declaration on a balanced interpretation of the ‘Three-Step Test’” explicitly refers to compensation in that it suggests to find certain uses that are not in conflict with a normal exploitation “particularly where adequate compensation is ensured, whether or not by contractual means.” The Declaration also introduced non-economic consideration regarding “important competing considerations” and competition concerns with regard to, in particular, secondary markets.

If an interpretation of the second step, which does not take non-economic considerations into account, were to be adopted, the second step itself should be read restrictively in order to avoid strangling L&Es and confining them to uses that cannot possibly yield any economic rewards. L&Es must be able to fulfill their function to balance the interest of rightsholders and users. With an interpretation that focuses on economic interest before taking other interests of a fundamental (rights) nature into consideration cannot fulfill this task. Legal certainty would, however, be provided by an expansive interpretation of the second step, at the cost of fundamental rights and user interest. Therefore, it is instrumental that non-economic interests are taken into consideration. If this is only to happen in the third step a sequential reading of the test should not make the third step impossible to reach.

The third step permits L&Es for uses of exclusive rights that do not unreasonably prejudice the legitimate interests of the author or the rightsholder, depending on the respective instrument. This implies that there is room for a reasonable prejudice and that there exist illegitimate interests to limit the use of protected subject-matter. The third step of the three-step test effectively boils down to a proportionality assessment in which the interests of the rightsholder are compared to other interests. These other interests vary in nature.

The authors of the “Declaration on a balanced interpretation of the ‘Three-Step Test’ in copyright law” suggested that the third step should be interpreted with respect to interests based on human rights and the funda-

898 Arguing that, at least with regards to parody, the proportionality test does not differ much as regards its practical effects from the three-step test, Arnold & Rosati, “Are national courts the addressees of the InfoSoc three-step test?”, JIPLP (2015).
mental freedoms, interests in competition and other public interests.\textsuperscript{899} Lucas agreed with the Declaration with regard to an application of the test that respects human rights and the fundamental freedoms, however rejected an application with respect to competition and scientific progress and cultural, social, or economic development, in general: other public interests. Whereas he refuted the competition law argument on the basis that competition law follows a different logic than L\&Es, he considered the ‘public interest’ element as being too vague.\textsuperscript{900}

The reference to fundamental rights is self-evident, widely undisputed and does not require further discussion. With regards to competition, the Declaration argued that L\&Es should be understood as complementary to competition law, which mechanisms do not provide legal certainty as they work on a case-by-base basis.\textsuperscript{901} This was already stated by the CJEU in \textit{Magill} where the Court argued that the abstract competition rules do not provide legal certainty for rightsholders with regard to compulsory licensing schemes, and a restriction on the exclusive right of reproduction under the \textit{Berne Convention} by competition law would not be in conformity with the Berne three-step test. Limitations to exclusive rights must be laid down explicitly in legislation.\textsuperscript{902} To create legal certainty for competi-

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\textsuperscript{902} CJEU, Judgment in Joined cases C-249/91 P and C-242/91 P, \textit{Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities}, EU:C:1995:98, para. 77; “A provision such as Article 86 of the Treaty, which merely sets out a general obligation and must be made precise and adapted from case to case, does not fulfill the conditions laid down by Article 9(2) of the Convention. Community legislation alone is capable of providing a proper legislative basis.”
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tive uses that fall under the wider notion of public interest, and competition law should work in the public interest, certain anti-competitive mechanisms must also find their way into copyright L&Es. Dreier remarked that L&Es for the purposes of competition in a digital environment are instrumental to enable downstream competition.\textsuperscript{903} This is in particular true for copy-reliant services, which would be paralyzed if rightsholders could invoke their exclusive rights against the use of protected material.\textsuperscript{904} In addition, to lower transaction costs, compensation-based L&Es can serve to enhance competition by decreasing the cost of licensing for rightsholders and users.

The public interest should also be taken into consideration, not least because Recital 3 \textit{InfoSoc Directive} refers explicitly to the public interest as one of the main objectives of copyright harmonization in the EU. Public interest should also have effects on the system of L&Es, the way they are legislated as well as their application by the judiciary.

The interest of rightsholders are also of a different nature. The WTO Panel already indicated that rightsholder interests must not only be limited to interest in the economic value of protected subject-matter, without mentioning what other interests are at stake for rightholders.\textsuperscript{905} Economic interests are already largely covered by the second step. Therefore, the third step must be understood to concern legitimate interests that are not economic in the sense of direct competition on relevant markets, but of interests that go beyond those of the second step. Senftleben argued that interests of licensees and other derived rightsholder, in other words everyone who is not an original rightsholder, must be taken into consideration.\textsuperscript{906} With particular regard to a digital environment, in which protected subject-matter if often exploited by intermediaries, this interpretation is


\textsuperscript{904} This, it can be argued, is different for the essential facilities doctrine developed in \textit{IMS Health} (CJEU, Judgment in C-418/01, \textit{IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG.}, EU:C:2004:257); a license agreement for essential facilities should not necessarily be regulated by L&Es.


convincing. For non-economic interests, Senftleben distinguishes between TRIPS and the WCT. The object and purpose of TRIPS, which is fundamentally economical, does not leave room for non-economic considerations, whereas the WCT, which is author-centered, would encompass non-economic interests in the third step. This is also reflected in the formulations of the test: whereas TRIPS uses the term “right holder” the WCT uses the term “author”.\footnote{907} The InfoSoc Directive follows the TRIPS terminology, however, the scope of the Directive also includes related rightholders. Nevertheless, Senftleben suggested to exclude non-economic considerations from the scope of the third step, subjecting the colliding interests to a basic proportionality test based on purely economic considerations.\footnote{908} Taking into consideration that moral rights are excluded from the scope of the Directive,\footnote{909} one would tend to agree with Senftleben. The CJEU in Deckmyn, however, has taken non-economic interest of authors into consideration in interpreting the parody defense under Article 5(3)(k) InfoSoc Directive. Whether this amounted to a \textit{de facto} harmonization of moral rights must not be answered here,\footnote{910} but it leaves room for an argument that the third step under the Directive, when applied to the interests of authors, should take non-economic interests into consideration. The Internet is a major hub for all sorts of campaigns, it leaves room for public and private debate and commentary, copyright implications of these exercises of the right to freedom of expression have been described above. Economic interests might not always be the primary concerns of authors or rightholders involved in such actions, but a decontextualized use of protected material on the Internet can certainly touch other interests, as well. A balance of these interests together with economic interests, against the interest of the public, based on human right and fundamental freedoms, competition and other public interests, should form the substance of the third step.

\footnote{907} Ibid., pp. 223-4.  
\footnote{908} Ibid., pp. 273-4.  
\footnote{909} Recital 19 InfoSoc Directive.  
iii. Order of interpretation

The balance the three-step test could create lies in its third criterion. Whereas the first two criteria limit exceptions “to certain special cases which do not conflict with the normal exploitation of the work” the last step qualifies that permitted uses to the effect that they “do not unreasonably prejudice the legitimate interests of the rightholder.” The basic understanding of the three criteria is that they must be met cumulatively in the order of their appearance in the test.  

The part of the test that takes, albeit indirectly, the interests of users into consideration is the last criterion. To get to the last criterion and thereby consider interests other than those of rightsholders, it is necessary to pass the first two steps. A failure to pass one of them disqualifies an exception pursuant to a traditional reading of the test. Rightsholders are privileged by the test because exceptions that would permit use of their protected subject-matter that fail on either the first or second step are ruled out without ever entering the phase of step three. This imbalance in the functioning of the test can be remedied by rethinking, and reordering the operation of the test to give the interest of non-rightsholders more weight. A first option is to change the order of the test and begin an analysis at the other end. A second option would consider all elements together without any hierarchy among the three elements.

One suggestion that has been made is to interpret the three-step test in reverse order. It is based on the assumption that the US fair use doctrine is more flexible than systems of L&Es that are based on narrower categories

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of permitted uses.\footnote{Ibid., p. 27.} However, this suggestion, which was made by Gervais in 2005, does not just turn the test around, it rather puts the balancing part that is contained in the second and the third step, which in practice ‘weds’ both steps and applies a holistic approach by combining these two steps.\footnote{Ibid., p. 30.} The reverse interpretation, it was argued, would use the test to adapt to technological changes. This should also be reflected in the second step in a traditional understanding, which analyses the economic impact of a use on the normal exploitation of a work.\footnote{Gervais argues that with changes in technology the notion of normal exploitation may have changed with the advent of the Internet, Ibid., p. 29. Indeed, making digital copies of CDs by ripping content can be considered in conflict with a modern understanding of a normal exploitation, considering that online offers for downloadable digital music exist. Similarly, the reproduction exception for private use can be questioned against the background of stream-ripping for the same reasons, but see Julian Boulanger, Alexandre Carbonnel, Raphaël De Coninck, & Gregor Langus, Study prepared for the European Commission (DG MARKT): Assessing the economic impacts of adapting certain limitations and exceptions to copyright and related rights in the EU. Analysis of specific policy options (2014), p. 97.} Others have argued that commencing with the third step would make sense because it would mean starting with the most important step, which seeks to establish a balance.\footnote{Cohen Jehoram, “Restrictions on copyright and their abuse”, E.I.P.R. (2005), p. 361.} Interpreting the test with a combined reading of the second and the third step leads in consequence to a holistic approach to the interpretation of all three elements. An interpretation of the test that does not discriminate against either of its element is favored by the authors of the “Declaration on a balanced interpretation of the ‘Three-Step Test’”.\footnote{Geiger et al., “Declaration: A Balanced Interpretation Of The ‘Three-Step Test’ In Copyright Law”, JIPITEC (2010), Article 1: “The Three-Step Test constitutes an indivisible entirety. The three steps are to be considered together and as a whole in a comprehensive overall assessment. Christophe Geiger, Reto M. Hilty, Jonathan Griffiths, & Uma Suthersanen, “Declaration: A Balanced Interpretation Of The “Three-Step Test” In Copyright Law”, 01.09.2008 (Max Planck Institute for Innovation and Competition), available at: http://www.ip.mpg.de/de/aktuelles/declaration_on_the_three_step_test.html (accessed: 10.01.2016), p. 4 under point 1, also Dreier, “Limitations: The Centerpiece of Copyright in Distress”, JIPITEC (2010), p. 52.} Proponents of a balanced inter-
pretation argue that this approach would take due consideration of the interests of other rightsholders and those of the general public. Economic interests of rightsholders can be balanced within the test against colliding fundamental rights. The overall assessment of all three steps further enables the direct consideration of the potentially different outcomes of the respective three steps. A final decision cannot be avoided that gives one interest the final edge over the others, but considering all three steps together would come closest to a general proportionality test that has proven to be effective whenever competing interests with a fundamental rights dimension have clashed. An overall assessment of the test also comes closer to the application of the US fair use doctrine, which, as interpreted by the courts, does not give preference to any of its four criteria, with the exception of transformative uses, which the US courts tend to find in compliance with the fair use defense. Lucas criticized the approach of the Declaration and titled his contribution to the discussion: "For a reasonable interpretation of the three-step-test". His critique of a balanced approach can easily be translated to a critique of any inter-


921 In general on the proportionality principle in relation to copyright see Ori Fischman Afori, “Proportionality – A New Mega Standard in European Copyright Law”, IIC (2014), 889-915, in particular pp. 908-11, the author argues that proportionality introduces a constitutional element in copyright that has begun to reconcile copyright with other fundamental rights, such as the right to freedom of expression and data privacy.


pretative approach, which does not follow the traditional, literal interpretation of the test as applied by the WTO Panel in the US Section 110(5) case.\textsuperscript{924} Conversely, the panel’s ruling has been criticized and dismissed as final authority for the interpretation of the three-step test.\textsuperscript{925} Because the Panel’s interpretation of the three-step test only takes rightsholder interests into consideration the approach suggested by the Declaration must be favored. The latter gives adequate weight not only to the interests of rightsholders but also takes the interests of authors and users into consideration.\textsuperscript{926} The declaration itself based its initiative on the restrictive effect of the test, which is precisely what the WTO Panel intended to achieve. Given the lack of a corresponding element in the InfoSoc Directive that would support the balance in favor of a non-restrictive approach to L&Es outside the test, that balance should be sought within the test by way of a re-interpretation.

Altering the interpretation of the test away from the status quo can turn the test into an enabling provision that would, within certain limits, contribute to a greater flexibility of L&Es in the EU. A new interpretation of the test does not imply an amendment to the InfoSoc Directive, however, rewriting Recital 32 in particular would provide clarity that the 21 L&Es currently listed in the Directive are not the last word. Instead, a new understanding of the three-step test could open the doors for an interpretation by analogy for certain exceptions that can be applied to ‘like cases’.\textsuperscript{927}

A reading strictly following the structure of the norm privileges rightsholders and fails to respect the aim of striking a fair balance between the

interests of rightsholders and users. However, this is one of the aims pursued by the InfoSoc Directive and should, therefore, not be neglected when interpreting L&Es individually as well as from a systematic perspective. Geiger also underlines that an analysis that stops at the second stage of the test would neglect fundamental rights considerations altogether, whereas any secondary EU legislation should have regard to fundamental rights – as general principles, and under the EU Charter.928

Interpreting the test within the framework of the InfoSoc Directive would also be justified by the purpose of the Directive. The test is only used in relation to the L&Es contained in the Directive, not directly in relation to the exclusive rights.929 Whereas the Directive provides a high level of protection for rightsholders (Recital 4), L&Es are aimed at creating “a fair balance of rights” between the different classes of rightsholders and users. A reading of the test that puts rightsholders at an advantage ab initio would not be able to achieve a fair balance. Therefore, the test should be interpreted flexibly, either by reversing its order, or by considering the elements of the test as equal parts of one comprehensive assessment. The CJEU has already shown tendencies in this direction, without, however, establishing such an interpretation as the principle approach to L&Es under the test.


929 Geiger has also suggested to use the three-step test as a model to define access to copyright protection, eliminating the need for L&Es in the first place and placing the balancing exercise at the definition stage of the scope of copyright protection, Geiger, “Flexibilising Copyright – Remedies to the Privatisation of Information by Copyright Law”, IIC (2008), pp. 190-2.
d. Limitations of the three-step test

"Viewed from a functional perspective, [the three-step test] sets limits to exceptions to exclusive rights"[^930] Senftleben succinctly encapsulates the current possibilities the three-step test offers in terms of flexibility; its flexibility is a restrictive flexibility, rather than an enabling flexibility. Suggestions to alter the application of the test at international and EU levels face one big obstacle: the current formulation of the test does not permit an overly flexible interpretation, and its systematic position in EU law further underlines its function as a restrictive corrective for the application of L&Es. Certainly, the three stages can be interpreted less restrictively, the notion of “normal exploitation” could be narrowed down to make room for uses that do not conflict with the main ways of exploitation. But even without changes to the wording of the test, a more relaxed interpretation cannot avoid that all three steps carry the potential to narrow the scope of L&Es rather than to extend it.

The three-step test was designed at the international level to give national legislators room to create L&Es, there is no exhaustive list of exceptions in any of the international instruments incorporating the test. But this systemic understanding of the test under international law is fundamentally different from the one under EU law. The EU legislator has taken the flexibility the test offers away from national governments and monopolized it at EU level, if indeed a reading of the test is followed, which only applies it as a restrictive interpretative tool for national judges for the application of a closed list of 21 L&Es. But in the absence of substantive activity by the EU legislator to adopt L&Es to new technological realities, national legislators should be able to reclaim parts of this flexibility, not by creating new “certain special cases” in their own national copyright laws, but by the adoption of an interpretation of the test that permits judicial flexibility to adapt L&Es to new technologies.[^931] Member States themselves cannot claim this freedom to introduce new L&Es because they lack the competence to legislate in areas in which the EU has already exercised its legislative competence, which is clearly the

case for copyright L&Es. The legislative foundation for this re-thinking has to be laid at EU level.

At least for the courts of the EU Member States there are limits to this interpretation. Nevertheless, there is a trend in national courts to use the test to widen the scope of L&Es. Slight alterations within the scope of an exception, e.g. by establishing a right of remuneration for a certain uses that do not fit precisely with the wording of the respective exception, have been found to be in the spirit of the privilege. National courts have also permitted the application of strictly formulated exceptions for analog uses to apply to digital uses. By arguing with the functional equivalence of digital uses to analog uses, national judiciaries have used the test to extend and complement existing L&Es under national law.

This interpretative flexibility will find its limitations, though, at some point, at the latest when it reaches the borders of the exhaustive list of L&Es, which does not contain a broad exception for UGC and other market failures. Historically, this is not what the test was introduced for. The Berne Convention did not contain only “one general restriction” but it listed a number of specific exceptions, which remained intact and were not overridden by the introduction of Article 9(2) in 1967. If the test is not employed to introduce new exceptions, it should at least be used to expand the application of existing L&Es. Furthermore, wide interpretations of existing L&Es contribute little to legal certainty and a stable legal environment for rightsholders and users. Such a flexibility implied legal uncer-

934 An exception is a Spanish decision, which, as described above, overruled copyright protection on grounds of public policy, stating that the three-step test also had a “positive” meaning in addition to its “negative” meaning, confirming, in principle, the original balancing effect of the test. Cf. Sentencia n 172/2012, 3 April 2012, Tribunal Supremo, Sala de lo Civil, Magakini.com v. Google Spain, a summary of the case again in Geiger et al. in: Gervais, International Intellectual Property: A Handbook of Contemporary Research (2015), p. 186.
tainty, to a certain degree.\textsuperscript{936} Using the test to extend limitations would provide flexibility at the price of legal certainty. Furthermore, the test in its application is too complicated for users to apply themselves in order to estimate whether a particular use would be privileged under a certain exception. Similar to fair use, it privileges legal experts, or those who can hire them, over parties for which hiring a lawyer is simply too expensive, financially or because of other transaction costs. A cumulative interpretation of the three steps would continue to privilege rightsholders because every step is a potential loss for users.\textsuperscript{937} But also a complicated and overly strict application of each step disadvantages those with little resources and results in relatively narrow exceptions.

e. Making the test work

The changes to the interpretation and application dealt with above can transform the three-step test into a flexible element in the system of L&Es of Article 5, which “permit[s] a combination of the security of a closed system of exceptions with the flexibility of fair use.”\textsuperscript{938} To make the test a flexible element it is necessary to break with the case-law of the CJEU and redefine the interpretation of this ambiguous provision.\textsuperscript{939} Flexibility based on the test within the catalog of exceptions provided by the \textit{InfoSoc Directive} and beyond this exhaustive list can only be achieved if the notion of strict interpretation is abandoned and Articles 5(2) and (3) are not seen as the limits to user rights but as their foundation. In its current formulation the \textit{InfoSoc Directive} does not permit the three-step test to develop its potential as a balancing tool that considers each interest with the same weight. Only an interpretation \textit{contra legem} could use the test to


\textsuperscript{939} Senftleben sees the enabling potential of the test in its ability for national legislators to introduce an US-style fair use norm, see Senftleben, “The International Three-Step-Test. A Model Provision for EC Fair Use Legislation”, \textit{JIPITEC} (2010), paras. 46-50.
open the closed list of exceptions and include uses that were not foreseen by the European legislature in 2001. Criticism directed against a flexible interpretation is based on arguments *de lege lata* and mainly historic interpretations dating back to the origins of the test in 1967 and its interpretation by the WTO panel. Such arguments should not prevent an evolution of the test at the international level that subsequently reflects on the *InfoSoc Directive*. It is not unconceivable that the impetus for a change in interpretation could come from the EU, and it is hard to imagine that the US would not side with an initiative that would give the fair use doctrine greater legitimacy. The general political problem of extending L&Es, however, remains.

Furthermore, a restrictive reading of the three-step test is not in accordance with the Agreed Statement concerning Article 10 of the *WCT*, which permits the Contracting Parties to create new L&Es that “are appropriate in the digital network environment.” This adds that the L&Es of the *Berne Convention* remain untouched by Article 10(1) *WCT*. The three-step test of the *InfoSoc Directive* must be read within its international context.

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940 See in this respect in detail Lucas, “For a reasonable interpretation of the three-step-test”, *E.I.P.R.* (2010), pp. 280-2, arguing that the drafters of the *Berne Convention* intended the text to be read in three steps, which would also correspond with a literal interpretation of the provision. Lucas also argues that an open interpretation of the test under Article 5(5) *InfoSoc Directive* would “[break] with the logic of the Directive on the information society” because the latter contains an exhaustive list of exceptions. However, the Declaration on a balanced interpretation of the “three-step test” in copyright law does not refer with one word to the *InfoSoc Directive*, its suggestions are rather addressed to the test as developed under international law. This can be supported by the fact that the Declaration has been published in eight languages, among these Chinese and Japanese (Christophe Geiger, Reto M. Hilty, Jonathan Griffiths, & Uma Suthersanen, “Declaration: A Balanced Interpretation Of The “Three-Step Test” In Copyright Law”, 01.09.2008 (Max Planck Institute for Innovation and Competition), available at: http://www.ip.mpg.de/de/aktuelles/declaration_on_the_three_step_test.html (accessed: 10.01.2016)) Thus, as reflected in the aims of the Declaration, which makes express reference to “[i]nternational economic regulation”, *Ibid.*, p. 3. A change in its interpretation, considering its age and several mutations, could certainly be justified, but would, it should be insisted, require multinational consensus. An interpretation suggested in the Declaration only for the *InfoSoc Directive* would require a revision of the Directive at least with regards to the exhaustive nature of L&E in Article 5.

941 *Agreed Statements concerning the WIPO Copyright Treaty*, Article 10 *WCT*. 

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context.\textsuperscript{942} Recital 44 \textit{InfoSoc Directive} seems to contradict the spirit of the Agreed Statement, or it must be understood as an express intention of the EU legislator not to make use of the opportunities that the \textit{WCT} has provided. In the end, the Agreed Statement on Article 10 does not create obligations but only ‘permits’ Contracting Parties the extension of existing L&Es in national law that are in compliance with the \textit{Berne Convention} and \textit{permits} to create new L&Es for the digital environment. If this was indeed the intention, the \textit{InfoSoc Directive} would have failed to “create a general and flexible legal framework at Community level in order to foster the development of the information society in Europe”\textsuperscript{943} with regards to L&Es. Recital 15 must be read with a rightsholder-protective undertone: “This Directive also serves to implement a number of the new international obligations.”\textsuperscript{944}

Applied differently, the three-step test could prevent contradictory developments at Member State level that would create further legal uncertainty. If Member States were to receive too much ‘breathing space’, e.g. by being allowed to add to the list of L&Es, L&Es in the EU would remain incoherent and would probably develop in different directions. The existing incoherence cannot be overcome by simply adapting a different reading of the three-step test, while Member States’ laws vary in their implementation of Article 5. The three-step test can provide guidance for interpretation, and it can possibly make existing L&Es slightly more flexible, but it cannot create coherence in EU copyright law with regards to L&Es, nor can it significantly tilt the balance of interests in its current biased application. Addressed to the Member States, allowing them, within limits, to introduce new L&Es, the test can function best to provide direly needed flexibility. As an additional corrective tool in the hands of the judiciary, the test could further be used to calibrate L&Es whenever necessary, again within limits. If judges were to receive too much leeway to apply the test without any guiding factors, legal certainty could hardly be safeguarded. Opening the test for the judiciary to introduce new exceptions would create a quasi legislature at the judicial level. But the fact that


\textsuperscript{943} Recital 2 \textit{InfoSoc Directive}.

\textsuperscript{944} Recital 15 \textit{InfoSoc Directive} (emphasis added).
the test was originally drafted to be applied by the legislator speaks against such a function. In applying the test and weighing all concerned interests, at least in the third step, the legislator is certainly better suited because of its capacities and resources (and the time) to thoroughly examine each of the three steps, in whichever order. In particular step two and three can make it necessary to conduct research and studies, e.g. to establish what constitutes a normal exploitation for the respective work.945

Ultimately, the test alone can only reduce the problems with L&Es temporarily. It cannot deliver future-proof solutions to introduce flexibility and legal certainty, while at the same time balancing user and rightsholder interests. The test must be supported by concrete guidelines and the scope of its application must be clearly defined. Griffiths, who opposed Senftleben’s assessment of the test as a tool to balance the interests of rightsholders and users, remarked critically that the test is a “hopelessly blunt instrument unsuited for the making policy distinctions [sic!] on issues on which differing, but nevertheless legitimate, conclusions may be reached.”946 In which form it should function at EU and Member State level will be discussed below.947

4. Adopting fair use

The shortcomings of the enumerative L&Es regime in the EU and the lack of flexibility of this system have led to a strange fascination of continental academics with the US fair use doctrine. Whenever a reform of the current system of L&Es is discussed, it is almost unavoidable that fair use is part of the conversation. It is not unusual that academic discussions try to find a middle ground, which is reasonable and practicable, by looking some-

947 Burrell and Coleman argue against an implementation of the precise wording of the test, recalling that the test was not intended to be applied by the judicature and pointing out that the test is too vague, Robert Burrell & Allison Coleman, Copyright Exceptions: The Digital Impact (Cambridge: Cambridge University Press, 2005), p. 298.
where between two extremes. And indeed, fair use can be considered as one of the two poles of the world of possibilities to design a system of copyright L&Es. The concept of a flexible open norm, and that of a closed list of clearly defined exceptions stand opposed as different philosophies of limiting exclusive rights. Whereas fair use promises almost endless flexibility, allegedly at the cost of legal certainty, a closed list of exceptions provides immense legal certainty, at the expense of flexibility.\footnote{948} With the European system lacking flexibility, it is only natural that Europeans look to the fair use doctrine for inspiration.\footnote{949} The EU would not be the first jurisdiction to introduce fair use in the 21st century. Following the conclusion of trade agreements with the US, a number of countries have implemented a fair use defense in their national copyright systems.\footnote{950} Countries that have decided to integrate the doctrine into their national laws include Israel, Singapore and South Korea.\footnote{951}

The fair use doctrine has its origins in common law\footnote{952} and was codified only in 1976 in 17 U.S.C. § 107. It privileges uses of copyrighted works that are found ‘fair’ under a four-factor test. These uses are considered on a case-by-case basis in the courts. A judge can find a use to be fair, and therefore permitted without authorization from the rightsholder, by considering (1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the portion taken, and (4) the effect of the use upon the potential market. Neither must judges


\footnote{950} The adoption of the fair use system in other jurisdictions is not primarily owed to its functional supremacy, though it is argued that fair use is indeed the more flexible, reliable, and therefore economically more reasonable alternative to the European L&E system. The reason why many states opted for an adoption of the fair use system is the pressure exerted by the US in negotiating its free trade agreements, which, in its IP chapters, usually includes the fair use doctrine.

\footnote{951} South Korea has adopted the fair use doctrine in 2013, subsequent to the conclusion of of the US-South Korea Free Trade Agreement, see Jaewoo Cho, “As Korea Implements Fair Use, Two Cases Offer Precedent for Flexible Copyright Exceptions and Limitations”, 18 February 2013 (InfoJustice), available at: http://infojustice.org/archives/28561 (accessed: 03.12.2015).

\footnote{952} The first fair use case is considered to be Folsom v. Marsh, 9 F. Cas. 342, No. 4,901 (C.C.D. Mass. 1841).
consider all factors, and they can add other factors to the test. Nor does any of the factors, in principle, have a higher weight than the others; however, finding uses of transformative character usually favors a finding of fair use. Instead, an overall assessment of the test and a careful balancing of all factors will bring the applying judge to the conclusion that a certain use constitutes fair use, or not. A finding of fair use has the result that the use is not infringing copyright.

The weakness of every open norm is that it requires interpretation by the judiciary. This is not to say that the specific exceptions of the InfoSoc Directive do not require interpretation, the CJEU has helped national judiciaries a great deal. But an open norm gives less guidance than an exception which describes the situation in which it is applicable at least to a certain extent. The fair use doctrine prevents borderless interpretation in two ways. It limits the scope by providing for “statutorily favored use categories”. The categories – “criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research” – guide the judiciary in applying the fair use doctrine; the

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953 § 107 of the US Copyright Act (17 U.S.C. § 107) specifies that the factors to be considered in determining if a use is fair “shall include”.

954 Campbell v. Acuff-Rose Music Inc., 510 U.S. (1994), at 579, This is criticized by Ginsburg, basing her criticism on the judgment in HathiTrust, arguing that the court trivialized market harm to enable a use which is compellingly benefiting the public interest. She pointed out that such uses could in fact be licensed, albeit significant efforts had to be undertaken, but the social interest and the transformativeness of the use trumps the rightsholders interests to bring a service to the public that is socially desirable, Jane C. Ginsburg, “Fair Use for Free, or Permitted-but-Paid?”, Berkeley Tech. L.J. (2014), 1383-1446, pp. 1401-2. Leval, who had welcomed the Supreme Court’s decision in Campbell v. Acuff-Rose, because it “teaches about fair use that it is a doctrine of the copyright law that seeks to advance the goal of copyright.” (Pierre N. Leval, “Campbell v. Acuff-Rose: Justice Souter’s Rescue of Fair Use”, Cardozo Arts & Ent. L.J. (1994), 19-26, p. 22, also already Pierre N. Leval, “Toward a Fair Use Standard”, Harv. Law Rev. (1990), 1105-1136, p. 1122) has suggested a more prominent standing of the first factor in the overall assessment of the four-factor fair use test (see Ibid., in particular p. 1116). He also argued that a strong finding of transformativeness would imply a positive finding of the fourth factor because the more transformative a work is, the less likely it will create competition on the market for the original work (Leval, “Campbell v. Acuff-Rose: Justice Souter’s Rescue of Fair Use”, Cardozo Arts & Ent. L.J. (1994), pp. 22-3).

doctrine’s application is further limited by four factors that help the judge to determine whether a use is indeed fair, which are not exclusive and are not to be read as a hierarchy or as a sequential test.

Fair use is not the only exception under US copyright law. The US legislator decided to provide for a number of specific exceptions that exist in addition to the fair use defense. These exceptions relate to highly socially desirable uses for disadvantaged groups or for other uses at the heart of the public interest (e.g. libraries, education, persons with disabilities). Similar to the fair use defense, privileged uses under express exceptions do not entitle rightsholders to claim remuneration or compensation.

Fair use is often praised for its flexibility, if for no other reason than usually out of frustration with the European system of strict and inflexible L&Es. From a systematic point of view, fair use has proven to be more accommodating in that it did not force US judges to seek solutions outside fair use in order to enable novel uses.

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957 Just as one example, in Perfect 10 v. Amazon the US Court of Appeals for the Ninth Circuit found that the defendants use of thumbnails was protected under the fair use doctrine arguing that the use of thumbnails was “highly transformative” (Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007)), German courts solved a similar problem by resorting to the theory of implied license, which enables a search engine to display Thumbnails because the operator of a website had not deployed technological measures to prevent search engines from indexing his website, and thereby implicitly consented to the use of images from his website, BGH, Urteil v. 19.10.2011, I ZR 140/10; BGH, Urteil v. 29.04.2010, I ZR 69/08. See for a French judgment on similar facts Cour d’Appel de Paris, 26 January 2011, La Société Des Auteurs des Arts Visuels et de L’image Fixe Visual Auteurs (SAIF) v. Google France SARL and Google Inc., the French court held Google not liable because it was merely processing data in a passive manner, therefore the company was found privileged in the light of the e-Commerce Directive. However, Google was held liable because it had failed to remove infringing pictures once it had been made aware of the infringing content. In first instance the District Court of Paris had still applied US law and found in favor of Google applying the fair use doctrine in its favor (Tribunal de Grande Instance Paris, 20 May 2000, La Société Des Auteurs des Arts Visuels et de L’image Fixe Visual Auteurs (SAIF) v. Google France SARL and Google Inc.).
Advantages and disadvantages of fair use

Senftleben sees the advantage of fair use in its flexibility that balances flexible and ever extending exclusive rights. For him the core advantage of fair use is its ability to constantly reassess the balance between user freedoms and rightsholder protection. Legislative interventions are not necessary because fair use allows an application of the four factors and a balancing of interests to new technologies and business models.

Fair use has the potential, and is exercised in this way in the US, to minimize “counterproductive overprotection”.\(^{958}\) This is also an effect of the openness of the norm and the abstract formulation of the four factors. The EU system of L&Es with a restrictive catalog of narrowly defined situations, further restricted by an unusual application of the three-step test, cannot exercise this function. Indeed, its flexibility enables fair use, the statutory formulation of which has not been changed since its introduction in 1976, to adapt to developments in society and technology. More importantly, the ability to react is in no way influenced by the legislative, and a burdensome legislative process does not delay the beneficial effects of legal certainty. Instead, judges apply the defense directly on a case-by-case basis. In the EU, reactions to new developments would require legislative intervention. Already 14 years after the *InfoSoc Directive* completed its ways through the legislative process, it seems hopelessly outdated with regards to L&Es, which are, in their current form, ill-suited to accommodate a number of digital uses the fair use doctrine has embraced. However, the flexibility of fair use has also raised doubts whether the doctrine is in conformity with international obligations, in particular the three-step test,\(^{959}\) but most commentators suggest that fair use is *Berne*, *TRIPS* and *WCT* (etc.) compliant.\(^{960}\)


A disadvantage of fair use for rightsholders is that it does not impose any obligation of remuneration or compensation for uses that are permitted under the defense. Ginsburg has argued that this missing feature of the doctrine disadvantages rightsholders. On the other side, it must be argued, that it gives the doctrine a much more user-friendly appearance, if successfully applied. Free uses without compensation or remuneration, so Ginsburg, should be reserved for ‘subsidy-related’ instances (“socially worthy redistributions”), whereas ‘market failure-related’ instances (e.g. high transaction costs) should be governed by a “permitted-but-paid” system. She criticizes that the ‘fair’ factor has created a situation in which uses are fair only because certain uses cannot reasonably be licensed on an individual basis. An element that could impose statutory licenses on users, without requiring authorization from rightsholders would be better suited to establish a balance of interests. The current system runs the danger of letting rightsholders pay the bill for market failures.

It is claimed that fair use, albeit the open nature of the norm, provides for a relatively high level of legal certainty. Arguing that an open norm, which is applied by the judiciary to the fact of every individual case, seems paradoxical at first glance. How can a system that lets judges decide on the facts of every individual case be predictable to the extent that busi-

963 Ginsburg suggests that new uses of existing works, which offer new distributions or novel applications based on works should be subject to a “statutory framework for license negotiations, with statutory licensing as a backdrop.” Ginsburg, “Fair Use for Free, or Permitted-but-Paid?”, Berkeley Tech. L.J. (2014), p. 1386; arguing that fair use could also provide for remuneration at the remedial stage: Pamela Samuelson, “Possible Futures of Fair Use”, Wash. L. Rev. (2015), 815-868, pp. 862-3.
ness models can rely on the defense as the foundation of their commercial activities? And how can a doctrine that gives users abstract standards that require legal and economic reasoning and analysis incentivize creativity? Proponents of the view that fair use provides legal certainty argue that the long tradition of the doctrine provides sufficient precedent on which judges can rely for guidance when applying the defense in a particular case. A number of reviews of US case-law on fair use support this view by isolating certain trends in the application of fair use.  

Senftleben sums up this position by stating: “A sufficient degree of legal certainty can easily be secured by applying case law established under the old system, as a basis of the new fair use system.” The US Copyright Office published a Fair Use Index the aim of which “is to make the principles and application of fair use more accessible and understandable to the public”. The Index is a searchable database of fair use court opinions. Search options include categorization by type of use, so that established fair use defenses can easily be identified. This database encapsulates the richness of the doctrine by presenting a searchable database of court opinions, including by category and type of use (e.g., music, internet/digitization, parody/satire).  

Aside from it being a useful research tool, it enables users to look for precedents and also cases in which the defense was rejected. The database also illustrates the corpus of fair use jurisprudence. But what it cannot do, and the website states this explicitly, is to provide legal advice whether or not a certain use would succeed under the defense. It can provide legal certainty only ex post, which is, it can be argued a weakness of a system that is based on case-by-case decisions.

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967 United States Copyright Office, “U.S. Copyright Office Fair Use Index”, (United States Copyright Office), available at: http://copyright.gov/fair-use/ (accessed: 10.01.2016), the database currently contains around 170 case summaries, in total the search function offers 15 categories and the option “Other”, the latter only includes one entry.
968 In addition to the fact that a fair use-system only provides ex-post certainty, the problems of a hierarchical courts system must be considered. If users can only rely with certainty on last instance decisions the value of such a precedent-system is reduced, cf. in this sense Dan Svantesson, “The holy trinity of legal fictions
Proponents of the EU system of a closed list support their position by claiming unlimited legal certainty, albeit within a tight corset.\textsuperscript{969} It is undeniable that the continental system, on the one hand, does not provide flexibility, but that, on the other hand, legal certainty that is only attained at the price of a ‘frozen’ system of L\&Es does not appear very desirable.

However, fair use should not be praised without reservations. A system that is based on case-by-case decisions is not necessarily something that provides absolute legal certainty. Before the US District Court for the Ninth Circuit found thumbnail previews to be “highly transformative” and therefore covered by the fair use defense the District Court of the Central District of California granted Perfect\textsuperscript{10} an injunction against Google’s use of thumbnail pictures for its search engine.\textsuperscript{970} Unless a clear precedent exists relying on fair use is often a gamble on a positive judgment.

For users, fair use offers a sort of negative foreseeability because no exhaustive list limits fair uses to ‘certain special cases’.\textsuperscript{971} Fair use always offers a chance that a certain use is found to be fair by the judiciary, existing case-law can provide guidance, but no certainty. For completely new technologies and uses based on these technologies also existing case-law can have only limited value. But fair use does not discourage new uses, whether “highly transformative” or not, only because a particular use is not covered by an express exception. There exists always at least a slight possibility that a court will find a use beneficial to society and transformative to a sufficient degree. Therefore, fair use has certain advantages beyond flexibility; absolute legal certainty cannot be achieved, probably, by any system of copyright L&E.

b. Is fair use really that flexible?

The title of this subsection is in no way meant to be rhetorical, it is a genuine inquiry into the extent to which the fair use doctrine offers flexi-
bility. Admitting, in part, that the doctrine offers legal certainty to a certain degree, its unique selling point is its alleged flexibility.

In the US, fair use has created more flexibility within the copyright system itself by permitting forms of transformation art that are fundamentally different from the original and are very unlikely to be in direct competition with the original work. Fair use also confirmed the legality of mass digitization projects. In the EU, a transformative element can only be found in Article 5(3)(k) under the parody exception, which effectively is the equivalent to the rule established in the US case *Campbell v. Acuff-Rose*. Digitization of protected subject-matter is permitted only within limits; reproduction beyond digital copies for conservation purposes and limited access via terminals would give rise to remuneration claims by rightsholders.

Under the fair use doctrine the transformative element under the first criterion has been stretched and (ab)used in many instances. It has overshadowed the application of the doctrine, degrading the other three factors to second class elements. But an excessive application and the higher weight given to transformative uses has provided a high degree of flexibility. The other three fair use factors are, compared to the purpose and character of the use, rather inflexible in their applications. Their application reflects an objective assessment of circumstances. It is, for example, rather obvious whether a given work is a creative work or a work of fact. It is also easily quantifiable what percentage of a work has been used. It is also intellectually burdensome to estimate the effect on the potential market for the work concerned. Whether a use is transformative leaves a certain margin for creative legal arguments. Often, however, transformativeness is too readily confirmed. Judge Chin’s enthusiastic ejaculation “Indeed all society benefits” in *The Authors Guild v. Google* is emblematic for this approach. Google Books is still a commercial undertaking and, if not directly, Google most likely derives some economic benefits (as one aspect of the first fair use factor) from the project (even if it is only

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972 *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006), see e.g. Jütte, “The EU’s Trouble with Mashups: From Disabling to Enabling a Digital Art Form”, *JIPITEC* (2014).


good publicity, though not necessarily with authors). The fading away of the other three factors benefits the flexibility of the doctrine. However, a dominance of transformativeness, even if in this case to the benefit of society, can create a significant imbalance for rightsholders in that their economic interests are not properly taken into consideration.

And there is another aspect of the fair use defense that makes it significantly more flexible than precisely defined exceptions or the three-step text. The factors of the doctrine, although the first one receives a certain weight, do not relate to each other in a predefined hierarchical system. Judges can, in applying the defense, balance all four factors against each other. A strong finding of transformativeness can overshadow commercial uses that are to an extent creating competition for the original work. A lack of transformativeness can be compensated by a use that does not affect potential markets significantly and that only borrows small parts of the original work. The undetermined relation between the four factors provides judges with a high degree of flexibility.

Fair use is more flexible than a closed system of L&Es of EU-style, but it creates all-or-nothing results that depend largely on one dominant factor. Either the defense succeeds and the user is allowed to use a copyrighted work without conditions, or the use is prohibited and the user would have to ask for a license. The European approach, which grants reproduction right against remuneration claims is alien to the US. It is in particular this element that has recently been discovered by US academics. This all-or-nothing flexibility might enable more uses that are transformative and benefit society to some degree. In itself it is not flexible because it lacks a mitigating – balancing – element, an element that in the EU is compensation and remuneration. The fair use doctrine can achieve this flexibility, while maintaining legal certainty, only with legislative intervention.

Fair use does not guarantee absolute flexibility, nor does it heavily favor users or rightsholders. But admittedly there are advantages of the doctrine over a closed list of L&Es. It compensates for the lack of specific exceptions, privileging specifically critique, artistic expressions and quota-

tions, with a tendency to extend to other fundamentally transformative uses. If fair use was not be completely imported into the InfoSoc Directive it could at least be the starting point to develop a more flexible, yet relatively predictable, systematically sound legal provision for L&Es in EU copyright law.

979 Limitations of fair use

But fair use also finds its limits. Whereas the doctrine has helped in accommodating a number of transformative uses, US judges shy away from treading too far into territory reserved for the legislative, ReDigi has been a good example for this limitation of the doctrine. This reservation to create new law would even find stronger expression with continental judges, who perceive their role more as interpreting than legislating. In Europe, the balancing choices that are made under the fair use doctrine are usually left to national legislatures. The three-step test of the InfoSoc Directive, which is still mainly addressed to the national legislatures, confirms this European legal tradition.

Fair use does not guarantee flexibility without boundaries or an absolutely just balance between the interests of rightsholders and users. The effects of fair use, and any other flexible norm that is applied by the judiciary, depends on how judges use the norm. Contradictors of the judgment of US courts indicate that fair uses are not always obvious and the recent emphasis on transformative uses has tilted the balance in favor of users. In the EU, the restrictive application of the three-step test has led to a stronger protection of rightsholders, which limited secondary uses or forced the courts to explore alternative avenues of interpretation.

c. Limitations of fair use


d. Implanting fair use

An adoption of the US fair use doctrine as a supplement to or as replacement for the exhaustive list of L&Es has been intensively discussed in academic literature. Peifer concluded in a 2014 article on private copies that the introduction of fair use in the EU would be politically feasible, but the process would be burdensome. Peifer did not specify why it would be burdensome, but what he had in mind was probably the political process that precedes EU legislation, be it a directive, or a regulation. Disregarding the process, there are other factors that are brought up against an introduction of fair use US-style in the EU.

Kleinemenke also sets forth the point that the introduction of an isolated free norm modeled after the US fair use doctrine would create flexibility at the price of legal certainty. He raised the further concern that fair use would collide with the three-step test and suggested a combination of both, accompanied by a list of rather precisely defined exceptions. Indeed, a self-standing fair use defense in EU copyright law would not automatically assume the role it has played, successfully, over the last 40 years.


years in the US. It is the historical context of the doctrine, a context that predates its codification in 1976, that makes fair use work in the US. Legal certainty is inextricably connected to the extensive body of fair use case-law, which gives guidance to the judiciary for an interpretation of the four factors. The lack of a comparable body of case-law would, at least in the short term, hinder its effectiveness in the EU.985

US scholars have presented impressive research to analyze the application of the fair use doctrine by courts, they have distilled common principles from domestic case-law and suggested that fair use is not that uncertain.986 They have done so based on a rich tradition of common law jurisprudence and after a statutory fixation of the doctrine in 1976. Samuelson has identified a number of fair use categories and encourages judges to develop fair use based on patterns contained in fair use case-law.987 Some of these patterns identified by Samuelson correspond to the basic categories of uses which should, it is argued, be permitted. But several decades of established fair use case-law do not protect the doctrine from significant derogations from (seemingly) settled case-law.988 For example, Beebe identified a number of systematic errors that weigh against legal certainty in particular. In his empirical analysis of fair use

985 A practical example for the transplantation of the fair use defence into a foreign national copyright system is described by Birnhack, who argues that the integration of a foreign doctrine into a national system of norms is impossible without considering its theory and history. Such a legal transplant would result in a “judicial snapshot” which freezes the implant and creates the potential for a limited application of a norm with more potential for (necessary) development, see Michael Birnhack, “Judicial snapshots and fair use theory”, QMJIP (2015), 264-284.
987 Ibid., p. 2621.
cases he discovered that non-leading cases do not always follow leading cases.989

Samuelson, in her study on fair use-case law, admits that the application of the fair use defense remains unclear. This is, so Samuelson, because the case-law on relevant uses is “quite thin”, and also because the views on the application of the doctrine differ between the publishing industry and researchers and educators. She concludes however, that, as an example, a “ubiquitous” use of protected material for teaching and research is so manifested in education and research that such uses “may have, in effect, become fair uses after all.”990 But doing something until it becomes law, some sort of ‘customary user right’, does not contribute to a coherent system of L&Es, nor does it provide legal certainty – neither during the time in which uses that lead to this custom to-be-established, nor after a custom has been established. Legal certainty can only be created by a judgment that confirms or rejects a manifested use. A manifestation of a use, against the will of rightsholders or users, to prescind this thought from the concrete example, is not the optimal way to create a balance within a system of copyright. This balance should be struck by the legislator, or the judiciary if its task is to shape the legislators intention as expressed in an open norm.

Certainty, in the sense of the first element of the three-step test, but also in the sense of legal certainty as one of the guiding principles of this research, is provided differently in systems with a closed list of exceptions and systems with an open norm. In closed-list systems certainty is delineated by the respective exceptions enumerated in the national copyright code (or in the InfoSoc Directive), in open-norm systems, certainty is created by precedents that establish certain cases for the future.991 Precedents rely on a longstanding legal tradition that is embodied in case-law.


991 See Geiger et al., ‘The Three-Step-Test Revisited: How to Use the Test’s Flexibility in national Copyright Law”, Am. U. Int’l L. Rev. (2014), p. 614, the authors make the argument to justify the compatibility of fair use with the three-step test. More precisely it is argued that every court decision makes a “special case” known and thereby certain (also for future users). The wealth of the case-law creates legal certainty, similar to detailed legislation; with reference to Martin
The lack of a jurisprudential tradition and experience in dealing with an open norm with four relatively unknown factors would probably pose the biggest obstacle for a EU fair use doctrine imported from 17 U.S.C. § 107. Fair use lives from its case-law and more than a century of judicial experience. In contrast, the EU copyright acquis has not even survived for 20 years and is already under heavy criticism – and has always been during its existence. The jurisprudence on the acquis can look back at merely a decade of case-law. And although the case-law is constantly growing, it does not relate remotely, quantitatively and substantively, to that of the fair use doctrine. National case-law, has no relation to EU copyright before harmonization commenced and cannot fulfill the role US common law occupies in the interpretation of 17 U.S.C. § 107. The only ‘flexible’ element in the EU copyright acquis, the three-step test of Article 5(5) InfoSoc Directive, is, more often than not, ignored by the CJEU. It would not be without risk to implant a common law element into a copyright system of L&Es that is based on the continental author’s rights idea.

In particular with regard to digital uses of copyright protected works and other subject-matter, the legal uncertainty that would be created by a replacement of the current system of L&Es by a ‘borrowed’ fair use defense would be detrimental to the functioning of the digital single market. Due to the lack of legal tradition in dealing with such an open norm, that is solely based on four factors, the doctrine, if implemented into EU copyright law without any further support or guidance, would constitute a foreign body that could hardly be expected to work smoothly and to fulfill the expectation of, above all, flexibility. Fair use just does not fit


with the mainly continental European tradition.\textsuperscript{994} In the best imaginable scenario, fair use in the EU copyright acquis would require significant time to develop its own substantive content. To achieve proper harmonization, the CJEU would also have to play an important role in this development.\textsuperscript{995}

For these reasons, replacing Article 5 \textit{InfoSoc Directive} in its entirety with a US-style fair use defense seems a bit radical. After all, the experiences with existing L&Es have not been entirely bad, especially with the recent tendency to interpret L&Es more liberally with the purpose of enabling the object and purpose of the exception concerned. It is without question that even a completely mandatory list of L&Es demands flexibility, which the current system is lacking. And, finally, an EU open norm could only work if the European approach to the three-step test would change. Even in the US “the three-step test exerts control over the fair use doctrine and not vice versa.”\textsuperscript{996} The European perception of the test would then also decide on the success of a European open norm.

5. Including an open norm

As has been argued in the preceding section, a simple import of an US fair use-style norm into EU copyright should be avoided. Deleting the infamous list of 21 L&Es and replacing it with \textit{one} open norm would rob the EU copyright system of its (still young) tradition. However, introducing an open norm in addition to the existing exhaustive list would preserve the inspiration that is generated from both, the case-law of the CJEU and scholarly commentary as interpretative means. A fresh open clause could then extend the scope of L&Es under the \textit{InfoSoc Directive}, guided by

\begin{itemize}
\item \textsuperscript{995} Cf. Senftleben, \textit{Copyright, Limitations and the Three-Step Test: An Analysis of the Three-Step Test in International and EC Copyright Law} (2004), p. 113.
\item \textsuperscript{996} In this sense Senftleben argues that the fair use doctrine cannot be used as a supplementary means of interpretation for the three-step test (within the meaning of Article 32 \textit{VCLT}), but rather as an enriching element of a comparative nature, as a “reservoir of ideas”, \textit{Ibid.}, p. 113.
\end{itemize}
common principles, read in the light of what is currently Article 5(1)-(3). These common principles should be referenced in the text of the open norm, which would give the courts guidance in interpreting a norm that can be used to react to changes in society and technology rather flexibly. As a guiding idea, this purpose should also find its way into the formulation of the new open norm.

To further instill flexibility into such an open norm, and to underline and emphasize its spirit, which should be to create a fair balance of all involved interests, express reference should also be made to the fundamental rights dimension of L&Es. In the absence of much jurisprudence on the conflict between copyright and fundamental rights, this reference could seem rather meaningless. But as much as fair use relies on a rich body of case-law, an EU copyright must also develop, and let grow, a comparable rich body of case-law, built on the wording of a future open norm. If the EU courts are to take fundamental rights seriously in their role as mediators between conflicting interests, particular in copyright, case-law should consistently reflect this influence. A reference to fundamental rights should serve as a reminder to the judiciary that it must consider fundamental rights more often and more fundamentally than it has done so far. Moreover, all relevant fundamental rights should be considered and not only selected aspects.997

V. Revising L&Es for digital uses

It is not a question if L&Es under the current InfoSoc-system must be reformed, but a question how such a reform should look like. The need for reform has been stressed sufficiently by academic scholars998 and public

998 E.g. Geiger et al., “What Limitations to Copyright in the Information Society? A Comment on the European Commission’s Green Paper “Copyright in the Knowledge Economy””, IIC (2008), p. 415; also, suggesting that a more flexible system, and therefor a reform of the current system, is “imperative”, Burrell &
The original draft of the “Reda Report” has focused on L&Es, the actions announced by the European Commission in the “Digital Single Market Strategy” were, however, rather disappointing. Introducing L&Es for research, education and text and data mining is not enough to make Europe’s digital markets thrive and to enable and encourage a vibrant digital single market.

In contrast to the Commission’s view, a comprehensive overhaul of L&Es as a system is necessary to achieve the goals that were set out in the 2010 communications “A Digital Agenda for Europe” and “A Single Market for Intellectual Property Rights”. A system that will function appropriately to strike the balance between the interest of rightsholders and users and to enable the dissemination of online content must display a


See Chapter 1.C.V.4.
number of characteristics. It should, first and foremost, be flexible. It should also be predictable, efficient and fair.\textsuperscript{1003}

It should be \textit{flexible} to adapt to new uses for protected subject-matter and at the same time it should be able to react to technological changes that disturb the balance of interest in copyright. It must be noted that there is a slight degree of flexibility in the current system. However, this flexibility was in no way sufficient to properly react to all technological developments of the last 15 years.\textsuperscript{1004} A new system for L&Es should also provide legal certainty, which means it should be \textit{predictable}. Users and rightsholders must be able to anticipate which uses are permitted, for free or against remuneration. The system should also be \textit{efficient}, in the sense that it is predictable without generating prohibitive transaction costs. Predictability does not mean that only lawyers should be able to assess the legality of certain uses, but rightsholders and users should be able to determine the legality of particular uses of protected subject-matter. High transaction costs should not bar uses of works or other subject-matter. Finally, the system should be \textit{fair} so as to strike an adequate balance between the interests of rightsholders and users.

Article 5(3)(o) of the \textit{InfoSoc Directive} has a flexible preservation clause. A reform of the Directive should supplement this flexible clause with a provision that enables flexibility in the future. With the above-mentioned four criteria, the following sections try to suggest the parameters for an open norm that is flexible, provides legal certainty, and that is efficient. This system should also strike a fair balance between the interest of rightsholders and users.

\textsuperscript{1003} A reformed system for L&Es should be ‘fairer’ (see Burrell & Coleman, \textit{Copyright Exceptions: The Digital Impact} (2005), p. 276) than the current system, which, as noted above, privileges rightsholders over users. Fairness also means that the role of users in copyright law is acknowledged (see \textit{Ibid.}, p. 279).

\textsuperscript{1004} \textit{Ibid.}, p. 277; also Hugenholtz & Senftleben, \textit{Fair Use in Europe: In Search of Flexibilities} (November 2011); European Commission, COM(2008) 466 final, p. 5.
1. The locus of an open norm

When it comes to re-modeling L&Es in the EU, the policy options are fairly limited, and they all relate to the *InfoSoc Directive*.\textsuperscript{1005} If the current model is to be changed it will require a revision of the central instrument of EU copyright. The most obvious solution would be to rewrite Article 5 of the *InfoSoc Directive* to include an open norm, e.g. by replacing paragraph 5, which currently contains an ‘unfiltered’ version of the three-step test, by an open norm. Article 5 could also be extended, leaving paragraph 5 intact.

Hilty, with reference to the “Green Paper on Copyright in the Knowledge Economy”,\textsuperscript{1006} suggested to think about regulating certain areas of copyright in specialized directives.\textsuperscript{1007} He argues that opening the “Pandora’s Box” of the *InfoSoc Directive* would be detrimental to the process to the effect that “it would never be possible to close it again.” The argument constantly reoccurs in discussions on reforms of EU copyright (see above). But disregarding political pitfalls and the fear of opening the floodgates (just to use another image) of reform proposals once the sick patient (the Directive) has been cut open, a separate legal instrument could also be a solution for L&Es, which could be the subject of a *lex generalis* L&E directive. However, this would make it necessary to clarify the relation between the current *lex specialis* directives (e.g. for the subject-matters of software and databases,) and the new directive as well as the exhaustive list of Article 5 *InfoSoc Directive* and the new directive. But even a new copyright directive dedicated (almost) exclusively to L&Es would be subject to fierce discussions during the legislative process.

And it does make sense to keep L&Es within the framework of the *InfoSoc Directive*. The Directive is best suited to accommodate a system for L&Es that applies horizontally to all areas of copyright law. Exceptions for particular rights could co-exist in other directives and the colli-

\textsuperscript{1006} The Green paper did not make such a suggestion, but it was limited in its scope to L&Es that are most relevant to dissemination of knowledge, European Commission, COM(2008) 466 final, p. 6.
\textsuperscript{1007} Hilty, “Declaration on the Three-Step Test: Where do we go from here?”, *JIPITEC* (2010), para. 18.
sion norms in Article 1 *InfoSoc Directive* would remain intact. More importantly, for systemic reasons, L&Es which are inextricably linked to exclusive rights should not be separated from Article 2-4 *InfoSoc Directive*. As counterparts to exclusive exploitation rights, L&Es should be read together with the relevant rights. Separating them cannot be explained for other reasons than political bargaining – and although a reality, political bargaining should not result in even more fragmentation of the copyright *acquis*. The *InfoSoc Directive* as it stands with its provisions on exclusive rights, L&Es and TPMs constitutes the core of EU copyright. None of the three elements should be separated from the others as all three constitute an inseparable trias of elements. Their interaction and interpretation can only be understood and further developed if they continue to exist in one legal instrument.

Therefore, the *InfoSoc Directive* is the right place to position an open norm that brings flexibility to EU copyright. Whether a revision of the Directive is politically feasible is yet another question.

2. The notion of an open norm

It has been argued above that the interpretational freedom that European national courts have so often sought outside their own copyright systems could also find its place within EU copyright in form of an open norm. An inclusion of flexibility should, however, not be achieved by ‘legalizing’ questionable interpretative approaches developed by national courts; it should find expression in a new flexible norm that stands in systematic contrast to the closed list of exceptions of Article 5 *InfoSoc Directive*. This must not mean that Article 5 must be abandoned in its entirety. The 21 L&Es contained therein reflect the EU copyright tradition and can still be applied and, to some extent, be reinterpreted. But a flexible interpretation of existing exceptions does neither promise flexibility for the future, nor does it provide positive legal certainty for uses that are based on new technologies. A supplementary solution within the *InfoSoc Directive* would be a best fit to conserve EU copyright tradition and open

the existing catalog to accommodate unforeseen uses that nevertheless should be permitted.

The principles that guide this research should also guide a supplement to Article 5 *InfoSoc Directive*. Any attempt to further harmonize or unify EU copyright rules, especially with regard to L&Es, should “respect the imperative of legal certainty”.1010 Legal certainty is absolutely necessary if a reformed Article 5 should contribute to the aims expressed in the “Digital Agenda” and the “Digital Single Market Strategy” and is of paramount importance for new business models. Predictability and trust are essential to establish businesses and to create content based on and distributed by digital technology using protected works and other protected subject-matter. The Green Paper “Copyright in the Knowledge Economy” recognized the importance of L&Es in 2008, the urgency to take action in this field, as a response to the publication of the Green Paper, was underlined and stressed,1011 but a genuine follow-up that would have resulted in concrete actions never took place.1012 For L&Es the EU needs a “clearer legislative framework, which should reach across borders”1013 in order to encourage innovation and attract investments. Legal certainty is also necessary to encourage and to enable new forms of creativity, the results of which naturally feed into business models in the information society.

An open norm should also reflect in its formulation some expression of a fair balance in copyright law. In contrast to the inflexible system of an exhaustive list that privileges rightsholders, an open norm should contain the standards and mechanisms that guide its fair and just application. Rightsholders concerns must find their place in the formulation of the norm, and user interests must be adequately reflected as well. Therefore, a formulation must deviate significantly from the current wording of Article 5(5) *InfoSoc Directive*, while maintaining parts of the three-step test to underline the interest of rightsholders. But already the fact that a norm is

1012 See European Commission, COM(2008) 466 final, p. 3.
open would shift the center of the balance in favor of users of protected works. Because it leaves room for more uses that do not require authori-
tation than a closed list it is de facto more user-friendly than a closed list.

Providing greater flexibility to L&Es at EU level, which would then affect national levels by way of implementation in case of a directive or by direct applicability in case of a regulation, can essentially take three forms. The first, and the most flexible form, could see the exhaustive list of Article 5 InfoSoc Directive replaced by an open norm fair use-style. The second option would be to retain characteristics of an enumerative (illustrative) list of L&Es and complement them with an open norm for cases that are not covered by the list. This open norm would still provide flexibility for new, unforeseen uses while conserving a certain measure of the legal certainty a closed list provides. A variant of the second option would complement the inspirational list with a number of general principles or aims L&Es are meant to pursue. A third possibility would be to rephrase the current list, and add to the list, where appropriate, generally phrased exceptions that are limited, but leave more room for interpretation. This option would provide some flexibility while at the same time restricting the scope of L&Es to certain special cases. This third option would also reflect continental concerns with an open-ended ‘fair use-style’ norm.

3. An inspired open norm

It is clear that the number of uses that would justify remunerated or free exceptions prohibits a continuation of the current system with a closed list of L&Es. Exceptions have already been suggested (e.g. for text and data mining, e-lending, UGC). In particular digital uses and uses that diversify the offer of online content are hard to predict with constant advances in digital technology. A continuation of an exhaustive list would gradually disadvantage users the ‘older’ the list gets, until another round

1014 Hargreaves et al., Standardisation in the area of innovation and technological development, notably in the field of text and data mining. Report from the Expert Group (2014), the expert group suggests an exception for text and data mining for scientific purposes that builds on the exception for research in the InfoSoc Directive; to avoid the shortcoming of the current InfoSoc Directive the exception should be mandatory (p. 66).

of additions is made by the legislature. A system solely based on precisely defined L&Es cannot be the solution that provides flexibility and legal certainty and a stable balance. An open clause of some sort “appears timely”\textsuperscript{1016} to react adequately to technological developments.

Neither option discussed above (extension, altered interpretation, fair use) can provide flexibility and legal certainty by itself; all have their advantages as well as their disadvantages, if not intrinsically then within the peculiar system of EU copyright. An extension of the exhaustive list will naturally require frequent revisions of the system in the future due to technological developments and novel uses for protected works. The European Commission would need to relaunch a “Digital Agenda” or “Digital Single Market Strategy” every now and then. A more flexible approach to interpretation would sacrifice legal certainty for more flexibility. An open norm similar to the US fair use doctrine alone would lack initial interpretative guidance and would only develop into a veritable replacement of the current system after many years of jurisprudence. At least for the first decades an open norm without strong indications as to its interpretation would raise concerns with respect to legal certainty.\textsuperscript{1017}

Hargreaves and Hugenholtz suggest a revision of the InfoSoc Directive with a list of mandatory L&Es that guarantee fundamental information right and freedoms as well as such L&Es that “have immediate impact on the workings of the single market”. The first set would aim at enabling certain acts in relation to the right to freedom of expression, which includes the right to receive and impart information. As examples the authors list quotations, news reporting, parodies, information location, research and data mining, and user-generated content. The second set would relate to the technical aspect of the Internet and would include L&Es for activities such as private copying and archiving. It is further suggested to make some exceptions non-overridable by contract and subject some limitations to remuneration claims, where effective enforcement is impossible. The authors also suggest to include a flexible provision that would allow Member States to react to socio-cultural and technological developments. A flexible provision should, in order to limit its

\textsuperscript{1017} Kleinemenke, “Fair Use, Dreistufentest und Schrankenkatalog”, ZGE (2013), p. 113.
application, be subject to the three-step test. This condition, in order to comply with international obligations under the Berne Convention and the WCT and WPPT Treaties could be either implicitly or explicitly directed at the judiciary.

It is a combination of the first three options and the approach suggested by Hargreaves and Hugenholtz that seems most appropriate and is suggested here. As it appears, this approach could (at least to a certain degree – this reservation is necessary) help to achieve the different aims here pursued. The model suggested resembles that of the “European Copyright Code” with an open norm that is guided by a non-exhaustive list of examples, which can be developed by analogy and with flexibility for the (near) future. A flexible open norm would address criticism that a closed list prevents progress and an overly excessive interpretation beyond the letter of the law would jeopardize credibility and trust in the law.

An EU solution could draw inspiration from continental and common law traditions, and also academia, to create a robust and reliable framework for L&Es that is flexible within a relatively defined scope. The definition of the scope would be given by a set of precise examples and guiding policy goals (e.g. fundamental rights and freedoms) and an altered version of the three-step test. In particular the latter would help to bring in aspects of fairness and reasonableness that can create a fair balance between competing interests. The elements of the test can be used, similar to the four factors of the fair use doctrine, to overcome problems of transaction costs and beneficial uses. The latter aspect must not go as far as to include a wide notion of transformativeness in the EU copyright system, but it could employ the continental tool of ‘use against remunera-

1018 Hargreaves and Hugenholtz were rather optimistic that such changes to Directive 2001/29 could be achieved by 2014-15, however, the current EU agenda does not support this perspective, Hargreaves & Hugenholtz, “Copyright Reform for Growth and Jobs, Modernising the European Copyright Framework”, (2013), p. 8.
1019 Because at some point in time even the imagination of contemporary legislators will not be sufficient to anticipate future technological developments.
1020 This argument was made in relation to the US copyright system, which already includes an open norm, see Angel Siegfried Diaz, “Fair Use & Mass Digitisation: The Future of Copy-Dependent Technologies After Authors Guild v. HathiTrust”, Berkeley Tech. L.J. (2013), 683-714, p. 702.
tion’ to permit beneficial uses while rewarding rightsholders economically.

The “Wittem Group” has drafted a hybrid provision, a compromise that embraces the continental and common law legal traditions. The approach is formulated in Article 5 of the “European Copyright Code”, which is was drafted as a “model or reference tool for future harmonization or unification of copyright at the European level.”

The chapter on limitations “reflects a combination of a common law style open-ended system of limitations and a civil law style exhaustive enumeration.”

The “European Copyright Code” contains four categories of permitted uses. The first category relates to uses of minimal economic significance. Such uses do not require authorization and do not entitle the rightsholders to any sort of remuneration (Article 5.1). The second category lists exceptions for the purpose of freedom of expression and information. Some of these exceptions are permitted and free, some others are permitted against payment of remuneration (Article 5.2). Articles 5.3 and 5.4 follow the same division between unauthorized uses that are free and that require remuneration for uses that promote social, political and cultural objectives and for uses that enhance competition, respectively.

Article 5.5 of the Code contains an open norm (“Further limitations”) that includes the second and the third step of the three-step test. Its formulation, which requires that uses comparable to those listed in the preceding paragraphs of Article 5 must “not conflict with the normal exploitation of the work and [must] not unreasonably prejudice the legitimate interests of the author or rightholder [and] tak[e] account of the legitimate interests of third parties.” This formulation implies that all other exceptions have already been subjected to the scrutiny of the test and in addition to the two criteria mentioned in Article 5.5 constitute “certain special cases”. These cases can be extended in (certain) comparable situations – by analogy – if they comply with the two last steps of the three-step test. The “European Copyright Code” leaves it open whether its Article 5.5 would follow an interpretation on the substance of the test under international and EU law.

1023 It is worth noting here that the chapter only refers to limitations and not to exceptions.
1024 Ibid., fn. 48.
a. Fundamental rights and technological developments – shifting standards

Developments in technology enable new business models, create new forms of expression and change the opportunities to participate in the digital market. Most activities relate to one or more fundamental rights, and the emergence of new forms of uses alters the balance within a copyright system via the exercise of the right to freedom of expression, the right to conduct a business or other fundamental rights under the Convention or the EU Charter. Therefore, L&Es as a balancing element in copyright must be constantly reviewed if a system of an exhaustive list is maintained. As a result, new forms of expression and shifting social circumstances require a constant review of L&Es, taking into account that technological developments have significant effects on fundamental rights. 1025

An open norm that makes express reference to fundamental rights as factors that must be considered in its application could remove the burden from the legislator to constantly review L&Es. At the same time it would safeguard that fundamental rights considerations are included into the system. Guidance for the balance of different fundamental rights (e.g. the right to property and freedom of expression) could, and should, be sought within the case-law of the CJEU and also the ECtHR. 1026

However, the weakness of this approach is that it would be difficult to guide national courts solely with reference to fundamental rights as to how to strike the balance. In particular with regards to the right of freedom of expression the ECtHR has constantly granted Members States a relatively wide margin of appreciation 1027 to strike the balance between the right of freedom of expression in particular, and other fundamental rights. This wide margin of appreciation could lead to different results in front of the national courts. The CJEU has taken a similar approach, which is owed to

1026 For the CJEU cf. in particular CJEU, Judgment in Deckmyn EU:C:2014:2132, for the ECtHR cf. ECtHR (5th section) of 19 February 2013, case of Fredrik Neij and Peter Sunde Kolmisoppi (The Pirate Bay) v. Sweden, Appl. nr. 40397/12; ECtHR (5th section), 10 January 2013, case of Ashby Donald and other v. France, Appl. nr. 36769/08, more recently, but without express balancing ECtHR (Grand Chamber), 16 June 2015, case of Delfi AS v. Estonia, Appl. no. 64569/09.
1027 Cf. e.g. Ibid., paras. 131 et seq.
the nature of the preliminary reference procedure under Article 267 TFEU. However, by defining the scope of applications the CJEU has limited the margin of appreciation of L&Es with strong fundamental rights implications to a certain extent.1028

An express inclusion of fundamental rights into the norm should underline the object and purpose of the provision and mark the departure from a strict rightsholder-oriented system to an enabling provision that permits the exercise of fundamental rights by users in cases that do not conflict with reasonable economic expectations of rightsholders and do not prejudice their legitimate expectations, one of which is the respect of their intellectual property. Accordingly, a re-modeled three-step test would integrate fundamental rights considerations as part of the two last steps. To avoid that Member States use their wide margin of appreciation to interpret either strictly or too widely, an illustrative list should support national courts in finding a proper fundamental rights balance.

b. Abandoning restrictive interpretation

The introduction of an open norm would also do away with the mantra of ‘restrictive interpretation’ and confirm the recent trend in the CJEU’s jurisprudence that interprets L&Es with a view to safeguarding their effectiveness. An open norm would not automatically require an excessively wide interpretation of certain categories of uses. The categories that would reflect public interest and fundamental rights would constitute the side of the scale that weighs against the protection of (intellectual) property. In this way L&Es, in the shape of an open norm, could take the function envisaged for them by Geiger, which is the role of a mitigator between competing interests, in particular other fundamental rights.1029 But an altered approach to interpretation should find a normative fixation in a reform of Article 5 InfoSoc Directive or a corresponding recital. The

habits of European courts – national, supranational and international –
must be overcome if an open norm should be effective. The recent trend in
CJEU jurisprudence to interpret L&Es to be effective is a good starting
point, but interpretation of an open norm must go further to include all
interest in a fair and equitable way.

c. Compatibility with the three-step test

_Hugenholtz and Senftleben_ argue in their 2011 study that “broadly worded
exceptions” would not collide with the three-step test as long as the “core
of the economic right(s) protected under copyright is left intact.” They
rather see a problem in an exclusively restrictive and narrow interpretation
of L&Es in the light of the three-step test.¹⁰³⁰ The authors seem to make
reference to the specific subject-matter of copyright as developed by the
CJEU. Their argument which is based on the preservation of the economic
core resembles, to a certain extent, the interpretation of the CJEU in
_FAPL/Murphy_.¹⁰³¹ An application of L&Es should not have the effect that
rightsholders are deprived of all economic value of their works or other
protected subject-matter, neither should they be able to squeeze every bit
of profit that can possibly made out of their creations. The balance must
lie somewhere in the middle, permitting rightsholders to make a decent
living and permitting users to consume, shift, re-use and enjoy works
without acquiring a license for every use.

By limiting L&Es to categories of uses and, in addition, subjecting
some uses to the payment of remuneration, the economic core of copyright
is preserved and the first step of the test would also be met. Certain special
cases would be the categories under which uses are permitted. These
categories must not necessarily be those of the “European Copyright
Code” but they should not permit a borderless application of the open
norm. _Samuelson_ has argued that in applying the fair use doctrine certain
categories of uses have developed,¹⁰³² which can constitute ‘certain
special cases’ for the purpose of the three-step test. In the absence of a rich

¹⁰³⁰ Hugenholtz & Senftleben, _Fair Use in Europe: In Search of Flexibilities_
(November 2011), pp. 18-25, 30; the authors point to the international dimen-
sion of the test as well as to Recital 44 _InfoSoc Directive._
body of case-law these categories must be defined in advance; one example is the structure of Chapter 5 of the “Wittem Code”. If the fair use doctrine is compatible with the three-step test under international law because of its categories of uses that have crystallized over decades of case-law, a European open norm for L&Es could define a similar set of categories and thereby stay in conformity with the Berne-test.\textsuperscript{1033} A set of illustrative exceptions as ‘guidelines’, a set of guiding principles for the application of the norm to new uses, or a combination thereof, would erase any remaining doubts with regards to the compatibility with the three-step test.\textsuperscript{1034}

4. Introducing technological neutrality

The exclusive rights of Article 2-4 of the InfoSoc Directive are not only very broad in their scope of application. Because of this broadness in scope they are also relatively technology-neutral. Unfortunately, this neutrality has been used more to extend their scope, rather than to reasonably confine it to certain modes of exploitation. The reproduction right protects “direct or indirect, temporary or permanent reproductions[s] by any means and in any form”\textsuperscript{1035} for five different classes of rightsholders with regard to their respective subject-matter, Article 3 provides, for authors,\textsuperscript{1036} the exclusive right of communication to the public “by wire or wireless means, \textit{including} the making available to the public of their


\textsuperscript{1034} Cf. Senftleben, \textit{Copyright, Limitations and the Three-Step Test: An Analysis of the Three-Step Test in International and EC Copyright Law} (2004), pp. 112 et seq., Senftleben found fair use to be in conformity with the international three-step test, moreover, he found the test to be similar to the fair use doctrine, which would further speak for compatibility. It could, therefore, be argued, that an inclusion of the elements into an open norm would also make this norm compatible with the three-step test.

\textsuperscript{1035} Article 2, \textit{InfoSoc Directive}.

\textsuperscript{1036} Other rightsholders than authors are restricted to the making available right, Article 3(2), \textit{InfoSoc Directive}. 

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works”\textsuperscript{1037} and Article 4 grants authors the right of distribution for “any form of distribution to the public by sale or otherwise.”\textsuperscript{1038}

Whereas the exclusive rights are formulated in a way that can easily adapt to new technological developments – if, for example, a communication to the public is made by other means than by wire, it is certainly ‘wireless’ – most exceptions relate to particular acts and purposes that are fairly limited. And whereas the exclusive rights are harmonized in all 28 Member States, and Member States can even increase protection and the categories of subject-matter that are protected,\textsuperscript{1039} exceptions are frozen in time and additions to the exhaustive list of Article 5 InfoSoc Directive are in so far unprecedented of a directive that will celebrate its 15th birthday in May 2016.

Introducing limitations and exceptions that are technology-neutral, which means that their purposes can be achieved whichever technology is used, be it analog or digital, is no easy task. Following the current mantra of restrictive interpretation, read in connection with Recital 44 of the InfoSoc Directive, legal options at the national levels are limited and political room for maneuver is narrow.\textsuperscript{1040}

If technological neutrality can be achieved at all, an open norm is best suited to guarantee users certain rights, or permitted uses, whichever terminology is employed. An open norm can, in principle, be applied flexibly to similar uses for which technological realities justify different interpretations of an exception. A re-modeled three-step test that supplements an open norm could enable uses that respect the balance, and it could prevent uses that would disturb it.

A system of limitations and exceptions should be formulated to safeguard that the balance such a systems seeks to establish between the

\begin{footnotesize}
\begin{itemize}
\item[1037] Article 3(1), InfoSoc Directive (emphasis added).
\item[1039] CJEU, Judgment in Case C-279/13, C More Entertainment AB v Linus Sandberg, EU:C:2015:199.
\end{itemize}
\end{footnotesize}
exclusive rights granted to rightsholders and the rights users enjoy with regard to certain uses does not only reflect the technological state-of-the-art at the time the legal norms that encapsulate this balance are drafted, but should preserve and stabilize this balance not necessarily forever, but for, say, more than five years.

The “Reda Report” had still contained a suggestion to introduce an open norm, but this suggestion was abandoned in the final Resolution. Instead, the Resolution suggested to interpret L&Es flexibly.\textsuperscript{1041} The final document retained two passages that could have a positive effect on technological neutrality. The Resolution suggested to review “a number of the existing exceptions and limitations in order to better adapt them to the digital environment”\textsuperscript{1042} and to apply a mode of interpretation that would safeguard that in cases where existing L&Es already apply, similar uses “which are made possible by technological advances or new uses of technology”\textsuperscript{1043} should be equally permitted. It was finally stressed that it is necessary to “ensure the technological neutrality and future-compatibility of exceptions and limitations”.\textsuperscript{1044}

5. Addressing rightsholder concerns

If the current system of L&Es is to be opened and extended this would have the consequence that the position of rightsholders would relatively worsen. If more uses are permitted, the exclusive sphere of rights is automatically reduced. In order to maintain a fair balance of interests a shift in the equilibrium of copyright must take the interests of rightsholders into consideration during the process that leads to a new balance between rightsholder and user interests.

\textsuperscript{1042} European Parliament, A8-0209/2015, para. 35.
\textsuperscript{1043} Ibid., para. 43.
\textsuperscript{1044} Ibid., para. 44.
a. Economic interests

With reference to *Luksan*¹⁰⁴⁵, Griffiths wrote that “depriving authors of exploitation rights as a matter of law will inevitably contravene EU law.”¹⁰⁴⁶ The question in the case was whether a provision of national law can assign the exploitation rights to the producer of a cinematographic work instead of the author. The argument which was used by the Court was based, *inter alia*, on Article 17 of the *EU Charter* and the object and purpose of the *InfoSoc Directive*.¹⁰⁴⁷ It can be interpreted to apply to L&Es that limit the exclusive rights of authors and other rightsholders by analogy.¹⁰⁴⁸ The difference between both situations is that in case of an extension of L&Es an exploitation right is not shifted by law from one rightsholder to another, instead the exercise of an exploitation right is limited or excluded in certain cases for the benefit of a third party. However, a rightsholder is not completely deprived of his right(s), but the exercise of the right(s) is limited in certain situations. Here, a further analogy can be drawn to the early free-movement case-law, in which the Court limited the exercise of intellectual property rights to enable the fundamental freedoms, in particular the free movement of goods.¹⁰⁴⁹ A limitation of an exploitation right that is protected by Article 17 of the *EU Charter* can only be justified by a very strong public interest or other colliding fundamental rights. In either case the proportionality of the infringing measure must be assessed. A factor that should be taken into consideration when assessing the proportionality of a measure that limits an economic exploitation right protected by the right to (intellec-

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¹⁰⁴⁵ CJEU, Judgment in Case C-277/10, *Martin Luksan v Petrus van der Let*, EU:C:2012:65, in this case the Court ruled that the exploitation rights for a cinematographic work are vested in the principal director of the work, national law vesting these rights with the producer are in contravention would violate a number of EU directives.

¹⁰⁴⁶ Griffiths, “Constitutionalising or harmonising? The Court of Justice, the right to property and European copyright law”, *E.L.Rev.* (2013), p. 76.


¹⁰⁴⁸ In the same way that authors enjoy the rights to their works, related rightsholders should retain the rights to their protected subject-matter.

¹⁰⁴⁹ In relation to trademarks and copyright, see e.g. CJEU, Judgment in *Consten & Grundig* EU:C:1966:41 and CJEU, Judgment in *Deutsche Grammophon* EU:C:1971:59.

tual) property is whether the rightsholder can receive remuneration if at the same time the ‘infringer’ is enabled to exercise other fundamental rights. Permitting a prima facie infringement of an exclusive right could be compensated by fair remuneration. Extending the concept of fair remuneration from Article 5(2)(a), (b) and (e) to other uses could safeguard the economic interests of rightsholders. Including this element into the balancing exercise of an open norm would, furthermore, also provide for the necessary degree of flexibility.

But, again, there remains a risk that national courts would too readily insist that users pay remuneration for unauthorized uses of works, retreating to a rightsholder-friendly interpretation of an open norm. Which uses that do not require authorization would trigger remuneration still had to be decided. It would be instrumental to also include guidance in the open norm. The norm could abstractly provide that uses that are permitted because of market failure require remuneration, that, for example, private reproductions (continue to) require remuneration, and that uses that are permitted to exercise certain fundamental rights (e.g. parody) do not require remuneration. \(^{1051}\)

Uses that do not require remuneration should reflect a political and social consensus with regard to analog and digital uses.\(^{1052}\)

The EU has the advantage that it has experiences with compensation schemes that are administered by collecting societies. Ginsburg raised the concern, when arguing that the fair use doctrine should accommodate paid uses, to remedy cases of market failure by granting rightsholders a statutory remuneration right. Fair use, until today, remains essentially a fair and free use.\(^{1053}\) Whereas the US does not have a well-developed infrastructure to collect statutory licensing fees, the European countries have. The economic interests of rightsholders that should be taken into consideration could therefore be managed by collecting societies. A precedent for a mandatory exercise of an exclusive right exists in the SatCab Directive,

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which mandates that the cable retransmission right can only be exercised through a collecting society.\textsuperscript{1054}

The open letter CISAC representatives sent to MEP Julia Reda in 2014 criticized her reform suggestions mainly on the basis that authors (and not rightsholders or intermediaries) would not receive sufficient remuneration from the digital exploitation of their works. Moral rights were indeed addressed in the letter, but only very briefly. Instead, the letter stated that “remuneration [for the use of works] is unacceptably low and not reflective of the market value of [the authors’] works.”\textsuperscript{1055}

A statutory license, as opposed to small licenses, which the Commission seems to favor, could set remuneration at a fair level. This would still only apply for uses that cannot be reasonably negotiated. However, rightsholders were put into a position where they were to receive at least some compensation for uses of their works and protected subject-matter. An extension of L&Es, ideally through an open norm, could be beneficial for authors if this measure would be accompanied by remuneration in form of statutory license.\textsuperscript{1056} It is important to stress that for L&Es, because they can serve purposes higher than simply overcoming market failure, a distinction should be made between the term compensation and remuneration. Rightsholders should be entitled to remuneration for the use of their intellectual property, not compensation for an infringement of their rights. The harm to the interests of rightsholders will often be difficult to demonstrate.\textsuperscript{1057} In the end, a norm that grants remuneration for uses of protected

\textsuperscript{1054} Article 9 \textit{SatCab Directive}.


\textsuperscript{1057} See here European Parliament, T8-0273/2015, para. 56, which had suggested compensation based on harm; this was criticized in particular because a generalized model based on harm suffered would not necessarily reflect a fair balance of interests and would neglect to consider permitted uses “justified by higher principles of constitutional value”, Geiger et al., \textit{Reaction of CEIPI to the Resolution on the Implementation of Directive 2001/29/EC on the Harmonisation of Copyright in the Information Society adopted by the European Parliament on the 9th July 2015} (2015), p. 17.
subject-matter can be more beneficial for rightsholders. Such solution would further prevent an erosion of the rights of authors. It should, however, leave room for uses for which a claim for remuneration would be inappropriate.

b. Non-economic interests

Non-economic interests traditionally have had no place in EU copyright L&Es. However, if a reform of Article 5 *InfoSoc Directive* were to see an extension of the scope of L&Es to more creative uses, moral rights, to some extent, must be part of the equation. Member States could receive a relatively wide margin of appreciation. But as the CJEU judgment in *Deckmyn* has demonstrated, the re-use of content on- and offline requires that non-economic interests are taken into consideration. The CJEU has dealt with online infringements of privacy rights from a jurisdictional perspective. It might be time to address moral rights actively at the legislative level. The “Wittem Code” already suggested including moral rights into the EU copyright *acquis* in some detail.

However, moral rights should not be used to prevent legal uses at the whim of rightsholders. The *Deckmyn* judgment, although it officially did not deal with moral rights, has initiated a discussion on moral rights in the EU copyright *acquis*. In balancing two fundamental rights, the right of property and the right not be discriminated against (or to be associated

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with a discriminatory message), the Court established a baseline for moral rights with regards to the parody defense. This approach can easily be transposed to other exceptions, or classes of exceptions. If, for example, UGC in some form would be permitted under a future system for L&Es, content that contains a discriminatory message would not fall under an exception, or an open norm would have to be interpreted not to permit such a use. If the open norm included the third step of the three-step test, it could then be argued that a discriminatory message in UGC that incorporates a work, or parts thereof, from another author would prejudice the legitimate interests of the original author. The legitimate interests would be precisely that the author does not want to be associated, directly or indirectly, with the work that transports a certain message. If not directly, moral rights could indirectly find their way into the copyright acquis through fundamental rights.

c. Limiting contractual freedom

In academic literature it has been often suggested to make all L&Es listed in the InfoSoc Directive mandatory.\textsuperscript{1063} This would mean that L&Es acquire the status of binding rights for users, which they can exercise. In the absence of mandatory exceptions, but also if they were introduced and subsequently implemented by Member States, it remains the questions whether rightsholders should be permitted to derogate from these exceptions by contract.

The imbalance in copyright that is constituted by a unilateral determination of contractual terms is not so much an expression of freedom of contract, but a reflection of unequal bargaining powers.\textsuperscript{1064} In particular for mass uses where individual negotiations are impossible rightsholders find themselves in a stronger position vis-à-vis users.\textsuperscript{1065} The use of standard terms and conditions and end user license agreements which are non-

\begin{itemize}
  \item \textsuperscript{1064} See Akester, “The new challenges of striking the right balance between copyright protection and access to knowledge, information and culture”, \textit{E.I.P.R.} (2010), p. 378.
\end{itemize}
negotiable give users a yes-or-no choice between using content under certain predetermined conditions or not using content at all.

Without doubt, the possibility to exclude the exercise of statutory L&Es by contract would strengthen the position of rightsholders significantly as they could extend the scope of their exclusive rights. However, this should be a task left to the legislator, which must delineate, as precisely as possible, the contours of exclusive rights and those areas of copyright that remain to be reserved for the general public. But it is in this way that Dusollier interpreted Recital 45 InfoSoc Directive which would confirm the existence of a private ordering regime for L&Es. If one were to follow the position that the exercise of at least some L&Es should be the prerogative of users: This position should be clearly expressed in the law, to the effect that neither contractual provisions, unilateral or negotiated, nor TPMs as an expression of private-ordering, should restrict the exercise of a set of clearly defined L&Es.

An analogy could be drawn to the judgment in UsedSoft v. Oracle. The Court ruled that rightsholders could not impose upon users contractual provisions that preempted the resale of computer software. If indeed

72; the author points out that the InfoSoc Directive favors the freedom of contract of authors.


1067 Recital 45 reads: “The exceptions and limitations referred to in Article 5(2), (3) and (4) should not, however, prevent the definition of contractual relations designed to ensure fair compensation for the rightholders insofar as permitted by national law.”


1070 CJEU, Judgment in UsedSoft EU:C:2012:407, para. 77; the judgment was criticized not only for the brevity of this argument and its consequences for the freedom to contract, Bill Batchelor & Luca Montani, “Exhaustion, essential subject matter and other CJEU judicial tools to update copyright for an online economy”, JIPLP (2015), 591-600, pp. 595-6.
exhaustion could not be derogated from by contractual terms, and exhaus-
tion were to be considered some sort of exception to the exclusive rights
(e.g. to distribution) rightsholders enjoy, the same argument could be
made for exceptions. However, systematically, exhaustion is commonly
understood to be outside of the scope of copyright protection, and has
been derived from the notion of specific subject-matter. But Rognstad
suggested that, at last for certain uses, exhaustion, or the right to dispose
of copy of a work (digital or physical) could function for certain types of
works under an exception to exclusive rights.\textsuperscript{1071}

In any case it should be made abundantly clear that content that is in the
public domain should under no circumstance be subject to contractual or
technological limitations. Whereas the situation for works that are
protected by copyright might currently be unclear, there is no justification
whatsoever to limit the access to and use of public domain material.\textsuperscript{1072}

6. What future for L&Es?

The momentum the discussion of L&Es had gained since the “Green
Paper on Copyright in the Knowledge Economy” lost its drive with the
“Digital Single Market Strategy”. The reform plans for L&Es were
reduced to a few exceptions for particular uses. With the “Strategy” L&E
politics fell back to the pattern of the InfoSoc Directive, which chose rela-
tively narrow and specific exceptions over an open norm. The critical
issue with the current system is that is does not reflect a systematic
approach to L&Es, which can be traced back to the genesis of Article 5
InfoSoc Directive. The latter is not a result of strict adherence to or inspi-
ration from the international framework including the international three-

\textsuperscript{1071} Cf. Rognstad, “Legally Flawed but Politically Sound? Digital Exhaustion of
Copyright in Europe after UsedSoft”, OSLaw (2014), p. 10: “[Article 6(2)
WCT] does not exclude the possibility of extending national or regional exhaus-
tion rules to the distribution of copies that are reproduced on the basis of an
online service. It only means that such extension must comply with the three
step test in WCT Article 10(2).”

\textsuperscript{1072} Cf. European Parliament, T8-0273/2015, para. 61: “Notes the importance of
Article 6(4) of Directive 2001/29/EC and stresses that the effective exercise of
exceptions or limitations, and access to content that is not subject to copyright
or related rights protection, should not be waived by contract or contractual
terms.”
step test. The norm is rather a result of a political bargaining process which saw the inclusion of national favorites into the list of 21 L&Es.\footnote{Jeremy Malcolm of the Electronic Frontier Foundation suggested that L&Es could be an appropriate tool to make copyright enforcement more effective. Instead of policing every infringement of exclusive rights, how little its economic significance might be; certain types of content, in particular derivative and transformative UGC, could just be made legal. This could easily be achieved by extending or rephrasing the current system of L&Es in the EU.\footnote{In this sense there is a positive aspect in the fact that the European Commission has been addressing L&Es throughout the process that led to the “Digital Single Market Strategy” and that resulted in the recent legislative proposals.}

To conclude this chapter three strands of thoughts are pursued: what should \textit{ideally} be changed in the current system of L&Es, what can \textit{realistically} be expected and, \textit{critically}, what the differences between idealism and realism mean for EU copyright as a system and the balance of interests between users and rightsholders.

a. Ideally!

A systematic approach, that is based on distinctive, albeit sometimes overlapping, categories would contribute more to legal certainty than the current patchwork-approach of precisely defined L&Es. A category-based approach would also provide room for sufficient flexibility to balance the interest of rightsholders and users to the extent necessary. The three-step-test could, and should, be integrated in a new system for L&Es, or user rights. With an altered interpretational approach the test can function more as a mediator between the concerned interests than as a barrier to permitted uses and a preserver of rightsholder interests.

A reformed system should not, however, forget its heritage that is fundamentally rooted in the continental author's rights tradition and there-

\footnote{Hilty, “Declaration on the Three-Step Test: Where do we go from here?”, \textit{JIPITEC} (2010), para. 21.}

\footnote{Jeremy Malcolm, “Is Europe Serious About Reforming Copyright, or Just Greasing the Squeaky Wheel?”, 3 July 2014 (Foundation, Electronic Frontier), available at: https://www.eff.org/deeplinks/2014/07/europe-serious-about-reforming-copyright (accessed: 10.01.2016).}
fore avoid to transform into a pure US-style fair use norm. A blend of both system, if applied with care by the judiciary, would have better chances of adapting L&Es to the digital economy and the digital society. The current list of exceptions should rather be preserved as an exemplary list, either within the provisions or in the recital of a new directive or a recast of Directive 2001/29/EC. Recital 32 of the InfoSoc Directive should, therefore, have no place in either option for reform.

In order to make a ‘semi-flexible’ system for L&Es work it is indispensable to confer some powers to the judicature. The courts of the Member States would be best suited to exercise discretion in weighing the respective interests against each other. The legislature must enable this role by conferring that power expressly and by guiding the courts in their new task. As far as possible, this guidance should be contained in the relevant legal provisions to avoid a relapse to a restrictive interpretational approach.

Ideally, a reform of the European copyright system would see the introduction of an open norm that provides flexibility, which is exercised by the courts of the Member States. The open norm would be guided by categories of uses that correspond to a number of interests, some of which must be rooted in fundamental rights. The CJEU would continue its role through the preliminary reference procedure. Statutory licenses should be introduced for more types of uses, e.g. for (commercial) mass-digitization but also for UGC. To safeguard legal certainty, uses against remuneration should form their own category of uses.

b. Realistically?

Griffiths doubted, in 2012, whether there is a political will to introduce a fair use element into European copyright law. This concern can, after

1075 Fischman Afori, “Proportionality – A New Mega Standard in European Copyright Law”, IIC (2014), p. 892, the author argues that reconciling the interests reflected in copyright (authors, intermediaries, the public) is only possible if courts are granted broad discretion.


“Digital Single Market Strategy”, be extended to the political will to reform L&Es altogether. The suggestions for changes of Article 5 InfoSoc Directive do not reflect a desire to make systematic changes. Instead, punctual adjustments do not continue the discussion that included the “Digital Agenda for Europe”, the 2014 Copyright Consultation and the 2015 “Reda Report”. All previous documents had foreseen a more significant adjustment of the closed list of the InfoSoc Directive.

With the addition of a few selected L&Es, a bigger reform of the acquis has been postponed indefinitely. The limited additions, if they may see the light of day after all, will still be subject to the interpretative paradigms that have shaped the application of L&Es in the EU. Moreover, the L&Es suggested (text- and data-mining and teaching and research) hardly reflect those interests that were pushing for a reform of Article 5 InfoSoc Directive. What can rather be expected is that national courts will continue to find creative solutions around the restricting effects of the closed-list approach and the CJEU could put an emphasis on interpreting L&Es to enable their effectiveness, also in a digital environment.

c. Critically

The closed list of limitations and exceptions reflect (necessarily) the technological state at the time of the drafting process. Therefore, due to the pace of technological developments the balance struck between rightsholders and users is certainly outdated. The more recent suggestions by the Commission to update the current list of Article 5 InfoSoc Directive is just another snapshot of technological history that adds to the album of the 21 L&Es. Moreover, that snapshot is incomplete, as it fails to reflect, among others, the cultural phenomenon of UGC that has newly emerged as an element in the information society. In particular for the latter, the EU legal framework remains a “hostile” environment that ignores cultural and social expression. It is further worrying that in the absence of legislative activity for more than a cosmetic reform of Article 5, a sincere discussion on a reform or alternatives is missing. The activity at policy

level does not reflect the lively discussion in academic literature and society. Moreover, it does not tackle pressing problems that have manifested itself with the emergence of digital media.

Apart from the closed list, a matter that needs settling is the interpretation of L&Es under the current copyright *acquis*, if the latter continues to exist in this form. And again, the task to drive the development of EU copyright law falls to the CJEU, with at least two references pending that will require the Court to interpret L&Es under the *InfoSoc Directive*¹⁰⁸⁰ and the *Rental and Lending Rights Directive*.¹⁰⁸¹ None of the referrals for a preliminary ruling make explicit reference to the three-step test, and it is uncertain whether the Court will elaborate on the effect of the test on either exception. Both cases are particularly interesting because they deal, more or less directly, with the freedom to access information as an element of the right to freedom of expression under Article 10 of the *EU Charter*. In the absence of a fair use-like open norm, this conflict requires resolution under the existing *acquis* and it has been argued above that exceptions with a strong freedom of expression element should receive ‘preferential treatment’.¹⁰⁸²

¹⁰⁸⁰ AG Wathelet, Opinion in Case C-301/15, *Marc Soulier Sara Doke v Ministre de la Culture et de la Communication Premier ministre*, EU:C:2016:536, the referring Court, the French Conseil d’État, seeks clarification on the question whether national legislation that permits approved collecting societies the right to authorize “reproduction and the representation” of out-of-print works, subject to objection by the rightsholder, is in conformity with the provisions of the *InfoSoc Directive*.

¹⁰⁸¹ CJEU, Application in *Vereniging Openbare Bibliotheeken*, the Rechtbank den Haag seeks an answer to, *inter alia*, the question whether the exception to the public lending right under Article 6 *Rental and Lending Rights Directive* requires that the original copy has been acquired by sale, within the meaning of Article 4(2) of that Directive, or whether any other conditions apply, see also Eleonora Rosati, “*Dutch court refers questions to CJEU on e-lending and digital exhaustion, and another Dutch reference on digital resale may be just about to follow*”, 15 September 2015 (The IPKat), available at: http://ipkitten.blogspot.com/2014/09/dutch-court-refers-questions-to-cjeu-on.html (accessed: 10.01.2016) and Eleonora Rosati, “*BREAKING: Dutch court refers questions to CJEU on e-lending and digital exhaustion*”, 01.04.2015 (The IPKat), available at: http://ipkitten.blogspot.lu/2015/04/breaking-dutch-court-refers-questions.html (accessed: 10.01.2016).

In the meantime, the Court can only resort to an altered interpretation of L&Es under the three-step test, or it find a way to integrate a proper fundamental right test into either the application of the respective L&Es or the application of the three-step test to the respective L&Es. A tool that has long been lying in the arsenal of the CJEU is the established proportionality test, which has, however, been used little or only with extreme caution in copyright cases.

Without further guidance from the Court or the legislature, proportionality is tempting as a general principle that can resolve conflicts of interests. It is implicit for some L&Es, namely those that mitigate between fundamental rights. The principle has also been suggested as a new general “mega standard” for copyright. But similar to the three-step test, which in essence is a modified proportionality test, the balance of colliding interests, it has been argued above, should be reflected in legislation rather than in balancing jurisprudence. In the end, national and European judges must find guidance in the written law and should be hesitant to interpret L&Es contra legem.

Proportionality would, therefore, require a normative introduction into the copyright acquis beyond freedom of expression and the right to conduct a business, the latter of which already contains an implicit reference to the proportionality test in Article 12 of the EU Charter. Explicit reference to proportionality as a general principle of EU copyright would give copyright a constitutional foundation and dimension. The explicit inclusion of proportionality in the copyright debate would have the beneficial effect that the general principle would underline copyright’s status as a fundamental right and expose it to full scrutiny with regard to

(Cheltenham, Northampton: Edward Elgar Publishing, 2015), 331-353, pp. 350-1, who argues that all L&Es that relate to the exercise of the right to freedom of expression should be mandatory.


1085 See Ibid., p. 896.

1086 As opposed to the US fair use doctrine, cf. Ibid., p. 910. US courts consider the doctrine sufficient to accommodate freedom of expression considerations within copyright, whereas in Europe the ECtHR as well as the CJEU have recently exercised ‘external’ control.
its conflicts with other fundamental rights. The economic nature of copyright, the way it is harmonized in the EU, would give room to permit *prima facie* violations of copyright as a fundamental right (under Article 17(2) EU Charter) if they are duly compensated, directly or indirectly. Such infringements must then be proportionate to the aim that is pursued by permitting such infringements, or by excluding certain acts by third parties from the scope of the exclusive rights. Copyright would (as part of general property) be integrated into a hierarchy of fundamental rights and be preserved as a pillar of creativity but also in its economic relevance. Instead of a submission of either the interests of rightsholders under those of users, or the other way around, the rights and interests concerned would be put into a hierarchical concordance and their parallel existence would be enabled. 

The Resolution of the European Parliament on the *InfoSoc Directive* turned out to be “less ambitious” than the “Reda Draft Report”, and the legislative actions announced in the “Digital Single Market Strategy” even more so. The Resolution stressed the need for a flexible interpretation, which would also leave room for national peculiarities. It further emphasized that L&Es should “as far as possible” be construed so as to enable digital uses similar to existing analog uses and highlighted “need to ensure the technological neutrality and future–compatibility” of L&Es. In the near future it is unrealistic to expect any significant change in the law, save for some minor and very punctual additions, so the only impetus will come from the courts. The CJEU has often provoked legislative reactions by handing down judgments that developed EU copyright law. It would be about time it did so for L&Es. Unfortunately, the Court has less room for maneuver that it had before, because the current legal framework, which is characterized by a relatively high degree of harmonization, is much stricter, and less flexible, than in the days of the free movement case-law that established exhaustion and other staples of the copyright *acquis*.

*Rendas* argues that it is the European system that offers unwanted flexibility because national courts are stretching the *acquis* and are looking for

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flexibilities outside of copyright law. But a search for flexibility should not end in interpretative acrobatics, but look for legally sound solutions that do not only achieve the aim of flexibility, but also respect the principle of legal certainty for rightsholders and users. Current reliable solutions are neither offered by the industry, which has blocked a genuine discussion of copyright L&Es at EU level. Nor can a revolution be expected from the current Commission, judging by the scope of the “Digital Single Market Strategy” communication. L&Es are not the favored tools to bring content online, with detrimental effects for users and their respective interests.

C. Technological Protection Measures (TPMs)

“[C]opyright no longer matters when you’ve got renewable digital locks and laws prohibiting you from breaking them.” Cory Doctorow painted a scenario in which digital locks, or digital limitations to access and use of content give full control to rightsholders. He warned that users would lose control of their devices and ultimately their lives if producers had unlimited discretion to install whatever technological control mechanisms they want. This is particularly true when digital locks can be updated on initiative of the producer. Doctorow used the example of e-book readers that can enable and disable functions whenever the software necessary to

1091 Yu has categorized and deconstructed the arguments against an extension of L&Es in an international context. His arguments also hold true at EU level. He argues inter alia that licensing solutions offered by Internet platforms for UGC are insufficient to enable UGC. Such licensing offers would be restricted to platforms that have the resources to negotiate licensing solutions and implement licensing mechanisms as part of their platforms, UGC would be restricted to a relatively small number of platforms, see Yu in: Drahos, et al., Kritika: Essays on Intellectual Property (2015).
operate the device is updated. If users have no choice whether to update the software, rightsholders are free to command what users can use their digital files for and how they can use and interact with them. But the basic statement of the quote reproduced here is also true for ‘ordinary’ digital locks. Rightsholders can make large parts of copyright obsolete by employing TPMs that control, through automated technological means, what users can and cannot do with content they have legally acquired and to which they have legal access. This is not a question of life and death, but a question of balance. Ideally, digital locks are, of course, used to prevent illegal uses, with regard to copyright protection, such uses which require authorization and for which authorization has not been granted. Digital locks can preserve the balance in copyright for the use of digital content if they are applied carefully and with due regard to user interests.

TPMs are a relatively new addition to the complex system of copyright law. Their proximity to enforcement disassociates them from the continental idea of copyright’s vital importance for the fine arts. Technological enforcement gives this aspect of copyright law a fundamentally economic connotation. It is not related to the specific subject-matter of copyright, it does not add a strictly substantive layer of protection to the core of copyright. Instead, it adds an additional advantage for rightsholders that does not find an equivalent on the user side of the copyright balance. It has also been argued that technological measures superimpose the core functions of copyright by defining the scope of protection through technological barriers. Thus, technological measures have become a “paracopyright”.

1093 Cf. Geiger, “Flexibilising Copyright – Remedies to the Privatisation of Information by Copyright Law”, II C (2008), p. 183. In his contribution Geiger argues with the basic assumption that copyright protection has gone too far to the extent that its scope of protection is too large (including non-creative information, and even information as such, as opposed to creative works), see Ibid., p. 185.


The existence of TPMs alone acknowledges that the law itself and its enforcement mechanisms are not sufficient to safeguard the interests of rightsholders, but it is also very difficult to draft legal provisions for the protection of TPMs that preserve the balance in a given copyright system. It may very well be this difficulty that has kept TPMs out of the major discussions on a reform of the EU copyright system, indeed there exist only scarce references to TPMs in the relevant policy documents. However, the CJEU has recently had the opportunity to interpret the provisions of Article 6 InfoSoc Directive on the protection of technological measures. This case-law helps to understand the role TPMs play within the EU copyright acquis.

TPMs have become an integral part of the marketing concept of digital content, which is distributed through the Internet or through traditional channels on traditional media. TPMs, it can be argued, encourage the marketing of digital content by removing the fear of rightsholders that their protected works and other subject-matter can be easily reproduced or otherwise abused in violation of their exclusive rights. With this argument, TPMs can be considered as tools that can enable the marketing of digital content by providing for preemptive enforcement mechanisms that, by themselves or in combination with other devices or mechanisms, make infringing acts impossible, or at least difficult to perform.

A note on terminology should be in order here. In academic literature technological protection measures are also referred to under the umbrella term digital rights management. As this section mainly concerns itself with the protection of measures under Article 6 InfoSoc Directive the abbreviations TPM and DRM are used interchangeably. However, it should be noted that DRM usually describes a wider arsenal of technological measures that can be applied to digital files or to control access to protected content.

This chapter begins with a short description of the role TPMs play in modern copyright law and for the marketing of digital content, followed by a brief overview of the European legal framework for TPMs. Next, the disabling effect of TPMs on permitted uses is discussed and subsequently possible routes for lawful circumvention of TPMs will be pursued. The

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chapter concludes with an assessment of the impact of TPM legislation and its application on the interests of rightsholders and users.

I. TPMs in modern copyright law

The legal protection of TPMs is an integral aspect of modern copyright law. Article 11 WCT underlines the importance of TPM-protection at international level. In particular in an online environment, but also for digital technology that is distributed on tangible data carriers, TPMs provide *de facto* protection against unauthorized acts that infringe the exclusive rights of authors and related rightsholders; as compared to legal protection against infringing acts. Technological measures also act as signposts for users who are usually not entirely familiar with the legal framework and often cannot estimate whether a particular act requires authorization. For this purpose, rightsholders can lock digital content and prevent users from executing certain acts which the rightsholder believes (should) require prior authorization.

The way TPMs are used to protect rightsholder interests have changed over the years. Most relevant for digital content distributed via the Internet were DRM technologies which administered the uses of digital files. Online music services applied TPMs to technologically restrict the range of uses purchasers of their content or users of their services could make with the data that was made accessible to them. In early 2009, with much media attention Apple removed TPMs from its iTunes store, making it DRM free.\(^{1097}\) The DRM technology Apple used for downloaded songs is still employed to files that are saved on a user’s device for offline consumption of music under Apple’s Music subscription service. Before downloaded music was available DRM-free, Apple offered music from selected publishers without DRM technology and in higher sound quality for higher prices.\(^{1098}\)

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TPMs are also employed by other online streaming services for music and audiovisual material. They serve to safeguard that users do use the services in accordance with the terms and conditions by refraining from accessing a service on more devices than the terms of use permit, or by preventing users from saving music- and video-streams to their devices. Most critically, TPMs lock content to a user’s device that is made available for offline use. Similarly, e-book stores employ TPMs to lock purchased e-books to certain devices and make reproductions on other devices or on paper impossible.

TPMs are widely used by service providers to make users comply with their terms of use, but also to prevent online-piracy. In the following it is argued that TPMs remain an important aspect of copyright law, although the focus in their application has shifted, but that the way TPMs are employed by rightsholders endangers the balance of interests in copyright law.

1. The ratio of TPMs

At first glance, TPMs increase the protection for rightsholders. Besides civil and criminal enforcement and the obligation of Member States to provide for “appropriate sanctions and remedies in respect of infringements of the rights and obligations”,1099 TPMs give rightsholders technological tools to police infringements before they can happen. By disabling certain functions of media, for example the possibility to reproduce a CD or a DVD, violations of the exclusive rights provided by the InfoSoc Directive can be prevented. The majority of users, namely those without advanced technological know-how, would not by themselves be able to overcome the technological limitations of content they have lawfully acquired. In other words, TPMs safeguard that, in the absence of an express authorization, acts that are prohibited cannot be exercised.1100 And even if users possess the know-how, or if they have access to such know-how through third parties, the circumvention of TPMs and the production, distribution of devices and provision of services (etc.) to enable users to circumvent TPMs is prohibited under Article 6 InfoSoc Directive. Rightsh-

1099 Article 8 InfoSoc Directive.
olders thereby gain another layer of protection, not only can they rely on basic enforcement of their copyright and related rights, but any attempt to break digital locks installed by rightsholders to prevent infringements can be policed.

It is also argued that TPMs level the playing field in a digital environment because of the ease of reproducing digital content. In this sense TPMs grant de facto protection where laws fail to provide adequate protection.\textsuperscript{1101} This approach is in line with the general aim of the \textit{InfoSoc Directive}, which is to provide a high level of protection for rightsholders.

2. The relevance of TPMS

Except for \textit{Nintendo v. PC Box} and the withdrawn request for a preliminary ruling in \textit{Grund},\textsuperscript{1102} TPMs have not been subject of much discussion in front of the Luxembourg Court. They are also widely absent from policy discussions. Only the draft of the “Reda Report” mentioned TPMs, which were mentioned in the report adopted by the JURIS Committee only in connection with interoperability of content and the resolution adopted by the European Parliament.\textsuperscript{1103} Nevertheless, a reading of \textit{Nintendo v. PC Box} as well as selected national jurisprudence indicates that TPMs play a more important role than it might become apparent from discussions at EU level. TPMs, it is argued here, mainly serve two functions, both of which are interconnected. They enable rightsholders to exercise indirect control over content once it has been marketed and provide security and the necessary trust to expose content on the digital marketplace.

\textsuperscript{1102} CJEU, Order in \textit{Grund} EU:C:2014:589.
a. Control over content

Technically, but not technologically, contracts are sufficient to communicate to a user of digital content what acts are permitted. Technological measures can supplement contracts for the use of digital content to increase control and give near-certainty that certain acts, in particular acts that are prohibited by contract, cannot be exercised by a user of the content.\footnote{1104} With regards to the resale of computer software, and this could also apply to other types of digital media, the Court in \textit{UsedSoft} stated that a copyright owner can “ensure by all technical means at his disposal” that the seller of used software does not retain a useable copy of the software.\footnote{1105} Accordingly, the Court expected that TPMs can play a role in extending the control of rightsholders over a file beyond the initial sale.\footnote{1106} The same argument was made in the Dutch Tom Kabinet cases, where the courts argued, against the concerns of the Dutch collecting societies, that a proliferation of illegal copies could be prevented by employing DRM measures. Tom Kabinet opted for watermarks to distinguish legally acquired e-books from potentially illegal copies. Only such copies can be ‘fed’ into the service that have been verified to originate from a legal source.

After the music industry has largely abandoned TPMs for their download services, TPMs are still employed for streaming services and for e-books.\footnote{1107} Operators of streaming services use TPMs to prevent users from saving content on their devices in order to use it independently of the

\footnotesize{\begin{itemize}
\item \footnote{1105} CJEU, Judgment in \textit{UsedSoft} EU:C:2012:407, para. 87.
\item \footnote{1106} See on this statement and its ambiguity, Graber, “Tethered technologies, cloud strategies and the future of the first sale/exhaustion defence in copyright law”, \textit{QMJIP} (2015), pp. 397-8; the author asks whether the CJEU encourages rightsholders to override lawful exhaustion by means of TPMs, however, read in conjunction with \textit{Nintendo v. PC Box}, a reasonable application of TPMs is more likely to be successful to defend the interests of rightsholders against unlawful distributions of their digital content.
\end{itemize}}
respective service. In particular music streaming services, which often allow users to store music locally for offline-access, must make sure that once the subscription period expires users of the service do not have access to this music anymore. Otherwise, streaming accounts could be abused to generate a considerable offline-music database and ‘circumvent’ the streaming business model. More traditional TPMs are also used by e-book stores to disable or restrict certain functions of digital text files. For example, users can lend their e-books to friends, but only for a limited amount of time, after which the file is no longer accessible for the borrower. Most e-book readers also prevent the printing of entire files, or parts of files.

Thus, with the help of TPMs, rightsholders or licensees can exert control over their content. They possess tools with which acts of reproduction can be prevented, or the number of total reproductions of one file can be limited; rightsholders can also prevent format- and time-shifting. In general, TPMs allow rightsholders to control copyright-relevant actions that users could exercise if TPMs were not applied to certain contents.

b. Trust and security

The ability to control content is instrumental to market content in a digital environment. The likeliness that content that is put online, and sold or made available in digital form and is not used for unauthorized uses, encourages rightsholders to exploit their content through these channels. It is a very economic consideration that is at the basis of this assumption. This economic consideration can also be extended. When Apple started marketing DRM-free content at higher prices, this offer might have been driven by a calculation that included the potential loss through infringements by non-protected content. The fact that content is technologically protected against infringements can decrease its price. Similar considerations are reflected in the CJEUs judgments on private copying levies, where the Court rules that the application of TPMs can have an effect on the amount of compensation dues for private reproductions.

A reversal of the logic behind this assumption comes to the result that the more unlawful uses are prevented by the application of TPMs, the more lawful uses will generate profits for rightsholders through direct or indirect remuneration. In both cases the absence of TPMs results in less revenue for rightsholders and more unlawful uses. If no TPMs were avail-
able at all, or if their legal protection was inexistent or insufficient, business models would have difficulties to develop because unlawful uses (e.g. unauthorized reproductions) would create a parallel ‘market’ on which digital content would be available at far lower prices, or even for free. The surge of illegal file-sharing demonstrated the necessity for TPMs and their protection as complements to basic legal protection.

Today, business models based on digital content are hardly imaginable without TPMs that protect the substance of services. The protection of different copyright-relevant acts furthermore helps to establish a multitude of parallel business models, that rely on the same content but distribute it in different ways.1108 TPMs applied to streaming services that prevent streams to be saved and subsequently reproduced guarantee the viability of business models that allow users the download of digital content.

Braun argued that business models only work when rightsholders can rely on a high level of protection that “guarantee[s] the integrity of the protected content and the viability of such business models.”1109 Therefore, the protection of TPMs plays a vital role in the development and future of such business models.

The support of legal protection of exclusive rights by technological means can encourage the distribution of works and other protected subject-matter. Ginsburg suggested that a refocusing of the perspective on TPMs from intermediary platform operators to authors might lend TPMs, and copyright in general, more legitimacy. Under this perspective TPMs could also help to encourage authors to market their content directly, bypassing the services of intermediaries.1110

1108 Gunnar W.G. Karnell, “The Technical Protection of Copyright”, in: Johan Axhamn, Copyright in a borderless online environment, (Stockholm: Norstedts Juridik, 2012), 119-124, p. 121, the author underlines the rightsholder-focus on of the rules on the protection of technological protection measures (and DRM in general), which enable rightsholders to establish competing market models that are based on different contractual arrangements.


II. Legal protection of TPMs

Technological measures enjoy protection under EU law. Their protection is linked to the protection of copyright and related rights and supplements the legal protection granted to holders of exclusive rights by a technological and an additional legal layer of protection.

1. Legislation on TPMs

In fulfillment of the EU’s international obligations the InfoSoc Directive transposed Article 11 WCT into EU law.\footnote{1111} The provision only obliged signatories to provide protection against the circumvention of TPMs, the implementation by Article 6 InfoSoc Directive paid a little more attention to detail, and also to the balance of interests between rightsholders and users.

Directive 2001/29/EC obliges Member States to provide adequate legal protection against the circumvention of technical protection measures when the circumventor knows, or has reasonable grounds to know, that he circumvents such measures.\footnote{1112} TPMs are defined as “any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject-matter, which are not authorised by the rightholder”.\footnote{1113} Member States must provide protection against “the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the provision of services” that are “promoted, advertised or marketed for the purpose of circumvention”\footnote{1114} of TPMs, “have only a limited commercially significant purpose or use other than to circumvent”\footnote{1115} TPMs, or “are primarily designed,
produced, adapted or performed for the purpose of enabling or facilitating the circumvention of"\textsuperscript{1116} TPMs. The scope of protection extends to copyright and related rights and the \textit{sui generis} right under the \textit{Database Directive}.\textsuperscript{1117} Whereas the acts under Article 6(2) require a commercial character as a qualifying element, Article 6(1), which relates to mere acts of circumvention, does not require this qualification.

Furthermore, Article 6(4), fourth subparagraph excludes the application of Article 6(4) to content that is “made available to the public on agreed contractual terms in such a way that members of the public may access [it] from a place and at a time individually chosen by them.” Accordingly, content transmitted through on-demand download and streaming services is excluded from the application of Article 6(4). This limits the application of the norm significantly with respect to digital content, and commercial services which enable users to save permanent copies, in particular of digital files.

Why Article 6(4) is limited to seven cases out of Articles 5(2) and (3) is not immediately apparent.\textsuperscript{1118} The provision itself does not help to illuminate this question; however, Recital 51 makes reference to public policy and public security.\textsuperscript{1119} But why exactly these seven cases were isolated is not specified. The seemingly arbitrary selection of L&Es the beneficiaries of which should be enabled to benefit from, and for which purpose Member States have to take “all appropriate measures”, has been criticized.\textsuperscript{1120} Indeed, the seven exceptions do not belong to any particular category of uses, some can be summarized under a broader category such as access to knowledge (e.g. Article 5(2)(c) and (e), 5(3)(a) and (b)), but this does not explain why for example Article 5(3)(n) has not been included.

The \textit{Software Directive} obliges Member States to provide remedies against persons who, for commercial purposes, possess or put into circulation means that have the sole intended purpose of facilitating the unautho-

\textsuperscript{1116} Article 6(1)(c) \textit{InfoSoc Directive}.

\textsuperscript{1117} Article 6(3) \textit{InfoSoc Directive}.


\textsuperscript{1119} Recital 51 \textit{InfoSoc Directive}: “The legal protection of technological measures applies without prejudice to public policy, as reflected in Article 5, or public security.”

\textsuperscript{1120} Cf. \textit{Ibid.}, p. 310.
rized removal or circumvention of TPMs.\textsuperscript{1121} The ‘sole intended purpose’ standard is higher than the ‘primarily designed for the purpose of circumvention’ standard under Article 6(2)(c) \textit{InfoSoc Directive}.\textsuperscript{1122} Any act of circumvention that does not relate to the distribution in any way of circumvention devices must fall within the scope of application of the \textit{InfoSoc Directive}. The relation between L&Es within the \textit{Software Directive} has been solved in a less complicated way. Article 7(c) provides protection for TPMs “[w]ithout prejudice to the provisions” on, \textit{inter alia}, L&Es. However, these provisions, enable rightsholders to derogate from L&Es by contract,\textsuperscript{1123} except for necessary backup copies.\textsuperscript{1124}

A third instrument that mentions TPMs is the \textit{Conditional Access Directive}.\textsuperscript{1125} It protects operators of protected services against unauthorized access by the use of illicit devices. Besides television and radio broadcasting, protected services also include information society services.\textsuperscript{1126} Protected are services that need prior authorization to be accessed when that authorization is controlled by technical measures or other arrangements.\textsuperscript{1127} Illicit devices are defined as “any equipment or software designed or adapted to give access to a protected service”.\textsuperscript{1128} The Directive protects the service as such and not the material the service includes. More often than not, such services will include copyrighted works or other protected subject-matter.\textsuperscript{1129} Acts against which remedies must be provided are, comparable to the respective provision of Article 6(2) \textit{InfoSoc Directive}, “the manufacture, import, distribution, sale, rental or possession for commercial purposes of illicit devices”,\textsuperscript{1130} “the installa-

\begin{thebibliography}{99}
\item \textsuperscript{1121} Article 7(1)(c) \textit{InfoSoc Directive}.
\item \textsuperscript{1123} Article 5(1) \textit{Software Directive}.
\item \textsuperscript{1124} Article 5(2) \textit{Software Directive}.
\item \textsuperscript{1126} Article 2(a) \textit{Conditional Access Directive}.
\item \textsuperscript{1127} Article 2(b) \textit{Conditional Access Directive}.
\item \textsuperscript{1128} Article 2(c) \textit{Conditional Access Directive}.
\item \textsuperscript{1129} Stamatoudi & Torremans in: Stamatoudi & Torremans, \textit{EU Copyright Law: A Commentary} (2014), para. 11.108.
\item \textsuperscript{1130} Article 4(a) \textit{Conditional Access Directive}.
\end{thebibliography}
tion, maintenance or replacement for commercial purposes of an illicit
device” or any promotion by means of commercial communication of
such devices.

The directives differ significantly in their scope of application. The
InfoSoc Directive is the most important instrument for protected subject-
matter as it will always apply to acts of reproduction, which are not
protected under either of the other directives. However, the Conditional
Acces Directive and the Software Directive can offer additional protection
against perpetrators. In general the overlap between the three directives is
limited to the possession of devices for the circumvention of access
controls for purely commercial purposes.

2. Interpretation of Article 6 InfoSoc Directive

Little case-law exits in relation to the TPM-provisions of the respective
directives, in fact only Article 6 InfoSoc Directive has been directly
addressed in a number of preliminary ruling procedures before the
CJEU. But the fragmented jurisprudence shines a dim light on the
function of TPMs in striking the balance of interests between rightsholders
and users. The CJEU has held on multiple occasions that rightsholders
have the possibility to protect their works against unauthorized reproduc-
tions or unauthorized access by employing TPMs.

In the relevant case-law of the CJEU, the term “effective technological
measures” receives a broad interpretation. It covers a wide variety of
instruments. This is in line with the purpose of the InfoSoc Directive
which is to provide authors with a high level of protection. In Nintendo

1131 Article 4(b) Conditional Access Directive.
1132 Article 4(c) Conditional Access Directive.
1133 Cf. Petroula Vantsiouri, “A legislation in bits and pieces; the overlapping anti-
circumvention provisions of the Information Society Directive, the Software
Directive and the Conditional Access Directive and their implementation in the
1134 Cf. Ibid., p. 589.
1135 Article 2(e) Conditional Access Directive was briefly addressed in FAPL/
Murphy with regard to the question whether a device the use of which is
restricted by contractual agreement to a certain territory is an “illicit device”
within the meaning of the Directive.
1136 CJEU, in Nintendo v PC Box EU:C:2014:25, para. 27.
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v. PC Box the Court has given examples of what can constitute such a technological measure, including access controls, transformation of works for encoding purposes (scrambling, encryption), and copy control mechanisms. Other ways to protect subject-matter with technological measures are means to identify the origin of a work (e.g. watermarks), registration keys, and mandatory activation of software via the Internet. The wide interpretation Article 6 InfoSoc Directive receives, also read in conjunction with the relevant provisions of the Conditional Access Directive, would potentially also bring geo-blocking within the scope of application of the InfoSoc Directive. This argument is likely to prove to be a strong one if geo-blocking is used to prevent user access to content that has not been licensed in specific countries. Again, the CJEU has not yet ruled on the issue, and whether geo-blocking is protected under the InfoSoc Directive or the Conditional Access Directive remains uncertain. In any particular case, it will also strongly depend on the particular use of a Virtual Private Network software (VPN), which is used to circumvent geo-blocking, if the particular circumvention is in violation of copyright law.

1137 Here in particular Recital 6, which justifies the protection of access control mechanisms by the necessity to “to ensure the economic viability of the services“. The Directive does not refer to a high level of protection for authors, which is justified to give the term “effective technological measures” a wider interpretation under the InfoSoc Directive. However, applying the argumentation the Court used in Nintendo v. PC Box, in circumstances where the services consist mainly of giving access to works protected by copyright, either the InfoSoc Directive should apply, or the provisions of the Conditional Access Directive should also receive a broad interpretation.

a. TPMs and fair remuneration

In a number of judgments the CJEU has indicated that the application of TPMs can have effects on the entitlement to remuneration under the private copy exception. The direction in which the case-law on the interpretation of the private copy exception under Article 5(2)(b) InfoSoc Directive has developed can encourage rightsholders to protect their works and other protected subject-matter with digital locks. Although the absence of effective technological measures to protect content cannot dispense with remuneration claims altogether, their application can be taken into consideration when calculating the amount due.\(^\text{1139}\) Hence, rightsholders are not under an obligation to apply TPMs in order to be entitled to compensation, but if they do apply TPMs their remuneration might turn out to be higher than for works that are not protected by TPMs.

The CJEU implied in *VG Wort* that rightsholders when applying TPMs must do so with regard to the principle of proportionality. It stated that “technological measures, which rightsholders have the possibility of using should be understood as technologies, devices or components which are capable of ensuring that the objective pursued by the private copying exception is achieved or capable of preventing or limiting reproductions, which are not authorised by the Member States within the framework of that exception.”\(^\text{1140}\) The Court, thereby, established that TPMs must safeguard the effectiveness of L&Es, at least with regard to the exception for reproductions for private use under Article 5(2)(b). This was confirmed, in principle, in *Nintendo v. PC Box* where the Court refused protection for TPMs that go beyond what is necessary to protect the exclusive rights under the InfoSoc Directive.\(^\text{1141}\)

When calculating the amount due for private reproductions, Member States may take into consideration whether, in a particular case, a rightsholder has employed TPMs to prevent unlawful reproductions. This possi-

\(^{1139}\) CJEU, Judgment in *ACI Adam* EU:C:2014:254, paras. 44-5.

\(^{1140}\) CJEU, Judgment in *VG Wort v Kyocera* EU:C:2013:426, para. 55.

\(^{1141}\) “In those circumstances, it is necessary to examine whether other measures or measures which are not installed in consoles could have caused less interference with the activities of third parties not requiring authorisation by the rightholder of copyright or fewer limitations to those activities, while still providing comparable protection of that rightholder’s rights.”, CJEU, in *Nintendo v PC Box* EU:C:2014:25, para. 23.
bility should encourage the employment of TPMs, which lead to the conclusion that if a rightsholder makes use of TPMs to avoid unlawful productions this should be reflected positively in the amount he receives under a statutory compensation scheme under the private use exception.\textsuperscript{1142}

This reasoning has its basis in the assumption that content which is protected by technological measures can prevent that the market is being flooded with illicit reproductions and, since the judgment in \textit{ACI Adam}, reproductions from unlawful sources must not be considered when calculating copyright levies.\textsuperscript{1143} The Court reasoned that an interpretation of the conditions of the private copy exception which does not distinguish between reproductions from lawful and unlawful sources does not safeguard that a fair balance is struck between the interests of “recipients of the fair compensation” and users.\textsuperscript{1144} This requirement of a fair balance is derived from Recital 31 \textit{InfoSoc Directive}, which primarily refers to the relation between L&Es and exclusive rights, but can also have effects on the protection of TPMs.\textsuperscript{1145}

If reproductions from unlawful sources were included in the calculation of private copy levies for blank media and reproduction devices, users of such devices and media would automatically compensate for the harm caused by reproductions from unlawful sources, which are, however, not covered under the exception of Article 5(2)(b) \textit{InfoSoc Directive}. Rightsholders, on the other hand, would receive compensation for acts which are outside the scope of the Directive, and would enjoy increased benefits. Effectively, this would constitute an extension of the remuneration claim under Article 5(2)(b) for pirate copies, whereas the act itself would still constitute copyright infringement, and could lead to civil or criminal claims. Therefore, an interpretation and subsequent application of the private copy exception that would grant rightsholders remuneration for

\textsuperscript{1142} Cf. CJEU, Judgment in \textit{VG Wort v Kyocera} EU:C:2013:426, para. 58.
\textsuperscript{1144} CJEU, Judgment in \textit{ACI Adam} EU:C:2014:254, paras. 56-7.
\textsuperscript{1145} Recital 50 \textit{InfoSoc Directive} clarifies the relation between L&Es of the \textit{Software Directive}, shielding Articles 5 and 6 of the latter against the effects of Article 6 \textit{InfoSoc Directive}. 

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reproductions form unlawful sources would fail to apply the limitation properly.

As a result, the existence or absence of TPMs can be taken into consideration when calculating fair remuneration which is due for acts of private reproductions. This should encourage rightsholders to employ TPMs to make sure that their works are not reproduced or otherwise used without their authorization. The absence of TPMs can be construed to the effect that their non-employment amounts to an implicit consent to reproduction. Reproductions made from sources that are freely available on the Internet, and access to or download of is not prevented by TPMs can be excluded for the purpose of calculating fair remuneration for reproductions for private uses.\footnote{\textit{Cf. Fabian Niemann, “Der gerechte Ausgleich nach den Urteilen des EuGH ‘VG Wort’ und ‘Amazon’”,} (2013), 1-45, para. 40.}

\subsection*{b. TPMs and control}

In \textit{Nintendo v. PC Box} the CJEU set limits to the employment of TPMs to protect copyrighted works. In this case Nintendo had equipped its game consoles with technological measures to avoid that unlawful copies of Nintendo software and non-Nintendo-licensed software could be played on consoles manufactured by Nintendo. The technological measures were located on the consoles as well as the data carriers. Third-party developers which produced software for Nintendo consoles under license were required to purchase blank media that contained encrypted information that made the exchange of information from the data carrier to the console possible.

PC Box had argued that Nintendo employed the technological measures primarily to avoid that software from independent producers could run on its game consoles and also to fragment the market in geographical zones. The referring court had based its questions entirely on the provisions of the \textit{InfoSoc Directive}, more precisely Article 6. It argues that computer games are not merely software but are "complex multimedia works" that contain elements or an artistic quality that would make them qualify as works under the \textit{InfoSoc Directive}.\footnote{\textit{Cf. AG Sharpston, Opinion in Nintendo v PC Box EU:C:2013:581, paras. 24-5.}} AG Sharpston argued that the \textit{Software Directive} constitutes \textit{lex specialis} in relation to the \textit{InfoSoc Directive}
but the former directive would only apply if the subject-matter concerned “falls entirely within the scope of [the Software Directive.]”\footnote{Ibid., para. 34.} The Court followed the AG and applied Article 6 InfoSoc Directive.\footnote{CJEU, in 
\textit{Nintendo v PC Box EU:C:2014:25}, paras. 22-3.} This approach was heavily criticized because it would significantly limit the application of the relevant provisions of the Software Directive if \textit{Nintendo v. PC Box} would be followed in future judgments.\footnote{Critics argued that most computer programs contain audiovisual works that would, pursuant to \textit{Nintendo v. PC Box}, bring most computer programs within the scope of the \textit{InfoSoc Directive}, e.g. Tito Rendas, “Lex specialis(sima): video games and technological protection measures in EU copyright law”, \textit{E.I.P.R.} (2015), 39-45, in particular p. 44.} However, if the ruling will be held up it would only underline the importance of the relevant provisions of the \textit{InfoSoc Directive}.

On the substance the Court held that TPMs must not disable uses that do not violate the rights of rightsholders. The protection of Article 6 InfoSoc Directive against the circumvention of TPMs does not extend beyond the protection of copyright. The CJEU further stated that TPMs which are employed to control acts that are not authorized by the rightsholders “must respect the principle of proportionality.” This means that the protection offered by TPMs must not disable acts that are not protected by the \textit{InfoSoc Directive}, and which do not require authorization by the rightsholders.\footnote{CJEU, in 
\textit{Nintendo v PC Box EU:C:2014:25}, paras. 30-1.} In other words, TPMs that have a broad scope and that do not distinguish between permitted uses for which no authorization is necessary under the Directive go beyond what is necessary to safeguard that the rights in the protected works are not infringed.

As a result of this interpretation, rightsholders are required to fine-tune their TPMs as much as possible. If technologically feasible, technological locks must leave room for authorized uses or for uses that do not require authorization, either because certain uses are permitted under an exception or limitation, or because the acts concerned do not fall within the scope of any exclusive right. TPMs that fire a metaphorical full broadside against any acts that might infringe copyright, but that might also constitute an exercise of user rights or that might not be relevant at all under copyright law, will most likely not enjoy full protection under Article 6 \textit{InfoSoc Directive} because their application would be disproportionate. In such a
case users could be permitted to circumvent technological locks without having to fear legal consequences.

III. Claiming access – circumventing TPMs

When drafting the *InfoSoc Directive*, the EU legislator was obviously aware that certain TPMs can have effects beyond the monopolies of rightsholders. Therefore, it established mechanisms for users to request that technologically locked content can be accessed within certain limits, but most notable to take advantage of L&Es, in particular the private copy exception. Article 6(4) has been implemented differently in the various Member States. Whereas some have established institutions and/or procedures that mediate between rightsholders and users, other impose sanctions on rightsholders who do not comply with requests to make the necessary means available so that uses can benefit from L&Es. In the absence of voluntary measures taken by rightsholders users often only have the option to litigate and request injunctions to exercise acts that do not require authorization. For game consoles, the CJEU has permitted users to circumvent TPMs to use specific functions of a game console. The decision is discussed in the following paragraphs and subsequently its application to digital content tested.

The Directive does not expressly permit users to circumvent TPMs for legal uses on their own initiative. The definition of “technological measures” can, however, be interpreted to mean just that. Article 11 *WCT*, in which light the provisions of the *InfoSoc Directive* must be interpreted, implies that users can circumvent such TPMs that are used to prevent acts that do not require prior authorization. Article 11 states: “Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures [...] that restrict acts [...] which are not authorized by the authors concerned or

1152 Recitals 51 and 52 *InfoSoc Directive*.
permitted by law." \(^{1154}\) The CJEU did not refer to the WCT in its *Nintendo v. PC Box* judgment, neither did AG Sharpston. But it can be assumed that both, the Court and the AG, had regard to the provision. Similar wording is found in Article 6(3) *InfoSoc Directive*, which defines that “technological measures” as “any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject-matter, which are not authorised by the rightholder”. \(^{1155}\)

The provision can be interpreted to the effect that users are not permitted to circumvent the technological measures themselves, but that they should be enabled to do so, either by rightsholders or distributors of content, or by a third authorized party. If users were entitled to circumvent TPMs for any uses that do not require authorization, the provisions of Article 6(1) and (2) *InfoSoc Directive* would be difficult to implement in reality. The practical problems of this normative collision are discussed in the following two sections.

1. **Mod-chips and consoles**

Effective TPMs within the meaning of Article 6(3) *InfoSoc Directive* must be proportionate. \(^{1156}\) A TPM is deemed effective only when it “achieves the protection objective.” Pursuant to the interpretation of the Court the measure cannot go beyond what is necessary, in particular national courts must assess whether there are TPMs available that are less intrusive with regard to lawful uses. \(^{1157}\)

The *Nintendo v. PC Box* \(^{1158}\) judgment can be interpreted as to permit users to circumvent TPMs if this act of circumvention allows users to...
make lawful use of a game console.¹¹⁵⁹ However, if a technological measure that prevents reproductions is circumvented mainly for uses that fall within the scope of one of the exclusive rights that particular act of circumvention is prohibited. This is argued differently by Peukert, who interprets Article 6 InfoSoc Directive to the effect that the circumvention of TPMs for the purpose of benefitting from an exception, e.g. for private reproductions, is prohibited.¹¹⁶⁰ That interpretation could be followed if Article 6(4) would be interpreted to mean that the protection of TPMs in general takes precedence over the exercise of L&Es. Interpreted literally, though, Article 6(4) includes a hierarchy: the protection of TPMs is paramount (“notwithstanding”) and the exercise of L&Es should primarily (“in the absence”) be enabled by “voluntary measures taken by rightholders”. Only in the absence of such measures Member States shall ensure that “rightholders make available to the beneficiary of an exception or limitation provided for in national law [...] the means of benefiting from that exception or limitation”. Accordingly, rightholders must enable users to benefit from a limited number of exceptions, and the list contained in Article 6(4) first subparagraph does not contain the exception for reproductions for private use. The provision does not state that users are, in the absence of voluntary measures undertaken by rightholders, entitled to circumvent TPMs in order to benefit from certain L&Es. Such an entitlement could fall under the obligation imposed on Member States to take “appropriate measures” that rightholders provide users with “the means of benefiting from that exception or limitation” so that users who have lawful access to a protected work or protected subject-matter can exercise a particular limitation or exception. The formulation can also be interpreted to mean that users must request access in circumvention of TPMs in the sense that rightholders must actively interact with users to grant the latter access to protected subject-matter in certain cases.¹¹⁶¹

¹¹⁶¹ In fact, Article 6(4) does not give guidance what “appropriate measures” are, neither does Recital 51 help in this regard: “Member States should take appropriate measures to ensure that rightholders provide beneficiaries of such exceptions or limitations with appropriate means of benefiting from them, by modifying an implemented technological measure or by other means.” (emphasis

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If indeed, as Peukert argues, the protection of TPMs takes precedence over the exercise of L&Es users who cannot make reproductions of protected works because of TPMs are at the mercy of rightsholders and national legislators. In the absence of any initiative of the latter the circumvention of TPMs also for lawful purposes is prohibited. However, the jurisprudence of the CJEU points to a different interpretation of Article 6(4). Unfortunately, the case-law on Article 6 is rather thin and the most relevant case was based on a very peculiar set of facts.

In *Nintendo v. PC Box* the Court in principle – albeit implicitly – permitted the circumvention of TPMs if the circumvention allowed the user to use the console for uses that do not require the authorization of the rightsholder (which in this case was also the manufacturer, respectively his licensees). Nintendo had argued that the TPMs were mainly installed on the consoles as well as the data carriers to prevent pirated copies to be run on their consoles. In other words, the TPMs were installed to prevent infringements of exclusive rights of Nintendo and its licensees. PC Box argued that their mod-chips, which circumvented Nintendo’s TPMs could also be used to run third party software and other media on Nintendo consoles, acts which are not protected under the *InfoSoc Directive* and which, accordingly, do not require authorization under Article 2-4 of the Directive. The protection of TPMs extends only to such TPMs that are aimed at protecting copyright and related rights or the *sui generis* right under Directive 96/9/EC. Nintendo, so the argument of PC Box, used TPMs to avoid third-party software to be played on its consoles and to segment the market geographically.

The Court found that that TPMs enjoy protection inasmuch as they “pursue the objective of preventing or eliminating, as regards works, acts not authorised by the rightholder”. However, as TPMs must not go beyond what is necessary to achieve that aim, in other words, digital locks must be proportionate. The CJEU gave a list of criteria to be taken into consideration if a TPM deserves protection. A national court must

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1162 AG Sharpston, Opinion in *Nintendo v PC Box* EU:C:2013:581, para. 23.
1164 AG Sharpston, Opinion in *Nintendo v PC Box* EU:C:2013:581, para. 24.
1165 CJEU, in *Nintendo v PC Box* EU:C:2014:25, para. 31.
consider the costs of different types of TPMs, for which other purpose the consoles are in fact used.\textsuperscript{1166} If a circumvention device is primarily used to enable users to make reproductions in violation of Article 2 \textit{InfoSoc Directive}, or in violation of other acts that require authorization its use can be prohibited. Conversely, if a circumvention device applied to a Nintendo console mainly serves purposes that do not require authorization from rightsholders legal protection against such devices must not be granted.\textsuperscript{1167}

2. Breaking files and access-controls

Circumventing digital locks to overcome a lock-in effect is one thing. It is another thing to circumvent TPMs applied directly to digital files. In the first case a piece of technical equipment, e.g. a game console, is altered so that its functionality is extended, without this extension having any direct effect on protected works. Although an alteration of the console might facilitate acts that lead to violations of copyright there exist numerous uses that do not require authorization, and are, therefore, not illegal. In the second case restrictions on the use of a particular digital file are lifted. Alternative uses to those which a particular TPM applied directly to a digital file is aimed at preventing are less numerous. If a digital lock that prevents reproduction of that file is circumvented it is almost certain that the circumvention has the aim of enabling reproduction or alteration of that file, which are both acts that, as a general rule, require authorization. The wide interpretation that must be given to the term “effective technological measures”\textsuperscript{1168} can also include measures that are integrated in an online service and that would prevent the communication to the public of a work or the making available of a that work. Also, in these cases, circumvention of the TPM would permit the user to commit acts that require authorization from the rightsholder. The judgment in \textit{Nintendo v. PC Box} has only limited value for such cases. In the absence of alternative

\textsuperscript{1166} \textit{Ibid.}, paras. 32-6.

\textsuperscript{1167} This is in line with the general rationale of TPMs and the legal protection they enjoy. Technological measures protected under the \textit{InfoSoc Directive} are only such measures that are aimed at preventing acts that would violate any of the exclusive rights protected under copyright law, cf. Arrezzo, “Video Games and Consoles Between Copyright and Technical Protection Measures”, \textit{IIC} (2009), p. 95.

\textsuperscript{1168} Cf. CJEU, in \textit{Nintendo v PC Box} EU:C:2014:25, para. 27.
uses that do no require authorization, such circumvention measures that
almost exclusively serve to facilitate infringing acts are not legal under
Article 6 InfoSoc Directive as interpreted by the Court.

The circumvention of TPMs is in principle only permitted if it has the
purpose to enable the use of non-protected works (e.g. works that have
fallen into the public domain) or if the particular use has been authorized
by the rightsholder.1169 This will not be the case if a digital lock that
prevents reproductions of a file is broken to distribute it further via p2p-
networks. However, it is unclear in how far L&Es constitute permitted
uses that do not require authorization. Especially reproductions for private
purpose under Article 5(2)(b) InfoSoc Directive can be prevented by
digital locks, but also reproductions that are necessary to create a parody
or to quote parts of a work.

3. Excluding ‘lawful circumvention’

AG Sharpston in her Opinion in Nintendo v. PC Box was much clearer
than the Court in its final judgment. She underlined that the provisions on
the legal protection of TPMs only apply to circumventions in which exclu-
sive rights under Articles 2-4 of the InfoSoc Directive or the rights granted
under the Database Directive are violated.1170 If circumventions are made
to enable the exercise of an exception it can at least be argued that this
constitutes a lawful use which does not constitute a violation of any of the
exclusive rights. If, for the moment, it is assumed that such circumven-
tions are lawful, or, in other words, that L&Es grant users a non-overrid-
able ‘right to use’, the circumvention of TPMs for such purposes would be
lawful. But, if correct at all, this holds true only for content that has been
lawfully acquired other than in circumstances referred to in Article 6(4)

1169 Stamatoudi & Torremans in: Stamatoudi & Torremans, EU Copyright Law: A
Commentary (2014), para. 11.112. (see also Michel Walter & Silke von
11.6.7.

1170 AG Sharpston, Opinion in Nintendo v PC Box EU:C:2013:581, para. 72.
a. Digital exception

In particular with regard to digital content and its lawful use Article 6(4) constitutes a significant barrier. When TPMs are applied to digital content users have no possibility to circumvent the measures lawfully, nor must rightsholders react to requests from users to enable the exercise of any of the L&Es listed in Article 6(4) first subparagraph. The rationale of Article 6(4) fourth subparagraph, as Peukert explained, is that operators of online content platforms could hardly cope with the amount of requests to give access to content protected by TPMs for the purpose of exercising L&Es. Users of online services are, under the InfoSoc Directive, limited to mere consumption of online content.\textsuperscript{1171}

And even if rightsholders were required to enable the use of protected subject-matter, this obligation would only relate to those particular exceptions and would exclude uses for the purpose of private reproduction, quotation, parody etc. All of these uses are fundamentally necessary to exercise a number of fundamental rights, including the right to freedom of expression.\textsuperscript{1172}

Whereas for analog uses rightsholders are encouraged to enable the exercise of L&Es, and in the case that rightsholders remain inactive Member States are obliged to take appropriate measures to enable their exercise, this tool for access facilitation does not exist for most content accessed via the Internet. This has the consequence that the exercise of L&Es with regard to digital content is more difficult – and potentially impossible – than for analog media. Article 6(4) InfoSoc Directive still grants users access, although the exercise of L&Es might prove to be more burdensome and especially very time-consuming. Its fourth subparagraph relieves rightsholders of any obligation to provide access to content protected by TPMs, it even omits any reference to voluntary measures that rightsholders might take. And Member States do not find themselves under the obligation to provide adequate means to enable the exercise of certain L&Es either. For analog uses users are inconvenienced in the exercise of some L&Es – and some, it seems, can fall victim to overzealous

\textsuperscript{1171} Peukert, “‘Copydan/Nokia’ und die Zukunft des gesetzlichen Vergütungsanspruchs für die digitale Privatkopie”, \textit{GRUR} (2015), p. 455.
\textsuperscript{1172} See above Chapter 3.B.III.1.
TPM protection. For digital uses the legal exercise can be made impossible by an application of TPMs.\textsuperscript{1173}

The resolution of the European Parliament on the implementation of the InfoSoc Directive demanded that distributors should make information available that would ensure interoperability of their content.\textsuperscript{1174} It did not call upon rightsholders to provide tools to circumvent TPMs, but merely to publish information that can be used to circumvent TPMs to make sure that users can use content across platforms. The circumventing acts that would be necessary to realize interoperability would still be exercised by users, or by service providers. It is implied that circumventing measures with the help of information provided by distributors to realize interoperability would not be illegal, and would not fall under the protection of TPMs under Article 6. More importantly, the relevant passage of the resolution does not distinguish between analog and digital content. However, it is also silent on the circumvention, implicitly or explicitly, of TPMs for the purpose of benefitting from L&Es. The “Reda Draft Report” had still addressed this issue\textsuperscript{1175} and had suggested to make the protection of TPMs conditional on the publication of information that would make circumvention possible. The draft report had referred to instances of “authorised circumvention”, viz. instances “where the circumvention of technological measures is allowed”.\textsuperscript{1176}

A right for users to circumvent TPMs for permitted uses would make a significant contribution to improve their position vis-à-vis rightsholders. In \textit{Nintendo v. PC Box} the mod-chips could also be used to play third party software or other media on Nintendo’s consoles. These uses did not infringe copyright but merely enabled users of the consoles to extend the functionality of Nintendo’s hardware. In the same way users should be allowed to circumvent TPMs to exercise L&Es, which are uses that do not infringe copyright. Of course, circumvention should only be permitted for certain purposes and for certain activities. But to exercise L&Es and to

\textsuperscript{1173} Cf. Peukert in: Geiger, \textit{Research Handbook on Human Rights and Intellectual Property} (2015), p. 147; the author argues that this restriction on fundamental rights should be ignored by courts to the effect that the exclusive right is inapplicable in instances where its interference with other fundamental rights is not justified.

\textsuperscript{1174} European Parliament, T8-0273/2015, para. 62.

\textsuperscript{1175} European Parliament - Committee on Legal Affairs, 2014/2256(INI), para. 23.

\textsuperscript{1176} \textit{Ibid.}, para. 24.
enable interoperability, users must be able, depending on the particular use, to access, reproduce, extract, print and move content. All these are acts which are also ‘necessary’ to commit infringing acts.

Depriving users of all possibilities to use content except for mere consumption is not proportionate to safeguard exclusive rights. In the same way in which TPMs that created a lock-in effect were ruled disproportionate by the Court, TPMs that disable the exercise of L&Es should equally be considered to be disproportionate.

If one were to assume, and if only for the sake of legal argument, that a TPM with regard to a particular use pursued a legitimate aim (e.g. protection of copyright) and was also suitable to achieve that aim (e.g. prevents infringing acts), the second and the third step of the proportionality test would, at least, require some argumentation. TPMs that do not distinguish between uses that require authorization and uses that do not require authorization – because they are covered by a non-waivable exception to copyright – would not constitute the least onerous means to achieve the aims pursued identified under step one, but they would also, as a result, fail to be reasonable, because they would unreasonably prejudice the interest of users. Again, the interest of the user is to benefit from exceptions that are granted by the InfoSoc Directive, and its respective implementation into national laws. The question whether a particular technological means to protect the interests of the rightsholder as granted under applicable copyright legislation is the least onerous one to safeguard that interest heavily depends on the ability of technological measures to distinguish between uses. If it is technologically impossible to distinguish between technological acts that infringe copyright and those that do not, it is hard to argue that TPMS thusly limited in their application constitute the least onerous

1177 Favale, “Approximation and DRM: can digital locks respect copyright exceptions?”, Int. J. Law Info. Tech. (2011), p. 319; the author had made her argument with regards to optical discs (CDS, DVDs), but it can easily be applied to digital content. The core of the argument is that user has acquired a permanent copy. The argument might pose difficulties in relation to streamed content (or services in general if the user does not assume an owner-like position) or content that is locked-in with a particular device.

1178 CJEU, in Nintendo v PC Box EU:C:2014:25, para. 30, in more detail AG Sharpston, Opinion in Nintendo v PC Box EU:C:2013:581, paras. 53-63.

1179 This being the first step of the classical three-step analysis of the proportionality test under EU law, see Craig & de Búrca, EU Law: Text, Cases, and Materials (2011), p. 526.
means, if in fact they are the only means to achieve the aim of protecting the rightsholder from infringements of his copyright. The alternative would then be a non-application of TPMs, which would unreasonably prejudice the interests of the rightsholder by exposing his content to potentially infringing acts without the slightest technological protection against such acts. The proportionality of a particular measure, therefore, also depends on the existence of technological means that are refined enough to distinguish between permitted and non-permitted uses.

It is also problematic that Article 6(4) InfoSoc Directive does not clarify its relation to Article 6(2). Whereas the relation to Article 6(1) is expressly addressed the provision omits to establish its relation to the second paragraph. The second paragraph is not, however, insignificant for enabling legal uses of protected works. It can hardly be assumed that every user who has an interest to make legal use of content protected by TPMs is by himself able to circumvent TPMs. It is more likely that a user would purchase equipment or request the services of a third person to circumvent TPMs to lawfully use content that he has lawfully acquired. A literal reading of Article 6(4) would come to the interpretation that Article 6(2) remains untouched\(^\text{1180}\) and that any of the activities enumerated in Article 6(2) and any of the three non-cumulative conditions could be challenged in court. This would indirectly deprive users of a legal source for tools and services to circumvent TPMs for legal uses.

Article 6(2) could not find application if a particular circumvention device or a particular service to circumvent TPMs is not aimed at “technological measures” as defined in Article 6(3) where such measures are measures that prevent acts “which are not authorised by the rightholder”. The exercise of L&Es, which have not been waived by contract, do not require the authorization of rightsholders, and therefore it could be argued that TPMs that disable the exercise of permitted L&Es do not fall within the scope of application of Article 6(2).

If the marketing – in the wider sense – of circumvention tools or the provision of services to circumvent TPMs were prohibited, most users would be unable to benefit from L&Es. The possibilities created by Article 6(4) and its interpretation after the *Nintendo v. PC Box* judgment of the CJEU would be ineffective if users were *in principle* allowed to

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circumvent TPMs, if the circumvention would *de facto* be impossible because the means to circumvent cannot be acquired.

The many questions with regard to the relation between L&Es and TPMs should be addressed in a discussion on a reform of EU copyright law. The current situation creates legal uncertainty and is detrimental for rightsholders and users alike. It would already be a significant improvement if it was clarified whether Article 6 applies to TPMs that prevent only unauthorized acts, or also permitted acts, and whether the marketing of tools or the provision of services to circumvent TPMs that prevent permitted acts is legal. The legal standards that apply, in particular in the latter case, are still not sufficiently defined. A quantitative assessment of the use of circumvention measures as required by the Court\textsuperscript{1181} will often be difficult to establish.

Requiring users to ask for permission to use content to benefit from an exception is practically impossible, but denying users the benefits of L&Es cannot be a solution either. The proportionality approach taken by the Court in *Nintendo v. PC Box* should also be applied with regards L&Es, the practical application might, however, prove to be complicated.

b. Exclusion by contract

The *InfoSoc Directive* does not address the relation between contractual agreements and the exercise of L&Es.\textsuperscript{1182} The Resolution of the European Parliament on the implementation of *Directive 2001/29/EC* stressed with regards to TPMs “that the effective exercise of exceptions or limitations, and access to content that is not subject to copyright or related rights protection, should not be waived by contract or contractual terms” and suggested that distributors of content provide information on technological measures to enable interoperability.\textsuperscript{1183} Compared to Julia Reda’s draft report, which had suggested to make the protection of technological measures conditional on the publication of the source code or the interface specification to facilitate lawful circumvention,\textsuperscript{1184} the final resolution

\begin{thebibliography}{9}
\bibitem{1181} CJEU, in *Nintendo v PC Box* EU:C:2014:25, para. 36.
\bibitem{1183} European Parliament, T8-0273/2015, paras. 61-2.
\bibitem{1184} European Parliament - Committee on Legal Affairs, 2014/2256(INI), para. 24.
\end{thebibliography}
passed by the European Parliament focused on the outcome, rather than suggesting concrete solutions. Only with respect to interoperability a concrete proposal to provide all necessary information was made but without making the publication of this information a condition for the legal protection of technological measures. Nevertheless, the Parliament made a clear political statement on the relation between TPMs and L&Es as well as TPMs and unprotected subject-matter. The final resolution also underlined that a copyright framework should be designed in a technologically neutral way. Read together with the paragraphs on TPMs this would no longer leave room for a provision such as Article 6(4) fourth subparagraph of the InfoSoc Directive.

More importantly, legal uncertainty as to whether rightsholders or licensees can use TPMs as an automated tool to enforce contractual limitations to the exercise of L&Es can be eliminated by a clear legislative expression of the political will that the exercise of L&Es must be safeguarded by rightsholders. To this effect, the latter would be required if technological measures are used to enable their circumvention for specific purposes. An unconditional protection of technological measures, and in particular with regard to digital content, would have the effect that although contractual limits to the exercise of L&Es could be invalid, users would still be effectively barred from benefiting from L&Es due to technological barriers. Contractual limitations to the exercise of L&Es and their technological supplements are, therefore, closely linked, and must be addressed in conjunction. The InfoSoc Directive has done this only to an unsatisfactory degree, and it would be instrumental that this interconnection would be addressed in the political and public discourse on EU copyright.

4. Uncertainties and the territorial dimension

The privilege to circumvent TPMs or the mechanisms to gain access to DRM-free content have been implemented differently in the 28 Member

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States.\textsuperscript{1186} Only a few Member States expressly provide that users have the right to circumvent TPMs to benefit from L&Es; but even in those cases not all L&Es are covered. It might be permitted to circumvent a TPM in one Member State to make private reproductions, but the same act might not be permitted in another Member State, where it might, however, be permitted to circumvent TPMs to create a parody or to use content in the classroom.

At least, and with this comes slight relief for users of locked content, circumvention acts fall under the jurisdiction of only one Member State. While a communication to the public through the Internet has implications on 28 different copyright laws in the EU, breaking a technological lock takes place within a determined territory, and only the laws of that Member State apply to the act in question. Although the protection of works and other subject-matter extends to all 28 Member States, and infringements of protected subject-matter on the Internet create liability in all Member States, acts of circumvention or acts that assist circumvention are limited to the territory where the harmful event occurs. This might be different for cases in which a circumvention tool is distributed via a website that is accessible in all Member States. The ordinary user, who acquires software to circumvent digital locks must not worry that he will face litigation in 28 different fora.

IV. Disabling legal uses

A strong level of protection of rightsholders and TPMs that protect their rights almost inevitably limits the exercise of permitted uses. The technological consequence is difficult to regulate from a legal perspective, the decision for high protection for technological measures can, in extreme cases, lead to a virtual insignificance of permitted acts and L&Es.\textsuperscript{1187}

\textsuperscript{1186} For a 2004 overview see von Lewinski, “Rights Management Information and Technical Protection Measures as Implemented in EC Member States”, \textit{IIC} (2004), pp. 847 et seq.

1. Over-employment

The potential to protect rights by TPMs is limitless. Disregarding circumvention measures for the moment, TPMs can prevent users from exercising any activities whatsoever, technically, in the basic meaning of the word, there are hardly any limits. Downloaded files can be protected against reproduction, against interference with the code, and even their regular use can be restricted (admittedly, this would not make much sense). TPMs can work in more nuanced ways, e.g. to the effect that technologically protected files can only be reproduced a certain number of times, or that they can only be opened by certain programs or by certain devices. In this way, rightsholders can limit the use of their protected subject-matter to uses they think users should be permitted to make. This might be uses for which the respective content was marketed. As an example, the operator of a download store which can only be accessed by users of certain devices limits the use of content from that store to such devices. The operator could also protect his content with technological measures so that downloaded copies can only be transferred a certain number of times. Users that purchase content from this store could not transfer files to devices of other manufacturers, and would be locked-in with the devices of the download store operator. A user could also be limited in his attempts to use the files to create derivative works, if the software the store operator provides would not allow the user to alter the files.

Rightsholders enjoy certain legal monopolies, and within these monopolies the employment of TPMs as automatic enforcement mechanisms should be allowed. But TPMs can, intentionally or unintentionally, spill over to uses that are usually permitted. In general, uses that are permitted should not be subject to control by rightsholders. With regard to digital exceptions it has been argued above that TPMs must respect the principle of proportionality. A fine line must be drawn, when deciding whether the employment of TPMs respect the principle, between intentional and incidental overprotection. Incidental overprotection can be unavoidable, and in every case an incidental overprotection should still be scrutinized as to its proportionality. Intentional overprotection, which means overprotection

in cases when less intrusive TPMs are available and affordable, should not be permitted, and such TPMs should not receive protection under Article 6 InfoSoc Directive. Rightsholders should not be allowed to overprotect their content and then (ab)use Article 6 as a justification. Julia Reda’s idea of ‘open source TPMs’ could have provided rightsholders relatively cheap access to modern TPM measures; in the absence of globally available high-end TPMs the price factor will have to be factored into the proportionality test. At least some cases of overprotection will most likely have to be accepted by users because of a lack of suitable TPMs that can distinguish between particular uses.

2. Technological limits

Technological solutions exist to limit the number of reproductions that can be made from one digital file. Similarly, music download services employ measures to safeguard that songs downloaded from their service could not be played on more than a certain number of devices. A user could thus be limited to listen to purchased music, e.g. on his desktop computer, his mp3 player and maybe one additional device. Comparable limitations to use a service on certain devices exist for online streaming services which limit access to the service to a number of devices. Users can decide for a subscription model that enables them, depending on the subscription model, to access the service on one or more devices. All these restrictions are usually included in the terms of use, however, their observance by the user is controlled, and contraventions are preempted, by technological barriers.

TPMs can be designed to prevent exactly such acts that the rightsholder does not want to authorize, or that an operator of a service does not want to include in his offer. These acts are then impossible to perform by users of such services, the TPMs function as an automated contract enforcement tool in demonstrating the limits of what has been negotiated, or unilaterally offered with the option to accept by agreeing to the terms and conditions.

Technological measures can prevent technological processes. A restriction of reproductions can only prevent reproductions or limit the number of possible reproductions for a particular file. But technological measures cannot identify the purpose for which a reproduction is made, and, therefore, TPMs cannot distinguish whether a reproduction is made to upload a
file to a sharing network or whether a reproduction is made for purposes that are covered by one of the L&Es of Article 5 *InfoSoc Directive*. TPMs find their limitation in the subjective element of a reproduction, of an act of communication to the public or making available. The subjective element, which is particularly dominant in L&Es, is difficult to control by technological means, to put it bluntly: technological measures are not lawyers!\(^\text{1189}\) As a result, the control TPMs offer to rightsholders does not only extend to acts that require authorization but also to acts that do not require authorization.

This conflict of interests between limiting and restricting uses of protected works by technological measures and the exercise of permitted uses is the subject of the following section.

V. Protecting rights – protecting use(r)s

The fear that L&Es could be effectively overridden by contractual arrangements and by TPMs already existed before the signing of the *WCT* in 1996.\(^\text{1190}\) *Thomas Vinje* asked before the adoption of the WIPO Treaties: “[H]ave we adequately considered whether such legislation will permit the survival of a public domain?”\(^\text{1191}\) An overassertment of exclusivity by means of TPMs can in fact limit the public domain and, thereby, many permitted uses. Whereas access to protected subject-matter, if it is freely available on the Internet, remains free and unproblematic, the re-use of protected material even for permitted uses can be significantly hindered by TPMs. Rightsholders can establish a system for the protection of their rights that overrides Article 5 *InfoSoc Directive* with a “private regime”\(^\text{1192}\) that extends protection by increasing the scope of exclusive rights by alteration of the effective applicability of L&Es. With a more nuanced application TPMs can be used to safeguard a number of interests,


\(^{1191}\) Vinje, “A brave new world of technical protection systems: will there still be room for copyright?”, *E.I.P.R.* (1996), p. 432, Vinje also asks: “[H]ave we properly addressed the extent to which anti-circumvention legislation might undermine existing copyright exceptions [...]?”.

however, due to technological limits it will be difficult to take all interests equally into consideration. Whether particular TPMs are granted legal protection should, as discussed above, be subject to a careful proportionality test.

1. The ability to enable

Article 6(4) enables the dissemination of digital content by providing rightsholders and their assignees with a high level of protection of their content on the Internet. This protection even extends to cases where users of content pursue to exercise their fundamental rights.\textsuperscript{1193}

Indeed, rightsholders should be encouraged to employ TPMs if the measures are able to prevent infringements. This kind of technological protection can give rightsholders the confidence to expose their content on the Internet. Robust remedies against circumvention under Articles 6(1) and (2) InfoSoc Directive complement the effects which TPMs can have to enable online business models. It must also be considered that policing the circumvention of TPMs by users can be relatively difficult. Circumvention acts often take place within the privacy of the home and cannot be easily traced through IP-addresses as copyright infringements on file-sharing platforms. Therefore, the intermediary liability of distributors and manufacturers of circumvention devices and providers of circumvention services has been included into Article 6 InfoSoc Directive.

With a combination of direct and intermediary liability rightsholders have the legal tools to pursue circumventions of their protected subject-matter. This second-tier protection enhances the protection provided by first-tier protection through the disabling effects of the application of technological measures. This interplay of technological prevention and legal remedies enables the establishment of business models based on digital content. The fear of infringement is lessened and the chance online services using protected content fail because of piracy decreases.

\textsuperscript{1193} In this sense, see Peukert in: Geiger, Research Handbook on Human Rights and Intellectual Property (2015), p. 147.
2. The ability to protect interests

The interests which must be taken into account in the last stage of a proportionality assessment (proportionality *stricto sensu*) are outlined below. The three interests (property rights, public policy, fundamental rights) can only represent broad categories and would require further distinction in any particular case. But their critical elements should be briefly mentioned here.

a. Property rights

Technological measures can be used in a multitude of ways, but essentially they serve to prevent unauthorized acts and can aid in enforcing copyright. Their task is to prevent violations of any sort of intellectual property. The limitation TPMs put on uses or modes of uses enable rightsholders to retain control over their works and protected subject-matter. The ability to prevent reproductions beyond a limited circle of individuals or to a specified number of devices serves to preserve the market potential of protected works. If an e-book could be infinitely copied to an unlimited number of e-book readers (even if only to those of the same manufacturer) publishing houses would face difficulties upholding the profitability of critical markets, e.g. markets for academic textbooks. Through the creation of artificial scarcity TPMs do not only protect property, but by limiting protected works to a finite number of legal reproductions. Copyrighted subject-matter acquires the attributes of tangible property by application of TPMs. Whereas the intellectual property would continue to persist even if it was violated on the Internet, TPMs make intellectual property in a digital environment manageable, it protects the legal title by giving control over the ‘digital embodiments’ of intellectual creations.

b. Fundamental rights

The exceptions for which Member States should safeguard, as a last instance, that their beneficiaries can indeed profit from them are L&Es
that relate to public policy or public security in the wider sense.\textsuperscript{1194} In particular those exceptions that allow communication to the public are very limited. These are uses for teaching and research, exceptions for people with disabilities and uses for the purpose of public security.\textsuperscript{1195} And again, the enabling effect of Article 6(4) excludes works and subject-matter that has been downloaded in digital form.

By preventing certain acts, TPMs can have significant effects on the exercise of fundamental rights. As a preliminary note it should be mentioned that TPMs also serve to protect fundamental rights, namely the right to property under Article 17(2) of the \textit{EU Charter}. But this section will focus on the fundamental rights of users and the effects TPMs can have on their exercise and their protection. The conflict between the right to property and colliding fundamental rights, which is anyway at the heart of copyright, will then be discussed again at the end of this section.\textsuperscript{1196}

The exception for private reproduction is probably the most illustrative exception, and thereby an exception, which has strong fundamental rights implications. For private individuals who cannot benefit from the more specialized exceptions, e.g. teaching and research, the private copy exception is of paramount importance to receive, store and process information for various purposes. It shall serve as an example that can be transposed to other comparable exceptions or acts that do not require authorization.

\textit{Karapapa} has argued that the CJEU in \textit{Padawan} has “develop[ed] a line of reasoning under which private copying should be treated as a user right.”\textsuperscript{1197} If this right indeed existed the non-application under Article 6(4) fourth subparagraph of the \textit{InfoSoc Directive} of the private copy

\textsuperscript{1194} Recital 51 \textit{InfoSoc Directive}.


\textsuperscript{1197} Stavroula Karapapa, “Padawan v SGAE: a right to a private copy?”, \textit{E.I.P.R.} (2011), 252-259, p. 259; she argues that because the Court assumes that users take full advantage of the technological possibilities of reproduction devices and blank media users are assumed to make copies and are therefore burdened with private copying levies (cf. CJEU, in \textit{Padawan v SGAE} EU:C:2010:620 para. 55). Although the latter can be collected from manufacturers of technological devices or sellers of blank media the price is forwarded to the users through the
exception to digital content, namely such content “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” would significantly limit this right. When rightsholders or persons exercising rights of third parties can disable reproductions by TPMs they can unilaterally extend the scope of protection of copyright and related rights.

Private reproductions can have a fundamental rights dimension. For example, the collection of information to be informed about a certain topic can fall within the scope of protection of Article 11 \textit{EU Charter}. The subsequent dissemination of information can include acts of reproduction and acts of communication to the public or making available. In a digital environment, avoiding either act is virtually impossible. Other reproductions are of a purely consumptive nature and are not necessarily protected by fundamental rights.\footnote{Cf. Christophe Geiger, “The answer to the machine should not be the machine: safeguarding the private copy exception in the digital environment”, \textit{E.I.P.R.} (2008), 121-129, pp. 122-3.} Digital technologies that are applied to digital files are, however, unable to distinguish between uses with different purposes. As already noted, TPMs are blind to the delicate balance that is struck at the legislative level,\footnote{Cf. \textit{Ibid.}, p. 124.} and this balance cannot be expressed in absolute terms that would enable technology to distinguish between right and wrong, or permitted and prohibited. The technological processes, which TPMs can recognize, do not differ for creative or consumptive uses, neither do they differ for creative uses for information entertainment purposes or uses for discursive purposes. The technological aspect that can be controlled by TPMs is in each case a reproduction or communication, the fundamental rights dimension of a particular use requires assessment beyond the mere identification of a technological process. Ultimately, TPMs cannot distinguish whether a particular act is necessary to exercise fundamental rights, or whether the latter remain completely untouched in their scope. By over-employing TPMs, or even by unintentionally creating collateral effects of TPMs on generally permitted uses, rightsholders can override legislative choices and thereby unbalance copyright to the detriment of users.

\footnote{price they pay for the devices or blank media, with which, \textit{Karapapa} argues, users acquire a license to make private reproductions.}
Digitization and changes in the way public and academic discourse is conducted necessitates reproductions and dissemination of works of third parties. The speed and scope of discussions often requires the inclusion of quotation of text, images and audiovisual content to illustrate and contextualize an argument or an opinion. TPMs that are employed to prevent acts of reproduction or communication to the public make it almost impossible for the ordinary user to quote from them.¹²⁰⁰

Already a limitation to permitted acts of (private) reproduction instead of an outright ban could safeguard that most L&Es, and as a consequence fundamental rights, can be exercised.¹²⁰¹ The problem boils down to a simple proportionality test. If the aim to be pursued is to protect the property rights of authors and rightsholders, an aim which is certainly legitimate and can absolutely be achieved by limiting reproductions of works, the proportionality test would inquire, inter alia, if an absolute prevention of acts of reproduction constitutes the least onerous way to achieve the objective pursued.

The importance of the private copying exception makes it even more surprising that it is not contained in Article 6(4) first subparagraph but only in the second subparagraph which Member States are not obliged to implement into their national laws. It could be argued that Article 5(2)(b) is subsidiary to certain other exceptions, e.g for teaching and research, but it is particularly the private nature that significantly extends the scope of this exception and gives it a distinctive fundamental rights dimension. If Member States make use of their discretion and fail to implement Article 6(4) second subparagraph, TPMs that prevent reproduction of media can severely impede the exercise of the right to freedom of expression. Of course, the impact of TPMs on fundamental rights can vary depending on the activities that are prevented by their application.

The theoretical possibility that users can be granted access to media that is protected by TPMs does not significantly alter the utility of this provision for users. The procedure that precedes access to media can be so extensive that it effectively constitutes a barrier to the exercise of L&Es

and fundamental rights. Article 6(4) does not permit direct circumvention, but obliges Member States, if rightsholders themselves do not take voluntary measures, to adopt adequate measures so that users can benefit from an exception. The provision does not give examples of such measures, nor does it give any indication as to how such measures should look like.

The practical impossibility, or even a delay in access to content or the ability to reproduce files, can constitute a violation of fundamental rights in that such limitation restricts their effective exercise. Member States maintain a wide margin of appreciation in deciding whether certain violations of fundamental rights are justified or not, at least in relation to the right to freedom of expression this is settled case-law of the ECtHR. The balancing of fundamental rights in relation to the application of TPMs leaves room for the argument that one of the involved interests deserves stronger protection. This interest is the protection of intellectual property on the side of rightsholders. In a digital environment the possibilities to infringe on rights, in particular copyright, are much higher than in the analog world. But this argument can be countered with the argument that the Internet plays an important role for the exercise of fundamental rights, the right to freedom of expression in particular. Against this background, Article 6(4) fourth subparagraph of the InfoSoc Directive, which clearly aims at protecting the rights of rightsholders especially in an Internet environment, is not understandable when the Internet constitutes an equally important forum to exercise fundamental rights. In a balancing exercise the provision effectively tilts the balance in favor of one side while neglecting the interests of the other.

In order to give proper weight to fundamental rights other than the right to property the effectiveness of L&E in a digital environment must be defended against undue restrictions by TPMs; whether this is technologically feasible is yet another question.

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1203 See e.g. ECtHR (Plenary), 7 December 1976, case of Handyside v. the United Kingdom, Appl. no. 5493/72, para. 48; ECtHR (5th section), 10 January 2013, case of Ashby Donald and other v. France, Appl. nr. 36769/08, para. 41; and ECtHR (Grand Chamber), 16 June 2015, case of Delfi AS v. Estonia, Appl. no. 64569/09, para. 111.
c. Rebalanced TPMs

The problems to strike a balance between rightsholder interests and that of users are similar to those in relation to L&Es and copyright. The application of means that prevent certain uses simply adds another layer of protection to the rights enjoyed by rightsholders. Considerations to establish a balance between the interests must take into consideration that TPMs increase the level of protection for rightsholders as well as the effective scope of protection of copyright. To maintain the basic balance in copyright law, users must receive ‘something’ in return. The complete exclusion of digital content acquired via the Internet from the scope of application of Article 6(4) does not contribute to rebalance copyright for digital content, quite to the contrary. In particular the fundamental rights dimension of L&Es should influence the legislator to rethink Article 6(4) fourth subparagraph, but also Article 6 in general. Due to the nature of property rights, which are created by law but are protected against state interference, property rights cannot be considered equal to other fundamental rights. This follows an argument by Peukert, who posits that there exists a *numerus clausus* of fundamental rights.\(^\text{1204}\) Therefore, the limits of the rights should be determined by the legislature and during the legislative process other fundamental rights must be taken duly into consideration. A triple layer of protection for the right to property by extensive scope of protection, restrictive interpretation of L&Es and (legally) unbreakable technological locks for digital content does not reflect a hierarchy between fundamental rights proper and the right to (intellectual) property. To the contrary, it suggests that the right to property is superior to rights reflected in L&Es if the latter cannot be exercised because a lawful circumvention to exercise and exception is not available to users.

*Peukert*, in a general argument on the fundamental rights dimension of intellectual property, suggests to approach intellectual property from a justification perspective. He argues that already at the legislative stage the establishment of IP titles should be considered as a limitation to the public domain, and therefore requires justification, which is different from a

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balancing of interests. Translated to TPMs, the protection of technological measures must be justified as a restriction to other fundamental rights. A justification to limit the public domain by legislative intervention first by copyright and then by the protection of TPMs requires a justification that goes beyond the protection of copyright itself, but must aim at pursuing other aims. The drafters of the *InfoSoc Directive* have failed to make clear what these other aims are.

But even if one were to discard Peukert’s argument on the hierarchy of fundamental rights and consider the right to property as equal to the right to freedom of expression and other fundamental rights affected by L&Es, the high level of protection provided by TPMs for digital content and the limited possibilities to circumvent TPMs for legal uses of digital content do not reflect a fair balance between two fundamental rights.

**VI. Do TPMs need reform?**

The EU legislator has dedicated little of its copyright-related efforts on rethinking the current system of TPMs and DRM, although there could be valid reasons for this. One reason would be that the current system is absolutely appropriate to serve the role TPMs should occupy within a coherent and efficient copyright system that has equal regard to the respective interests of rightsholders and the general public. Another reason could be that the legislator wants to wait until other issues have been resolved and the interests between which a balance should be struck are firmly established. However, these interests constantly change. In favor of the first reason speaks the relatively little amount of case-law on the relevant provisions of the *InfoSoc Directive*, and in particular the

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1205 *Ibid.*, pp. 140-1; the author then suggests that the justification is reversed once an IP right has been established in that any interference with the constitutionalized right in turn needs to be justified by distinct aims.

1206 In this case a clarification similar to that for digital exhaustion would have been a most welcome indication.

withdrawn preliminary reference in *Grund*. Rightsholders and users could, in principle, be satisfied with the status quo.

When Article 6 *InfoSoc Directive* was drafted, the opportunities to interact with digital content that exist today were just not foreseeable. A strict framework for TPMs which grants the interests of rightsholders primacy over user interests by providing the former wide protection against TPM circumventions, similar to the imbalance within the system for L&Es, privileges rightsholders in the long term. Moreover, strong protection for TPMs has spillover effects to L&Es because the exercise of certain exceptions or user rights are being made impossible with the application of TPMs to digital content.

Whereas L&Es require a more disruptive intervention, or even a full reform, Article 6 *InfoSoc Directive* could be adjusted to current technological realities with smaller adaptions. The general rule that circumvention of technological locks is prohibited to enable unauthorized acts should remain. But those instances in which rightsholders are allowed to circumvent TPMs for authorized uses should be expressly stated in the law. Furthermore, in order to make circumvention possible, rightsholders must be obliged to make the means available to users that enable the latter to breach digital locks for authorized uses. Even in such instances rightsholders should retain the privilege to employ TPMs that make the tracing of files that have been ‘unlocked’ possible to identify persons who use authorized circumvention mechanisms to put unlocked files to unauthorized uses. As many authorized uses will constitute exercises of L&Es, this implies that Article 6(4) fourth subparagraph cannot remain part of a re-struck balance.

A new balance that must be reflected in an adapted provision for TPM protection must have regard to the vital role technological measures play in marketing digital content, and the necessity to permit certain uses, in particular those that are rooted in fundamental rights considerations.

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1208 CJEU, Order in *Grund* EU:C:2014:589, withdrawn after the judgment in *Nintendo v. PC Box*. 

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1. TPMs protect business models

TPMs protect content from being used beyond contractual agreements. If an online service permits streaming of content (e.g. music or video) it usually does not permit its users to download the content or make any other type of permanent fixation on any of the user's devices. If users had the permission to make permanent fixation then a streaming service could replace most other business models that permit a user to store content permanently. TPMs, to a certain degree, help to preserve a multitude of business models by segmenting the market by types of use. Of course, legal protection cannot entirely eliminate circumvention of TPMs, in the same way that p2p file-sharing has not disappeared. But legal protection can give service providers some comfort and legal certainty that violations of their contractual terms and circumvention of their technological locks will not be without consequences for the perpetrators. Moreover, the current legal framework for the protection of TPMs provides for a sort of intermediary liability mechanism in that it also provides remedies against persons that provide the tools that make circumvention possible, and not only remedies against individuals that directly circumvent TPMs.

New business models have not made the application of TPMs a thing of the past, but the types of TPMs that are employed have changed; their relevance remains fundamental to the digital market environment. In the same way that technological measures have evolved, the availability of circumvention devices and services has developed in parallel. With a little effort users will find tools to circumvent technological measures of download- and streaming-services.

1209 Article 8 (“User Guidelines”) first subparagraph (d) Spotify Terms and Conditions of Use, available at: https://www.spotify.com/uk/legal/end-user-agreement/ (last accessed on 04.08.2015): “circumventing any technology used by Spotify, its licensors, or any third party to protect content accessible through the Service”; Article 6(b) Netflix Terms of Use, available at: https://www.netflix.com/TermsOfUse (last accessed on 04.08.2015). “You also agree not to: circumvent, remove, alter, deactivate, degrade or thwart any of the content protections in the Netflix service”; For all of its services Apple provides in its terms of use: “You agree not to violate, circumvent, reverse-engineer, decompile, disassemble, or otherwise tamper with any of the security tech”, Apple terms and Conditions, available at: http://www.apple.com/legal/internet-services/itunes/uk/terms.html (last accessed on 04.08.2015).

1210 In May 2013 an extension was published for Google's Chrome browser that enabled users to rip streams from Spotify. Google reacted by taking the exten-
Legal protection of TPMs is an appropriate tool to provide rightsholders remedies against illegal uses and exploitations of their content. A too robust regime carries the potential not only to frustrate users, but also to deprive them of some of their rights stemming from L&Es. An adjusted norm on TPMs protection should have as its basic idea the protection of rightsholders which also acknowledges – expressly – the rights and interest of users.

2. Clarification of the relation between TPMs and L&Es

There exists an inverse relation between technological developments and legislative harmonization with regard to TPMs. The more sophisticated TPMs become, the better they can distinguish between acts that require authorization and acts that do not require authorization, the less intrusively must the legislature intervene. If TPMs are to accommodate permitted uses Article 6(4) would almost become obsolete.\textsuperscript{1211}

The ruling in \textit{Nintendo v. PC Box} has increased the burden on rightsholders, albeit only with regard to TPMs that prevent infringements of copyright as well as limitations to acts that do not require authorization. Rightsholders carry the burden of proof to demonstrate that circumvention measures applied by users primarily pursue aims that are in conflict with

the exclusive rights under the *InfoSoc Directive*.\textsuperscript{1212} However, the ruling cannot be applied without reservation to other digital locks. Especially in cases where the act for which exercise a user would like to circumvent digital locks also requires authorization the beneficial effects of the judgment fade away. It raises the question whether the exercise of L&Es in a digital environment can be preempted by the application of TPMs to digital content.

The relation between the application of TPMs and the use of content on the Internet is not only problematic with regards to L&Es. Also the protection of exclusive rights can be effected by employing TPMs. In this context, as Dreier has pointed out, the Court tends to give preference to technological measures. Their existence does not necessarily indicate that a certain act falls within the application of any of the exclusive rights, however their employment can be indicative for the intention of a rightsholder to make a work freely available – or not.\textsuperscript{1213} This is problematic for two reasons. First, rightsholders could extend the scope of exclusive rights to acts that are not within the scope of *Directive 2001/29/EC* by creating a factual reality that is delineated by the limits of TPMs. Second, they could effectively limit the scope of L&Es through over-employing TPMs. The resulting autonomy of rightsholders to define the limits of their rights dramatically shifts the balance in their favor, leaving users to benefit from exceptions only in such cases in which acts that do in principle not require authorization are not prevented by TPMs.

However, it is not clear whether the trend in the CJEU’s case-law with regards the interpretation to the right of communication to the public can be applied without reservation to the relation between TPMs and L&Es. The criterion of a “new public”, as was the case in *Svensson* and *Best-Water* is relevant to determine whether an act requires authorization. If it is assumed that the exercise of L&E does not require any authorization whatsoever, but might only give rise to claims for remuneration, the appli-

\textsuperscript{1212} Cf. Newton et al., “CJEU increases burden on manufacturers of games consoles to prove the unlawfulness of devices circumventing technological protection measures and that their TPMs are proportionate”, *JIPLP* (2014), p. 458.
cation of TPMs should not have any influence on the legality of the use of protected content.

a. Primacy of L&Es over TPMs

The “European Copyright Code” only contains one provision on TPMs, which states that L&Es should prevail over the application of TPMs. Rightsholders should be obliged to make means available so that users can benefit from an exception or limitation under three conditions: first, the users must have lawful access to the protected work, second, the ability to use the work (as permitted by TPMs) is not sufficient to benefit from the exception or limitation, and third, that the rightsholder can take adequate measures to limit the number of total reproductions. Otherwise, the “Wittem Code” does not suggest any further alteration, however, it states explicitly that the Code does not contain any other provision on the legal protection of TPMs.\(^\text{1214}\)

With this suggestion the Code takes a stricter approach than the \textit{InfoSoc Directive} does. It directly obliges rightsholders to enable users to benefit from an exception and does not give priority to voluntary measures. Further, the suggestion establishes this obligation to all exceptions save for the private copy exception under Article 5.3(2)(a). It thereby eliminates the arbitrariness reflected in Article 6(4) \textit{InfoSoc Directive}.\(^\text{1215}\)

Against the background of the international legal framework L&Es should indeed enjoy priority over TPMs.\(^\text{1216}\) Article 11 \textit{WCT} states that legal protection for TPMs shall be granted in respect of works against acts “which are not authorized by the authors concerned or permitted by law.”\(^\text{1217}\) Whereas Article 5(1) \textit{InfoSoc Directive} excludes the acts mentioned therein from the scope of exclusive right of reproduction

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\(^\text{1217}\) (\textit{Emphasis added}) See also for similar wording, Article 18 \textit{WPPT}: “Contracting Parties shall provide adequate legal protection and effective legal remedies
(“shall be exempted from the reproduction right”), paragraphs (2) and (3) only refer to “exceptions or limitations”. Nevertheless, a particular L&E, once implemented, in principle does not require a user to ask for authorization for the acts covered under an exception. Although one could argue that the rightsholder has not given express authorization to an act covered by an exception, the rationale behind Article 11 *WCT* and Article 18 *WPPT*, and indeed the fundamental purpose of L&Es, would not be achieved if TPMs could override L&Es based on a literal, and very narrow interpretation.

It is still uncertain how TPMs and L&Es in a digital environment interact. Pursuant to Article 6(4) fourth subparagraph rightsholders incur no obligation to enable beneficiaries of L&Es to take advantage of a given exception. Because online services are usually offered subject to contractual terms they are excluded from the application of the first and second subparagraph. Whether standard terms and end-user license agreements qualify as “agreements” is not yet a settled question, neither is it settled whether such “agreements” constitute valid waivers of L&Es.\(^{1218}\) It could very well be argued that contractual terms that are unilaterally determined and offered on a “take-it-or-leave-it” basis, do not constitute an agreement, in the sense of a meeting of minds, and, therefore, do not have any effect on the legitimacy of certain uses.

Much of the uncertainties in regard to the relation between L&Es and TPMs can be dissolved by moderate interpretation of the relevant provisions in the light of the international obligations of the EU and its Member States. Users should be allowed to benefit from L&Es even if the necessary acts are prevented by TPMs. Giving users access to protected files is a question of technological access, rather than legal entitlement. It is also a question of policy choices and what message either solution transports.

b. Removal of effective obstacles

If one were to agree, as it is suggested here, that L&Es take priority over TPMs, but rightsholders are unable to fine-tune their technological measures sufficiently, there are two extreme situations.

In the first situation users would be required to ask for access if a particular act is blocked by technological measures. This would give users the impression that the use is not free, or permitted, because they have to ask that the work is freed from its technological chains before they can use it. It would also be relatively burdensome to identify the person who will give access to the digital file, or who will disable the technological measures for the user. The time and effort required can easily discourage a user to ask for permission and to benefit from L&Es; burdensome procedures can pose an effective obstacle to the exercise of fundamental rights.

If, through a system of rigid legal protection for TPMs, the exercise of L&Es is significantly hampered, and individuals who circumvent technological measures in exercise of fundamental rights were committing illegal acts, the balance in copyright would suffer to the detriment of users.

In the second situation users were, in general, permitted to circumvent TPMs to benefit from L&Es, if not all, then at least with regard to some very important ones (privileged uses). And assuming that users can practically circumvent all kinds of TPMs to benefit from L&Es, the distinction between lawful uses (those covered by L&Es) and unlawful uses would be hard to make. If the CJEU is required to interpret the scope of application of particular L&Es, it cannot be expected from users that they have the legal literacy to estimate which uses are clearly legal and which are more likely illegal. Furthermore, the distinction between lawful and unlawful uses might be assessed very differently based on subjective user preferences, the mere possibility of circumvention could lead users to believe that they are entitled to use content protected by technological measures.

c. Increased efficiency

One way or another, it would be instrumental to clarify the relation between TPMs and L&Es. Neither solution to the two scenarios described above is optimal in terms of efficiency. Practically, a permission system could be integrated into a digital copyright exchange, as it has been suggested by Ian Hargreaves in his report for the UK Government.
“Digital Opportunity. Review of Intellectual Property and Growth” (Hargreaves Report).\textsuperscript{1219} Instead of circumventing TPMs, users could directly get access to a DRM-free file. Until the idea of a copyright exchange is realized, and for the entire EU it might even take longer than for the UK, a clarification of the unclear elements of the current \textit{acquis} and a just resolution to the questions whether users are permitted to circumvent technological measures or not is required.

First, Article 6 should clearly express the hierarchy between permitted uses and TPMs, whereby ‘permitted uses’ includes acts covered by L&Es. Second, rightsholders and their licensees could be obliged to cooperate to enable users to benefit from L&Es, rather than obliging the Member States to safeguard that users benefit from L&Es in the absence of voluntary measures by rightsholders. Licensees of works and other protected subject-matter, e.g. online music stores and streaming services, are certainly better placed to develop a permission system than individual authors, or to develop, in cooperation with each other, a European copyright exchange. Third, if rightsholders or their licensees do not enable users to benefit from L&Es users should be permitted to circumvent TPMs, but would carry the burden of proof that the circumvention was necessary to benefit from an exception to one of the exclusive rights. Finally, and most importantly, Article 6(4) in its current formulation, which gives priority to TPM protection, must be abolished to secure the effectiveness of L&Es in a digital environment; including, in particular, the second subparagraph, which would enable users to benefit from the private copy exception also for digital content.

3. Technological measures in the digital market

The European legal rules relating to TPMs, as interpreted by the CJEU, seem fair and reasonable, and the jurisprudence of the CJEU has helped to readjust to a proper balance of interests, which enables rightsholders to protect their rights by automated processes and which enables users to exercise their rights to use protected content within the limits of their rights, statutory or contractual. The problems with TPMs are primarily of

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a technological nature rather than legal. It is, probably, unavoidable that the application of TPMs to digital content has ‘side-effects’ that go beyond what merits protection. The collateral damage of TPMs are permitted acts, usually of reproduction, that are prevented in the course of preventing illegal acts. This has the effect of disadvantaging users because they cannot exercise their rights, although they are, pursuant to the jurisprudence of the CJEU, entitled to circumvent TPMs in such cases. It can, however, neither be expected that every user is able to circumvent TPMs by himself, nor should it be expected that every user would acquire software that makes the (lawful) circumvention of TPMs possible. It is this unbalancing effect that legislative intervention should target.

a. Steps in the right direction

The ruling in *Nintendo v. PC Box* has given some orientation how the current provisions on the protection of TPMs must be interpreted. It has put the burden of proof on the manufacturers of game consoles to demonstrate that the TPMs employed are proportionate to the goals pursued, *viz.* the protection of exclusive rights under the *InfoSoc Directive* and the *Software Directive*, respectively. The Court has also indicated which factors should be taken into consideration, including the cost of the technological measures, their technological and practical aspects, and their relative effectiveness.\(^\text{1220}\)

It has also become clearer that rightsholders cannot extend their rights through overprotection and expect legal protection of their TPMs under the *InfoSoc Directive*.\(^\text{1221}\) The protection offered under Article 6 only extends to TPMs that prevent acts that are within the scope of the exclusive rights of Article 2-4 *InfoSoc Directive*. A *de facto* extension of these rights by legally protected TPMs is not prohibited. Users are, accordingly, permitted to circumvent TPMs that go beyond the protection of exclusive

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\(^\text{1220}\) CJEU, in *Nintendo v PC Box* EU:C:2014:25, para. 33; cf. Newton et al., “CJEU increases burden on manufacturers of games consoles to prove the unlawfulness of devices circumventing technological protection measures and that their TPMs are proportionate”, *JIPLP* (2014), p. 458.

\(^\text{1221}\) This would also be in conformity with the EU’s international obligations under Article 11 *WCT*, cf. Favale, “The Right of Access in Digital Copyright: Right of the Owner or Right of the User?”, (2012), pp. 2, 10-1.
rights, because such TPMs do not enjoy legal protection under the Directive.1222 This approach prevents TPMs from replacing copyright law as a regulatory instrument in the relation between rightsholders and users.1223

b. Legislative tasks

The mitigating effect of the Court’s proportionality approach fails when circumvention is approached from a different angle. If rightsholders design their TPMs with preventing effects that are proportionate, users cannot easily circumvent such measures because proportionate technological locks enjoy legal protection. In addition to the protection of proportionate technological measures it is necessary to provide mechanisms that enable users to circumvent such locks to benefit from lawful uses. Again, technological locks cannot perfectly distinguish between lawful and unlawful uses. An absolute protection, even only of proportionate TPMs, would disadvantage the user.

It has been argued that certain L&Es carry a higher ‘value’. These are L&Es that are, so the argument, based on fundamental rights considerations. If TPMs are used to prevent the proper or “optimal”1224 use of such L&Es, the protection of exclusive rights effectively trumps fundamental rights protections. Using Ducoulombier’s arguments that there does exist a hierarchy amongst fundamental rights,1225 this conclusion is untenable. Exceptions that are more important to protect and facilitate the exercise of fundamental rights should, in any case, prevail over the protection of TPMs.1226 By submitting the exercise of privileged L&Es to the control of rightsholders, this control would be taken away from the governments of

the Member States. But it is primarily the latter which are obliged to protect and safeguard the exercise of fundamental rights under the *Charter*, the *Convention* and under their respective national constitutions.

With regard to L&Es the general system, in terms of its balance but also its legal clarity, is more than unsatisfactory.\footnote{Geiger et al., “What Limitations to Copyright in the Information Society? A Comment on the European Commission’s Green Paper ‘Copyright in the Knowledge Economy’”, *IIC* (2008), p. 417.} If not all L&Es, then at any rate certain privileged uses should enjoy absolute priority over the protection of TPMs; these should comprise at least those uses with a strong fundamental rights dimension.\footnote{Cf. Akester, “The Impact of Digital Rights Management on Freedom of Expression – the First Empirical Assessment”, *IIC* (2010), p. 44.} An absolute priority means that users should be able to circumvent TPMs if rightsholders do not make the necessary means available upon request within a reasonable amount of time. Also in this case, proportionality is a standard that can and should be used to assess the appropriateness of user reactions to locked content. The distinction between, on the one hand, privileged uses that justify a circumvention of TPMs that are not expeditiously removed by the rightsholder and, on the other hand, uses that do not enjoy absolute priority over TPMs must be made by the legislator.

At least for ‘privileged’ L&Es the control of their exercise by TPMs should be carefully reconsidered against the background of current legislation. The most effective, and also probably the most appropriate solution could be to charge rightsholders with the duty to enable the exercise of certain L&Es on request. This would reflect the approach taken currently under Article 6(4) *InfoSoc Directive*, but it would turn the voluntary measures into mandatory measures. More precisely, rightsholders or intermediaries who make online content available could be charged with the task to make TPM-free files available upon request for certain purposes. It could also be conceived that files thusly provided could be equipped with lighter TPMs, e.g. an identification code or a digital watermark, which would enable rightsholders to identify files that have been provided to a user for the exercise of an exception, but are later found to be used in violation of the rights of rightsholders.

A recast of Article 6(4) should also have regard to the interplay of the relevant directives and its impact on the EU copyright *acquis*. It should be expressly stated that users have the right to exercise L&Es and to exercise

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any other acts that do not require authorization, and that a privilege under Article 6(4) InfoSoc Directive could not be overridden by the stricter provisions of the Conditional Access Directive.\footnote{Cf. Vantsiouri, “A legislation in bits and pieces; the overlapping anti-circumvention provisions of the Information Society Directive, the Software Directive and the Conditional Access Directive and their implementation in the UK”, \textit{E.I.P.R.} (2012), p. 597.} In this vein, a recast of Article 6 should also take into consideration that TPMs have developed since the passing of the InfoSoc Directive in 2001. Modern digital locks for online content can communicate with their creator even after the user has made a permanent digital fixation of a file.\footnote{Favale, “Approximation and DRM: can digital locks respect copyright exceptions?”, \textit{Int. J. Law Info. Tech.} (2011), p. 312.} These technological measures can react more flexibly than TPMs that are applied to tangible media and are ‘disconnected’ from the rightsholder once the medium is in the possession of a user. This flexibility of modern TPMs must also be reflected in the balance of interests that the legal protection for technological measures strives to create. It is, in the near future, very unlikely that TPMs or DRM will be able to fully control uses of digital content, even to the extent that L&Es for private reproductions do not need to be compensated by private copying levies on blank media and reproduction devices.\footnote{In that sense see Philippe Gilliéron, “Collecting Societies and the Digital Environment”, \textit{IIC} (2006), 939-969, p. 952, with reference to Bernt P. Hugenholtz, Lucie Guibault, & Sjoerd van Geffen, \textit{The Future of Levies in a Digital Environment} (2003), p. 10 et seq., and p. 45. The scenario imagined by the authors of the 2003 study, in which DRM control of private reproductions would replace the administration of this aspect of copyright by CMOs has not materialized yet. It might, with a view to the near future, be a bit too utopian. Gilliéron’s study, based on interviews with CMO representatives confirms this view.} But TPMs will play an important role in supplementing copyright enforcement.

The balance in copyright law has been disrupted by technological measures, their legal protection and the, in general, high level of protection. Dusollier suggested three ways to break the “extraordinary potential” of TPMs. First, lawmakers should actively define what acts TPMs are allowed to restrict, their tempting omnipotence should not lure lawmakers into putting too much trust in their capabilities. Second, the protection of TPMs should be expressly limited to acts that are within the scope of
exclusive rights. And, third, a balanced solution should safeguard that users can enjoy the benefits of L&Es.\textsuperscript{1232}

The strong protection afforded to TPMs, slightly mildened by the application of a proportionality test, strengthens the rights of the rightsholder. A private ordering system for copyright that employs technological measures must be restricted.\textsuperscript{1233} The effective extension of rights could also be avoided if rightsholders were obliged to limit the application of TPMs, if possible, to uses that can legally be restricted. This would include L&Es which can be derogated from by contract. In such a case, in order to give TPMs legal legitimacy, such preventive measures should also be reflected in the terms of use, or any other contractual agreement governing the use of content. A textual fixation of the effects of TPMs would also guarantee legal certainty for users, who could then foresee which uses are technologically disabled by reference to a written agreement. Whether this contractual agreement comes into effect in unilaterally imposed or multilaterally negotiated form must not make any difference. A coupling of TPMs and contractual agreements would help to clarify the borders between exclusive rights and free uses, and exclusive rights and the public domain. The thin line between permitted and prohibitive uses would then become visible to mark a clear delineation.

\section*{D. Collective Copyright Management}

Bringing content online requires licenses, and bringing content online in multiple countries requires even more licenses. And if any online offer should attract the attention of users, \textit{viz.} paying customers, it should contain as much attractive content as possible. The more content and the more diverse the content is, the more likely will customers be willing to pay for access. After all, who would pay for an online streaming offer a monthly flat-rate, which only offers a few songs, movies, or TV series. The digital single market can only deliver for the European Union, in terms of turnover, if it can create attractive offer, for which users are willing to pay, directly or indirectly.

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Collective management organizations are traditionally those institutions that deliver licensing solutions for large scale uses of copyrighted works. They represent rightsholders and manage right on their behalf. Radio stations, discotheques and events are typical customers of collecting societies for music. Through the acquisition of licenses covering most of the worldwide music repertoire transaction costs can be avoided. At the same time, users of music can be sure that they will not incur liability for copyright infringement. For the ‘real’ market this system has worked for quite some time, but the digital market has disturbed the established licensing institutions and mechanisms.

One reason is that when marketing or otherwise disseminating music or other content online different and more rights are affected. Another reason is that, by their nature, online services are not limited to a certain territory. Whereas radio broadcasts or TV broadcasts, even via satellite, only cover a certain territory, which can be determined in advance, online services are available in every country around the world.

Digitization involved challenges for rightsholders but has also enabled rightsholders, to a certain extent, to manage their rights individually. For analog uses rightsholders are not able to manage their rights individually and to monitor uses of their works by themselves; they depend on the services of CMOs to make sure that they receive remuneration for uses of their exclusive rights. For digital uses individual rightsholder can employ technology to monitor and manage their rights without the help and services of CMOs.

However, in cases of large-scale uses of digital content the services of CMOs are indispensable for both, rightsholders and users. Individual licensing would increase transaction costs to a prohibitive level and would make diverse and comprehensive online offers virtually impossible. Therefore, CMOs must adapt to the requirements of the digital market and create licensing models that are convenient and attractive for entrepreneurs to develop entertainment business models for the Internet.

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This section looks at the recent developments in the field of collective rights management in Europe. In particular the new Collective Management Directive is analyzed with regards to its ability to provide solutions for multi-territorial licensing models. Besides, the effectiveness of the European framework for multi-territorial licensing for online uses and its effect on the balance in EU copyright is analyzed.

I. Collective management in a nutshell

Gervais describes collective management as a middle ground between exclusive rights and exceptions, that is, it should be added, within the scope of protection of copyright. Within the scope of exclusive rights, rightsholders can prevent acts, whereas within the scope of the collected L&Es, rightsholders do not have the power to prevent uses of their works. Once his works are subject to collective management, the individual rightsholder looses the ability to object to particular uses, instead the exclusive right to authorize uses is replaced by a right to remuneration, which is administered by a collecting society. The rights are either assigned to the society, or the latter exercises rightsholders’ rights under a compulsory license.\textsuperscript{1236}

Collective rights management reduces transaction costs, in particular for large-scale uses when a single use requires several authorizations for different rights.\textsuperscript{1237} Collective management also facilitates licensing in cases where rightsholders are difficult to identify. CMOs are in a better position to trace rightsholders, or they can grant blanket licenses, relieving rightsholders of liability.\textsuperscript{1238} The wide scope of licenses that CMOs can offer facilitates the clearing process especially for digital uses; without


\textsuperscript{1238} Gervais in: Gervais, Collective Management of Copyright and Related Rights (2010), p. 3.
such licenses many forms of exploitation would be virtually impossible from a legal perspective.

1. Collective rights management in a historical perspective

Most scholarly contributions on collective management begin with the story of Pierre-Augustin Caron de Beuamarchais and the first collecting society in the Paris of the eighteenth century.1239 This story illustrates the *raison d’être* of organizations that enable authors to safeguard their financial interest by collecting compensation for uses of their works. Individually, authors were not able to monitor uses of their works and enforce their claims in every single case. Collecting societies were therefore mandated with this task and societies for different types of creative writers appeared in France and in other European countries.

Collecting Societies began cooperating in the early 20th century when the International Confederation of Societies of Authors (CISAC) was founded, which today has over 220 members representing different categories of rights.1240 However, aside from this model of self-regulation, there exist no binding rules in any of the international instruments dealing with copyright that apply directly to the modalities of copyright management in general and digital copyright management in particular.1241

The tasks of CMOs evolved from a mere collection and administration of royalties to other functions, including social and cultural tasks.1242 Most importantly, through increased membership numbers, CMOs acquired a significant bargaining power in comparison to the individual bargaining powers of its members.1243 Whereas very successful artists and big record

1239 See e.g. *Ibid.*, pp. 3-4.
1241 Cf. Ficsor in: Gervais, *Collective Management of Copyright and Related Rights* (2010), pp. 29 et seq; the author describes discussion at international level, demonstrating that collective management is not absent at international level, however, it has not been possible to find a consensus on international obligations that would have found its way into the international treaties.
labels could cope with a more fragmented licensing landscape, the existence of CMOs protects small artists and labels, which, without collective management, would not be able to sustain themselves.\textsuperscript{1244} It has been suggested that a combination between individual licensing by more popular and successful artists and the major labels could coexist with CMOs that represent the interests of smaller and less popular artists.\textsuperscript{1245}

With the emergence of new trans- and multinational models of exploitation CMOs extended their cooperation to approach the challenges posed by new forms of exploitation to licensing for works and related rights. This cooperation facilitated the granting of multi-territorial licenses and the aggregation of the world repertoire. It also significantly reduced transaction costs for commercial users and created a broader offer for private users. Especially for uses with a high volume of protected content CMOs were the institutions that were able to license and monitor uses efficiently, based on their institutional capacities and experience.

2. Systematic territoriality

Traditionally, CMOs have been licensing locally, for only a limited territory, which normally corresponded to the country in which the CMO was established. As a general rule, and there are of course exceptions, a CMO can only license works from authors it represents.\textsuperscript{1246} And, also traditionally, a national CMO has as its members authors from the country of its establishment. The basic repertoire of a CMO, therefore, consists of national authors of the type of works the CMO licenses.

\begin{itemize}
\item \textsuperscript{1246} Extended collective licensing constitutes one such exception. CMOs, by law, are granted the right to license rights on behalf of their members as well as non-members. In this way, CMOs are able to license all rights for a relevant category of rights, however, some states provide that rightholders are able to opt out of an extended collective licensing scheme, see further below.
\end{itemize}
Under so-called “reciprocal representation agreements” (RRAs) collecting societies from different countries can agree to represent their respective repertoires in the respective other country. This enables CMOs to offer their licensees a wider spectrum of works, including works from other countries. For example, a German CMO could conclude such an agreement with a Puerto Rican CMO with the effect that the Puerto Rican repertoire would be licensed in Germany with the German CMO partner to the agreement and the German repertoire would be licensed by the Puerto Rican CMO in Puerto Rico.

Based on such a cooperation, CISAC members were able to grant multi-territorial licenses for the world music repertoire under a one-stop-shop model. However, licenses were only granted to users established within the territorial reach of the respective CMOs and CMOs agreed to accept only rightsholders as members who were located within the administered territory of a respective CMO. Important aspects of the activities of CMOs remained thus fundamentally territorial.

The territorial dimension of collective management enabled collecting societies to exercise their social and cultural functions more efficiently. Their natural structures connected CMOs systematically to their respective national members. It is for those markets that CMOs use their expertise and local integration to support new artists and provide different services to their members. The territorial nature of CMOs was, and it is argued still is, essential to safeguard that CMOs can continue to render services to their members and to fulfill their current cultural functions as promoters and protectors of national and regional arts and culture.

3. Collective management in the copyright acquis

The EU copyright *acquis* makes reference to collective management in several instruments. An example for the mandatory management of rights for certain uses is the *SatCab Directive*, which provides that “Member States shall ensure that the right of copyright owners and holders or related rights to grant or refuse authorization to a cable operator for a cable retransmission may be exercised only through a collecting society.” The *Rental and Lending Rights Directive* merely allows for the collective management of the unwaivable right to remuneration for rental and lending, and further provides that Member State may impose collective management for these exclusive rights. A similar provision is contained in the *Resale Right Directive*. The *InfoSoc Directive* merely makes reference to CMOs in its preamble, underlining that “[it] is necessary, especially in the light of the requirements arising out of the digital environment, to ensure that collecting societies achieve a higher level of rationalisation and transparency with regard to compliance with competition rules.” A directive on collective management was only passed in 2014, nine years after the European Commission had issued a non-binding Recommendation. Both instruments are discussed below.

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1252 Article 9(1) *SatCab Directive*.
1253 Article 5(3) *Rental and Lending Rights Directive*.
1254 Article 5(4) *Rental and Lending Rights Directive*.
1255 Article 6(2) *Artist Resale Right Directive*.
1257 *Collective Management Directive*.
II. Collective copyright management in multi-territorial digital markets

Digital uses are numerous, uses and reuses on the Internet are difficult to quantify and even more difficult to monitor. It is argued, and reflected in the case-law of the CJEU, that individual rightsholders can monitor and manage their online rights on an individual basis, but this, it is further argued, only relates to large-scale online uses for online music offers, download or streaming. There are, however, other uses that require administration, which do not fall squarely within a limitation or exception, and that are difficult to administer individually. This is again a problem of transaction costs and a market that is immensely difficult to manage.

Gervais advocated to increase the above-mentioned middle ground. Similar to Ginsburg's argument in relation to the impact of digital uses on fair use, Gervais advocates to replace the approach to copyright law as reflected in the EU copyright acquis, which underlines the disabling effects of exclusive rights. Instead, he suggests that collecting societies should help in establishing a “yes but” approach, which would enable uses of little or no economic significance. He draws an analogy to the analog world and compared digital uses with little economic significance to the economic significance of out of print works. In the end Gervais argues for a collective licensing system for online music uses that would come close to a cultural flatrate. Users would pay a small fee per month (around 5 €), which would be collected by CMOs, simply because they would lend legitimacy to such a model. The basic idea Gervais put into

1259 Commission, Decision in COMP/C2/37.219, Banghalter & Homem Christo v SACEM.
1263 Gervais bases its suggestion on a Canadian survey, in which users expressed favorable views on songwriters and performers, rather than record labels. Therefore, Gervais argues that collecting societies that represent these two groups would lend legitimacy to a system by safeguarding that the revenues would reach their proper recipient, and users would support such a system because their monthly fees would go to those individuals who they support with their consumptive behaviour; cf. Gervais in: Axhamn, Copyright in a borderless online environment (2012), pp. 95-6.
discussion is to make uses profitable, which, in so far, have not generated remuneration for rightsholders. Collecting societies can offer experience, effective mechanisms and legitimacy to such a system and are likely to continue to play an important role in administering copyright in the digital market.\textsuperscript{1264}

The suggestion interlinks with the ‘administration’ of L&Es and other uses that require remuneration. CMOs could fill the gaps where rightsholders cannot effectively manage their rights, or where policy commands that rights are exercised by CMOs instead of rightsholders or other institutions or organizations. This role of CMOs, in particular with regards to functions that are mandated by law, e.g. collection of remuneration for exercises of L&Es, requires regulation and harmonization in the interest of rightsholders and users. It also requires legal solutions to the exercise of rights in a multi-territorial digital environment.

CMOs can be instrumental in facilitating the administration of rights for online uses. From a territoriality perspective, CMOs can bundle rights for a number of territories, potentially for the entire EU single market. From a rights perspective, this would also facilitate licensing when all rights required for a certain online use could be bundled and licensed from one source, e.g. a CMO.\textsuperscript{1265} Such a one-stop shop licensing approach could decrease transaction costs significantly for the benefit of users and rightsholders. The former would profit from more efficient and less time-consuming licensing negotiations, the latter could enjoy higher royalty payments due to a decrease in administrative fees.

In this constellation, CMOs would take an enabling role by helping to organize access to works, rather than administering exclusivity, which would have a disabling effect on the dissemination of works online.\textsuperscript{1266} Many other instances can be imagined where CMOs could facilitate the access to lawful uses of protected works. Gervais also suggests that CMOs give users access to works if the content is not available in a certain format,\textsuperscript{1267} which could also apply to cases in which users would need to

\textsuperscript{1264} Noting the deficits of CMOs but concurring: Anette Kur & Jens Schovsbo, “Expropriation or Fair Game for All?: The Gradual Dismantling of the IP Exclusivity Paradigm”, (2009), 35, pp. 12-3.


\textsuperscript{1266} Ibid., p. 15.

\textsuperscript{1267} Ibid., p. 20.
circumvent TPMs to use works under a L&E. CMOs could work as facilitators and enablers of access to protected works.

This chapter traces the development of multi-territorial licensing by CMOs in the EU and will give an outlook into the future with regard to the ability of CMOs to contribute to provide licensing solutions for the digital market. First, the regulation of CMO activities under EU competition law is briefly described, followed by two periods of legislative intervention. Finally, a number of alternative solutions are considered that could disentangle current licensing problems for digital uses.

1. Legal responses to economic solutions in the EU

Traditionally, EU law addressed the activities of CMOs under the competition rules of Articles 101 and 102 TFEU (ex Articles 81 and 82 TEC). Competition law was applied mainly to three relations: first, the relation of CMOs and its members, second, between CMOs and users of their services and, third, the relations between different CMOs. With regard to multi-territorial licensing two more recent competition decisions influenced the discussion that led to the adoption of the Collective Management Directive. Both cases dealt with RRAs concluded between a number of CMOs.

a. IFPI Simulcasting: exception for concerted practices

In the IFPI Simulcasting case a group of CMOs had concluded an agreement that permitted each CMO party to the agreement to grant multi-territorial licenses for Internet-simulcasts for all repertoires of the participating CMOs, but only for the users established within the territory administered by the respective CMO. The Commission argued that terri-

torial limitations to the activities of CMOs would not be justified because modern monitoring technology would allow CMOs to monitor the use of their repertoires also across borders.\textsuperscript{1270} The Commission took concern, too, with the modalities with which the contracting CMOs charged their users. The CMOs were not clearly distinguishing between the price paid for the use of copyrighted works and the administrative fees due to the CMOs. Further, the applicable fees were pre-determined, which significantly reduced competition between the participating CMOs.\textsuperscript{1271}

The Commission, however, granted an exception under Article 101(3) (a) TFEU until the expiration of the agreement in 2004.\textsuperscript{1272} It found three reasons why the agreement qualified as an exception. First, the agreement enabled the provision of a new service in form of multi-territorial licenses, which, second, provided broadcasters with significant benefits in the form of a reduction of transaction costs to acquire licenses for multi-territorial simulcasts, and third, consumers profited because the facilitation of licensing mechanisms generated a wider and more attractive range of simulcast offers.\textsuperscript{1273}

\textsuperscript{1270} Ibid., para. 61, in two previous decision the CJEU had ruled that national restrictions to grant licenses to foreign users and to license fragments entire repertoire of a CMO were justified by the interests of the members whose interests CMOs aim to pursue. In \textit{Tournier} the Court stated that the relevant “contested practice [may not exceed] the limits of what is necessary for the attainment of that aim. Those limits may be exceeded if direct access to a subdivision of a repertoire […] could fully safeguard the interests of authors, composers and publishers of music without thereby increasing the costs of managing contracts and monitoring the use of protected musical works.”, CJEU, Judgment in Case C-395/87, \textit{Ministère public v Jean-Louis Tournier}, EU:C:1989:319, para. 31; see also CJEU, Judgment in Joined cases 110/88, 241/88 and 242/88, \textit{François Lucazeau and others v Société des Auteurs, Compositeurs et Editeurs de Musique (SACEM) and others.}, EU:C:1989:326, para. 18. Cf. also Reto M. Hilty et al., “European Commission – Green Paper: Copyright in the Knowledge Economy – Comments by the Max Planck Institute for Intellectual Property, Competition and Tax Law”, (2008), 1-20, pp. 7-8.


\textsuperscript{1272} Ibid., para. 115.

\textsuperscript{1273} Ibid., paras. 84-95.
Another type of agreement between CMOs was the subject of the 2008 CISAC Decision.\textsuperscript{1274} The model agreement drafted by five members of CISAC (Santiago Agreement)\textsuperscript{1275} was subject to scrutiny under Article 101 TFEU after a complaint by two enterprises. Under the agreement CMOs were allowed to issue multi-territorial licenses (similar to the Simulcast Agreement) for users residing or established in the territory where the respective CMO operated. The complaint referred to the provision of the model agreement that related to, \textit{inter alia}, the online exploitation of musical works. In its statement of objection, the Commission took issue with two provisions, in particular the one that prevented CMOs from accepting members of other CMOs or nationals of countries in which another CMO operated, and that prevented CMOs to grant licenses to users in the territory in which another CMO party to the agreement was established.\textsuperscript{1276}

The Commission held that the agreements between the 24 European CISAC members and the model agreement precluded competition on the relevant markets.\textsuperscript{1277} It stressed that the monitoring of certain uses of protected works concerned did not require a physical presence in the territory.


\textsuperscript{1276} Commission Decision, in Case COMP/C2/38.698 – CISAC, para. 74.

\textsuperscript{1277} The Commission identified two relevant product markets: (1) the market for copyright administration services for public performance rights, and (2) for the licensing of public performance rights for satellite, cable and internet transmissions; it also identified three relevant geographic markets: (1) the market for copyright administration services to right holders, (2) the market for copyright administration services for other CMOs, and (3) the market for performance rights for satellite, cable and internet broadcasting to commercial users, \textit{Ibid.}, pp. 20-2.
tory where the relevant use takes place. Pursuant to the Decision its addressees were prohibited from maintaining restrictive membership clauses that allowed only nationals of the Member State where a CMO is established to become its members, and territorial restrictions to the licensing of repertoires to users established in the territory of a CMO were considered as rules to be in violation of European competition rules. Finally, the Commission found that the CMOs concerned had engaged in concerted practices. It derived the existence of concerted practices from a combination of factors.

The Commission found that the concerted practices were not justified because the agreement did not “contribute to improving the production or distribution of products or to promoting technical or economic progress” within the meaning of Article 101(3) (ex Articles 81(3) TEC) and the territorial restrictions imposed by the Santiago Agreement not necessary to enable CMOs to issue multi-territorial licenses.

The decision was partially annulled by the General Court in April 2013. It found that the Commission had failed to prove the existence of concerted practices to the extent that it had not succeeded in refuting

1278 Ibid., para. 160.
1281 Commission Decision, in Case COMP/C2/38.698 – *CISAC*, paras. 233-53; the Commission left the question open whether under the second condition of Article 101(3) *TFEU* consumers were receiving a fair share of the advantages generated by the concerted practice (paras. 242-9), which had an anti-competitive effect (paras. 250-2).
1282 Ibid., for a brief commentary on the decision see Quintais, “The Empire Strikes Back: CISAC beats Commission in General Court”, *JIPLP* (2013), parallel to the complaint by CISAC the General Court also delivered judgment in 22 related cases involving different collecting societies.
the possibility of other justifications for parallel conduct other than concerted practices.\textsuperscript{1284} CISAC argued that territorial limitations to the activities of CMOs as reflected in RRAs were justified by the need not only to monitor legal activities, but also to discharge of its enforcement function in fighting unlawful uses.\textsuperscript{1285} The General Court annulled Article 3 of the 2008 \textit{CISAC} Decision due to a lack of evidence brought by the Commission to prove the existence of concerted practices and a failure to successfully reject the argument of CISAC that a physical presence of CMOs in a given territory is necessary to fight unlawful uses of protected subject-matter.\textsuperscript{1286} The deadline for filing an appeal passed in July 2013 with neither party having filed an appeal against the ruling of the General Court.

c. Impetus for anti-territorial legislation

The licensing structure CMOs had established under the RRA-system stood in stark contrast to the realities of the digital markets.\textsuperscript{1287} Instead of offering multi-territorial licensing solutions, CMOs clung to a licensing market that was divided along the lines of national territories. However, at least to a certain degree, the system was efficient, in that it enabled users to license global repertoires from only one CMO for a given territory.

But as much as competition law was instrumental in shaping the collective management landscape as a means of ex-post control of market-led solutions to multi-territorial licensing, the Commission realized that a

\textsuperscript{1284} The applicant relied on two pleas: first, that the Commission had failed to prove the existence of a concerted practice, which would form an infringement under Articles 81 \textit{TEC} and 53 \textit{EEA}, and, in the alternative, that such a concerted practice would be justified. As the General Court ultimately found that the Commission had failed to prove the existence of a concerted practice the second plea was not addressed in the judgment, see \textit{Ibid.}, para. 80.

\textsuperscript{1285} General Court, Judgment in Case T-442/08, \textit{CISAC v Commission}, EU:T: 2013:188, paras. 156-81.

\textsuperscript{1286} CISAC and the European Broadcasting Union had argued that geographical limitation in RRAs were necessary means to ensure the effectiveness of the fight against unauthorized musical works, \textit{Ibid.}, paras. 140-4.

stable and reliable framework for collective management, in particular for online uses, required a legislative intervention prepared by a well-developed policy initiative. When the market failed to deliver effective solutions for cross-border management of copyright and related rights which were acceptable to the Commission, it set out to unsettle territorial licensing fundamentally in the early years of the new millennium. The process also involved other legislative organs, most notably the European Parliament. These developments eventually led to the adoption of the Collective Management Directive in 2014.

2. The early cross-sectoral approach

Before discussing the Collective Management Directive itself, it is necessary to take a step back, i.e. before the CISAC decision and the CISAC judgment, both of which, without doubt, had significant influence on the final version of the Directive. What turned out to become a legal instrument with a heavy focus on the collective management of musical works for online uses began with the attempt of a cross-sectoral approach in the early 2000s. Part of this approach is reflected in the second title of the directive, which deals with the governance and transparency of CMOs. However, a number of aspects that had reoccurred in policy initiatives got lost along the way in the legislative process.

a. The Parliament’s Resolution

The discussion on collective management of copyright was picked up in early 2004 following an initiative by the European Parliament. At the same time the Commission was preparing a Communication, the European

Parliament published a resolution on a Community framework for collective management societies in the field of copyright and neighboring rights. A draft was available already in December 2003 (Echener Report) and the final resolution was passed on 15 January 2004. At the beginning, the Echener Report as well as the adopted resolution underlined the importance of the cultural dimension of CMOs, a reference that was not to be found in the subsequent Commission Communication. It emphasized that “collective management societies are the most significant option for the efficient protection of the copyright of the artist and must operate according to the principles of transparency, democracy and the participation of creators; stresses that the institution of reasonable levies as compensation for free reproduction for personal use constitutes the only means of ensuring equitable remuneration for creators and users’ easy access to intellectual property works and cannot be replaced by DRM systems.” In particular for smaller individual artists collecting societies provide support to master the challenges of new business models that rightsholders would find difficult to face alone. Elements that were later echoed in the Communication were the freedom for authors to choose which specific rights to entrust to a CMO and common standards for CMOs. The Parliament also expressed its concern with RRAs, while recognizing their legality pursuant to European case-law. It advocated for separate administration of rights where “unequal rights exist”, and, therefore, against a one-stop shop administration in certain cases.

1293 Ibid., para. 30.
1294 Ibid., para. 25.
1295 Ibid., para. 32, This part reflected the Commission decision in Banghalter/Christo (Daft Punk); the Court held that a CMO, which makes membership conditional on the assignment of all rights was, in principle against Article 102 TFEU (ex Article 82 TEC), and that users were entitled to retain certain rights, in particular rights for the online use of works, and manage them individually (Commission, Decision in Daft Punk ).
1297 Ibid., para. 44.
olution contained a total number of nine “essential” points, which were much clearer expressed in the explanatory statement of the Echener Report.\textsuperscript{1298}

b. The Commission’s reply

The Commission reacted to the Parliament’s initiative with a 2004 Commission Communication on the management of copyright and related rights.\textsuperscript{1299} After “many parts” of substantive copyright had been harmonized, the Communication argued that it was time to follow up by addressing issues of copyright management.\textsuperscript{1300} It identified territorial limitations to copyright licensing as an obstacle to the development of online services in particular, a solution to which could only be found by some sort of “Community-wide licensing”.\textsuperscript{1301} The Commission toyed with ideas that would effectively introduce Community exhaustion for acts of communication to the public, or a ‘country of origin’ model, similar to that of the Directive 93/83/EEC, which established that the relevant act of communication occurs only in the territory of the Member States in which “the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth”.\textsuperscript{1302} Both solutions would have dispensed with the necessity to grant multi-territorial licenses. The suggestion that was finally favored was to grant rightsholders the right to choose a collecting society of their

\textsuperscript{1298} See European Parliament, A5-0478/2003, pp. 17-9; the statement listed the following “essential points”: (1) organisational forms of CSs, (2) conditions for authorization, (3) areas of activity, (4) internal structure, (5) reciprocal agreements, (6) cultural/social operations and functions in the public interests, (7) supervision/control over CSs and their activities, (8) arbitration mechanisms, and (9) transparency.


\textsuperscript{1300} Ibid., p. 5.

\textsuperscript{1301} The Communication defined “Community-wide licensing” as “the grant of a license by a single collecting society in a single transaction for exploitation throughout the Community.” Ibid., p. 8.

\textsuperscript{1302} Article 1(2)(b) SatCab Directive.
choice, which would be mandated to grant multi-territorial licenses for the entire territory of the EEA.\textsuperscript{1303}

The Communication also stressed the important role that DRM technology plays in the administration and management of copyright for new digital services. Interestingly, it stated that “the widespread deployment of DRMs as a mode of fair compensation may eventually render existing remuneration schemes [...] redundant, [...] in their present status of implementation, DRMs do not present a policy solution for ensuring the appropriate balance between the interests involved, [...] 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.”\textsuperscript{1304}

In a brief discussion of the most pertinent competition law aspects of CMO activities the Communication stressed that “[w]hilst competition rules remain an effective instrument for regulating the market and the behaviour of the collecting societies, an Internal Market in the collective management of rights can be best achieved if the monitoring of collecting societies under competition rules is complemented by the establishment of a legislative framework on good governance.”\textsuperscript{1305}

Four issues, the Commission suggested in its 2004 Communication, required a legislative approach. First, with regard to the establishment of CMOs, all CMOs, disregarding their legal status (corporate, charitable, for profit or non-for profit) should be subjected to similar conditions throughout the EU. Second, users of the services offered by CMOs should benefit from fair tariffs that are transparent and reasonable. Third, the relations between CMOs and rightsholders should be governed by the principles of good governance, non-discrimination, transparency and accountability. Rightsholders should benefit from flexibility as to the duration and scope of the mandate given to CMOs, they should also be able to manage certain rights individually. Fourth, and finally, common rules for the external control of CMOs should be developed and harmonized. The

\textsuperscript{1303} Cf. \textit{Ibid.}, p. 9.

\textsuperscript{1304} Whilst competition rules remain an effective instrument for regulating the market and the behaviour of the collecting societies, an Internal Market in the collective management of rights can be best achieved if the monitoring of collecting societies under competition rules is complemented by the establishment of a legislative framework on good governance, p. 9.

\textsuperscript{1305} \textit{Ibid.}, pp. 17-8.
Commission intended to propose a legislative instrument, without, however, giving a schedule for the legislative process. In the absence of any other indication, the legislative approach would, it was expected, take a horizontal approach to collective management which would not be limited to any particular mode of exploitation.

3. Shifting licensing landscapes

A legislative instrument that would regulate the activities of CMOs was not to materialize until 2014. However, in 2005, the Commission finally produced something in the form of a non-binding recommendation. Preceding this recommendation, which was published on 18 October 2015, were a study and an impact assessment in July and October, respectively.

The study was an in-depth analysis of the problems of the digital market in 2005, a full recapitulation of which would go beyond the scope of this work. It defined the problem that was to be addressed in the following political process as a “lack of innovative and dynamic structures for the cross-border collective management of legitimate online services.” The accessibility of digital services throughout the EU had created a demand for multi-territorial licensing models. In the absence of market-developed solutions for this problem, the Commission deemed it

1306 Ibid., pp. 18-9.
1307 Pursuant to Article 288 TFEU recommendations have no binding force. They do not create any direct rights and obligations, however, they may be taken into consideration when interpreting national rules implementing a recommendation, cf. Koenraad Lenaerts & Piet Van Nuffel, European Union Law (London: Sweet & Maxwell Ltd, 2011), paras. 22-100.
1310 Commission of the European Communities, Study on a Initiative on the Cross-border Collective Management of Copyright, p. 6. As drivers of this problem the Commission identified technological implications of online content provision and collective management of copyright works, the multitude of rights and terri-
necessary to intervene legislatively. It referred to RRAs concluded between CMOs and criticized that rightsholders were not free to choose their CMO and that they should not be permitted to move between CMOs parties to RRAs.\textsuperscript{1311} The Commission intended its envisaged legislative intervention to be based on Articles 18 and 56 \textit{TFEU} (ex Articles 12 and 49 \textit{TEC}). As to the Treaty provisions on non-discrimination and the free movement of services, it also considered that action in this field would not violate the principle of subsidiarity and that action was further necessary.\textsuperscript{1312} The objective pursued was to “harness the potential that European music has in stimulating growth of the EU online sector. European policy must therefore create a vibrant market for online exploitation of copyright across the Community”\textsuperscript{1313} The study set out two main objectives (“specific objectives”), which were to be realized by seven “operational objectives”. These were to improve accessibility of creative output, and to let rightsholders participate fully in the revenue streams generated by cross-border exploitation.\textsuperscript{1314} The study suggested policy options along with an analysis of their respective impacts, a section on monitoring and evaluation, a brief summary of the stakeholder consultation conducted pursuant the 2004 “Communication on Management of Copyright and Related Rights in the Internal Market”\textsuperscript{1315} and concluded with a reasoned decision for one of the policy options.

The Communication suggested three options for further action. The first two options, which were not followed up were (1) to do nothing or (2) to eliminate territorial restrictions from RRAs. Whereas the first option can only be considered as an element of a rhetorical figure in order to have a

\begin{itemize}
  \item \textsuperscript{1311} Ibid., p. 27.
  \item \textsuperscript{1312} Ibid., pp. 28-32.
  \item \textsuperscript{1313} Ibid., p. 32 (emphasis added).
  \item \textsuperscript{1314} Ibid., p. 32-3. The operational objectives for the first main objective were a licensing policy for CMOs in line with the demand of online content providers, enhanced transparency of CMOs, improved clearance of protected works in the EU and in increase of available multi-territorial licenses for online content; for the second objective the operational objectives were to create freedom for rightsholders to choose the CMO of their choice, to enhance transparency and accountability of CMOs, as well as the distribution of royalties and rights enforcement, and the cross-border distribution of royalties.
  \item \textsuperscript{1315} Commission of the European Communities, COM(2004) 261 final, p. 19 under point 3.6.
\end{itemize}
trias of options, the second option would have taken a step towards existing practices among CMOs. By opting for the third option, the Commission took an approach that would abandon RRAs in their existing form altogether. Option number three foresaw to give rightsholders the choice to authorize any CMO of their choice to administer their rights for the entire EU. The “Recommendation on collective cross-border management of copyright and related rights for legitimate online music services” reflected this choice. It contained five substantive sections which addressed the relationship between rightsholders, CMOs and users, the distribution of royalties, non-discrimination and representation, accountability and dispute settlement. The contents of the first three sections will be discussed below as they are most relevant in the present context.

a. Narrowed scope: online music services

Most remarkable about the process that was initiated by the Study and the Impact Assessment was that they significantly narrowed down the scope of the policy initiative to the collective management of copyright and related rights for legitimate online music services. Whereas the content of the Impact Assessment did not differ much from that of the Study, except for the fact that it was slightly shorter, the title evolved between July and October 2005 from a “Study on a community initiative on the cross-border collective management of copyright” to an “Impact assessment reforming cross-border collective management of copyright and related rights for legitimate online music services.” Why the Commission reduced the scope of its policy approach on collective management and multi-territorial licensing does not become directly apparent from the Study. However, the document begins by underlining the importance of the online music market for the EU economy, also compared to the US market for online music services. Although the section of the definition of the problem mentioned that collective management also poses problems in relation to other types of work, the music sector was isolated “for purposes of illustration”, but also because the impact of digitization on the collective

1317 Ibid., p. 6.
management of copyright has been most felt in relation to the cross-border provision of music services.\textsuperscript{1318} This focus “for the purpose of illustration” was then manifested terminologically in the Impact Assessment and subsequently in the Recommendation of 18 October 2005.

b. Relations between CMOs, users and rightsholders

The Recommendation\textsuperscript{1319} suggested that rightsholders should be able to choose which CMO to entrust with the management of their rights for the exploitation of their works by legitimate online music services.\textsuperscript{1320} The extent of this right was specified under No. 5 of the Recommendation. Disregarding the nature of membership (statutory or contractual), rightsholders should be able to determine the online rights and the territorial scope of the mandate with regard to the rights entrusted to a CMO.\textsuperscript{1321} Rightsholders should also, it was recommended, be able to withdraw their online rights and transfer the multi-territorial management thereof to another CMO upon reasonable notice. The recommendation further suggested that rights withdrawn from a CMO and entrusted for their management to another CMO should be withdrawn from any RRAs to which the CMO from which the rights have been withdrawn is a member to.\textsuperscript{1322} Under this section the Recommendation, moreover, provided that CMOs should inform rightsholders and commercial users, as well as in certain cases other CMOs, about their repertoire, their RRAs and changes

\textsuperscript{1318} Ibid., p. 7.
\textsuperscript{1320} No. 3 \textit{Collective Management Recommendation}.
\textsuperscript{1321} No. 5(a) and (b) \textit{Collective Management Recommendation}.
\textsuperscript{1322} Nos. 5(c) and (d) \textit{Collective Management Recommendation}. 

https://doi.org/10.5771/9783845278759
to their repertoires.\textsuperscript{1323} The granting of licenses by CMOs should not discriminate between different commercial users.\textsuperscript{1324}

On the distribution of royalties, the Recommendation gave three rather unspecific suggestions. The distribution of royalties should be equitable with regard to different rightsholders and categories of rightsholders, the rules governing the distribution should indicate transparently for which purposes any deductions from the royalties were made other than the cost of management, which should also be specified when rightsholders receive their royalties.\textsuperscript{1325} In the remaining three substantive sections is was underlined that in the relation between CMOs and rightsholders all rightsholders or classes of rightsholders should be treated equally and their representation in the internal decision-making processes should be fair and balanced;\textsuperscript{1326} and that CMOs should report regularly to their rightsholders on licenses granted, tariffs and royalties collected, including those under RAAs.\textsuperscript{1327} Finally, Member States were “invited to provide for effective dispute settlement mechanisms in relation to tariffs, licensing conditions, entrustment of online rights for management and withdrawal of online rights.”\textsuperscript{1328}

c. Abandoning territorial licensing

The aim of the Recommendation was to “facilitate the growth of legitimate online services in the Community by promoting a regulatory environment which is best suited to the management, at Community level, of copyright and related rights for the provision of legitimate online music services.”\textsuperscript{1329} The practices of CMOs to license their repertoires on a territorial basis constituted a significant obstacle to this aim. Recital 8 stated: “In the era of online exploitation of musical works, however, commercial

\textsuperscript{1323} Points 6 and 7 \textit{Collective Management Recommendation}. The Recommendation also contained a point on the information provided by commercial users to CMOs on the particulars of the services they intend to offer, and for which they intend to acquire the online rights (No. 8).
\textsuperscript{1324} No. 9 \textit{Collective Management Recommendation}.
\textsuperscript{1325} Nos. 10, 11 and 12 \textit{Collective Management Recommendation}.
\textsuperscript{1326} No. 13 \textit{Collective Management Recommendation}.
\textsuperscript{1327} No. 14 \textit{Collective Management Recommendation}.
\textsuperscript{1328} No. 15 \textit{Collective Management Recommendation}.
\textsuperscript{1329} No. 2 \textit{Collective Management Recommendation}.
users need a licensing policy that corresponds to the ubiquity of the online environment and which is multi-territorial. It is therefore appropriate to provide for multi-territorial licensing in order to enhance greater legal certainty to commercial users in relation to their activity and to foster the development of legitimate online services, increasing, in turn, the revenue stream for right-holders."

The operative part of the Recommendation did not invite Member States to provide for multi-territorial licenses, but it suggested that rightsholders should be able to give CMOs the mandate to manage their online rights on a multi-territorial basis. This was a clear statement against RRAs, which were not considered to be a solution for the online market, but were rather suited for analog exploitations. The withdrawal of online rights from ‘national’ CMOs to CMOs that offer to manage online rights on a multi-territorial basis would make the maintenance of RRAs for online rights impossible, simply because those rights would not be included in the scope of existing RRAs.

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1331 Cf. Ibid., p. 269.
1332 Collective Management Recommendation, p. 44.
It was anticipated that a shift would take place from territorial specialization to subject-specialization.\textsuperscript{1334} The fragmentation of the world repertoire into several topical repertoires was prone to prevent the establishment of one-stop shops for licenses.\textsuperscript{1335} In a best-case scenario competition between CMOs would have resulted in a small number of organizations dividing the market between each other, these would have been those CMOs with the most attractive and efficient service for rightsholders. In a less ideal scenario, the repertoires would have been fragmented, with the more popular and commercially attractive Anglo-American repertoires managed by the bigger players on the market, and smaller and less popular repertoires managed by smaller CMOs. In the absence of an obligation to contract with rightsholders, CMOs could even refuse to represent rightsholders and to manage their online rights, with the effect that smaller and lesser known artists who are not promoted by the bigger record labels would have been disadvantaged.\textsuperscript{1336} The ability for rightsholders to switch between CMOs

\begin{itemize}
\item \textsuperscript{1335} \textit{Ibid.}, p. 649, also Drexl in: Torremans, \textit{Copyright Law: A Handbook of Contemporary Research} (2007), p. 269, who saw the disadvantage that CMOs would not be able to use RRAs to offer one-stop shop licenses.
\item \textsuperscript{1336} Cf. Max-Planck-Institut für Geistiges Eigentum, Wettbewerbs- und Steuerrecht, \textit{Stellungnahme des Max-Planck-Instituts für Geistiges Eigentum, Wettbewerbs- und Steuerrecht zuhanden des Bundesministeriums der Justiz betreffend die Empfehlung der Europäischen Kommission über die Lizenzierung von Musik für das Internet vom 18. Oktober 2005 (2005/737/EG) (2005), paras 7-8; the Max-Planck Institute for Intellectual Property, Competition and Tax Law argued that an obligation to contract would only be possible to foresee in legislation if a CMO would possess a dominant position, which would be in contradiction to the aim of the Recommendation, which was to create competition among CMOs; but even if a CMO would naturally assume a monopoly for a certain repertoire, the duty to contract would be restricted to that particular repertoire. See also Drexl in: Torremans, \textit{Copyright Law: A Handbook of Contemporary Research} (2007), p. 270.
\end{itemize}
without significant restrictions would have also made the management of rights and the acquisition of the relevant licenses relatively difficult and lead to a significant degree of legal uncertainty. In particular online music service providers would have faced the challenge to keep track of artist movements between CMOs, or to maintain multi-territorial licenses with a significant number of CMOs in different Member States.

e. No effective harmonization

The Recommendation attracted criticism on a number of additional points. The most obvious was the choice of the legal instrument and the lack of legitimacy that went along with it. Whereas the 2004 Communication had announced that the Commission intended to propose a legislative document, the 2005 Study and Impact Assessment remained silent on the matter; it was not addressed in the respective sections on subsidiarity, where a discussion on the type of legislative instrument would have been appropriate. As an instrument for harmonization, which is furthermore non-binding, the Recommendation was not able to achieve its aim.

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1339 The Recommendation was adopted only by the Commission without participation of any other EU organs. Critical input from the European parliament was excluded by the nature of the adoption process, which led to what was described as a democratic deficit of the Recommendation; the Parliament criticized in its 2007 Resolution that interest of authors and other stakeholders aside from the major music publishers were not considered sufficiently (European Parliament, European Parliament resolution of 13 March 2007 on the Commission Recommendation of 18 October 2005 on collective cross-border management of copyright and related rights for legitimate online music services (2005/737/EC) (2006/2008(INI)), OJ 301 E, 13.12.2007, p. 64-69, P6_TA(2007)0064, Strasbourg, 13.03.2007, Recitals A and L) cf. von Lewinski in: Axhamn, Copyright in a borderless online environment (2012), pp. 112-3.


1341 See also the subsequent resolutions of the European Parliament: Point no. 1 European Parliament, P6_TA(2007)0064, however, also this remark by the
the intention was, as stated, to facilitate the establishment of legitimate online music services through facilitating the granting of multi-territorial licenses for the respective rights, a directive would have been more appropriate, also in accordance with the principle of subsidiarity. If, as the Recommendation phrased it, rightsholders should be enabled to entrust their rights to any CMO of their choice, this ability must be established by binding law throughout the EU. A recommendation cannot have the harmonizing effect of a directive or a regulation, both of which are binding on the Member States.

The simple freedom of choice for rightsholders which CMO to entrust with their online rights was not sufficient. To achieve a level playing field throughout the EU a more substantial harmonization would have been necessary. The management of rights in the narrow and technical sense should have been addressed in more detail.\textsuperscript{1342} The Recommendation was too focused on the quality of collective management services from an outcome perspective that it failed to properly address the issue of fair remuneration for rightsholders beyond a general statement.\textsuperscript{1343} As a result, significant sections of the Study and the Impact Assessment were not reflected in the Recommendation.\textsuperscript{1344} The Recommendation, the European Parliament was restricted to online music services, also no. 2 European Parliament, \textit{European Parliament resolution of 25 September 2008 on collective cross-border management of copyright and related rights for legitimate online music services, P6_TA(2008)0462}, Brussels, 25.09.2008, criticizing the “refusal to legislate”. The Parliament, in its second resolution, made reference to the 2008 CISAC decision, which would, so the Parliament, have the effect that ‘rightsholders’ choice of CMOs would be significantly limited pursuant to the decision, which would naturally create CMOs with oligopolistic market powers (no. 3).


\textsuperscript{1344} See e.g. sections 4.11.3 and 5.2 of the Recommendation.
D. Collective Copyright Management

Parliament argued, would lead to increased legal uncertainty, a further development of the approach into a binding legal instrument with its participation as a co-legislator would be necessary.

The Recommendation also made no reference to the cultural dimension of CMOs, another aspect that fell victim to the outcome-oriented approach. This was already reflected in the terminology used: the definition of collecting society in Article 1(e), read in conjunction with (a), limited the definition to mere service providers and left their public-policy elements aside. In particular the cultural mission of CMOs was not reflected in the definition contained in the Recommendation. Furthermore, the use of the term “right-holder” for all types of rightsholders has been remarked critically. The term as used in the Recommendation includes creative artists and derived exploiters of works alike.

4. Collective management and multi-territorial licensing

Collective Management facilitates licensing by reducing transaction costs. It is particularly important for uses that use a large number of different works of different rightsholders. The European Commission had certain uses in mind when it announced a legislative initiative in the field of cross-border collective management in 2011. It argued that “[t]he creation of a European framework for online copyright licensing would greatly stimulate the legal offer of protected cultural goods and services across the EU. Modern licensing technology could help make a wider range of online services available cross-border or even create services that are available all over Europe.” At the same time, it underlined that “[w]hile the focus on the cross-border management of copyrights in the online environment is of

1346 Ibid., Point 6.
1349 Ibid., para. 15.
particular importance in view of the development of a digital marketplace for cultural goods and services, attention should also be given to the governance structures of other forms of collectively managed rights.\textsuperscript{1350} Governance structures are directly linked to the interests of rightsholders, as only proper governance and transparent decision making can safeguard that rightsholders receive their fair share of copyright royalties.

The first proposal for a directive on collective rights management was published in summer 2012.\textsuperscript{1351} In order to create a reliable framework for collective management in the internal market it suggested rules on “better governance and greater transparency” of all CMOs and by “encouraging and facilitating the multi-territorial licensing of the rights of authors and their musical works”.\textsuperscript{1352} The proposal provoked a storm of commentary and criticism in academic literature.\textsuperscript{1353} The draft Directive took a dual approach to collective management: the first part dealt with the regulation

\textsuperscript{1350} European Commission, COM(2011) 287 final, pp. 10-1 (references omitted).
\textsuperscript{1352} Ibid., p. 2.
of membership and organization of collecting societies, and the second part was dedicated to multi-territorial licensing of online rights in musical works. Already this was criticized, most notably by the Max Planck Institute for Intellectual Property and Competition Law, which questioned the merging of both regulatory approaches. Besides the unobviousness of coupling both issues in one directive, it saw the adoption of the instrument jeopardized because the controversial issue of multi-territorial licensing could block the adoption of the provisions on adequate governance and transparency of collecting societies. A concern that did not materialize in the end.

In more detail, the first part of the draft Directive addressed shortcomings with regard to services rendered by all collecting societies to its members in relation to all classes of rights. This horizontal harmonization was designed to improve the services of CMOs in terms of increased efficiency, accuracy, transparency and accountability. The proposal underlined that CMOs should improve their services to the benefit of their members, of service providers, and of consumers; and also for the benefit of the European economy as a whole. The second domain covered by the proposal aimed at changing the modalities of multi-territorial licensing of the rights of authors in musical works for online uses. This initiative was to facilitate obtaining multi-territorial licenses to establish and operate online music services with a European ‘footprint’ as opposed to a fragmented European market for online music services. Consumers should be able to enjoy a wide variety of services and gain access to the full diversity of musical repertoires. The proposal was limited in scope because, as the Commission argued, “other areas of collective management have not given rise to any difficulties that need to be addressed in this context”.

The explanatory statement to the draft Directive did not forget to underline the important function of CMOs in protecting and promoting the diversity of cultural expression, in particular by representing smaller and less popular repertoires. In the absence of concrete provisions, or any other reference to the cultural dimension of the work of CMOs, this isolated remark has to be seen in context with the passport system that the

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1354 Ibid., para. 25.
1356 Ibid., p. 3.
draft Directive suggested, which would enable CMOs with minor repertoires to ‘piggyback’ on the services of bigger CMOs which are permitted to issue multi-territorial licenses. The cultural function of CMOs at EU level was thereby reduced to creating access to a wide variety of musical repertoires, other social functions were excluded from the proposal.

The proposal took into consideration the answers to the public consultation launched in October 20091357 and the Impact Assessment that was published together with the proposal.1358 The Impact Assessment had suggested different options for the two problems identified and went at great lengths to explain the final choice for a combination of the two approaches that were ultimately chosen. It stressed, however, that both problems were interlinked, arguing, that competition between CMOs could only be created if rightsholders were given a real choice between competing CMOs. The competition that would result from the provisions of Title III of the draft Directive would require that CMOs provide sufficient information of their services and rightsholders have control over the management of CMOs.1359

For both problems the Commission saw a need for legislative harmonization, partly because the 2005 Online Music Recommendation had been unsuccessful.1360 It stressed again the interlinking nature of the two sets of problems and underlined their necessity. The options suggested would create a licensing landscape that enabled multi-territorial licensing through standards of governance and transparency for CMOs and strict conditions for CMOs that intend to issue multi-territorial licenses.1361

1357 European Commission, Creative Content in a European Digital Single Market: Challenges for the Future. A Reflection Document of DG INFSO and DG MARKT, 22.10.2009; the consultation did not exclusively address pan-european collective licenses but also took other options into consideration, including, extended collective licensing and L&Es for certain uses.
1359 Ibid., pp. 14-5.
1360 Ibid., p. 28; the Commission realized the ‘limited persuasive value’ of the Recommendation due to its non-binding nature.
1361 Cf. Ibid., pp. 27-9; subsequently the Impact Assessment briefly addressed the legal basis for the proposal and issues of subsidiarity and proportionality,
a. Control of CMO activities

Under the first set of problems the Impact Assessment identified two particular issues. First, rightsholders could not effectively exercise their rights because of poor governance and transparency standards. This applies specifically to non-national rightsholders, who are not members of CMOs that collect their royalties abroad. Naturally, they are barred from participating in the governance of CMOs that administer their rights abroad. Although CMOs are subject to general EU company law and the competition provisions of the Treaties, these rules are not sufficient to guarantee appropriate governance and transparency standards for CMOs. In order to safeguard that rightsholders can ensure that CMOs are acting in their interest it would be necessary that CMOs provide rightsholders with sufficient information on their activities, which also applies to CMOs which have their repertoires managed by other CMOs abroad.\textsuperscript{1362} Second, the royalties collected by CMOs are not always managed efficiently. The distribution of royalties can take significant time resulting in an unnecessary high positive cash-flow for CMOs. Combined, the two problems generated a situation in which CMOs underperform. Rightsholders suffer under late distributions of incomes and lost licensing opportunities. To make informed choices, rightsholders must be properly informed which CMO to entrust with the management of their rights.

i. Options

To solve the set of problems pertaining to governance and transparency, the Impact Assessment considered four policy options (Options A1-A4).\textsuperscript{1363} The first option ("Option A1 – Status quo") would have left the market to cope with the problems that had been identified; the second option ("Option A2 – Better enforcement") would have relied on existing EU law rules and at national levels and cooperation with national supervision authorities to safeguard compliance with those existing rules; the third option ("Option A3 – Codification of existing principles") would

\textsuperscript{1362} Cf. Ibid., pp. 15-9.
\textsuperscript{1363} Ibid., pp. 33 et seq.
have codified the existing *acquis* together with the 2005 Recommendation into a binding legal instrument supplemented by a set of sanctions; and the fourth option (“Option A4 – Beyond codification: a governance & transparency framework for collecting societies”) would have supplemented Option A3 with “targeted and principle-based rules” and was subdivided into two sub-options which differed on the degree of self-regulation left to CMOs. These options were then subjected as to an impact assessment which was based on a multiple-factor scoring system.\(^{1364}\)

ii. Policy choice

A comparison of all policy options identified option A4 as the most promising one. Harmonizing standards for governance and transparency beyond a mere codification, it was argued, would create a framework that would increase the control of CMOs based on converging standards in the entire internal market. This, in turn, would enable rightsholders to compare the services of competing CMOs and enable them to make informed choices and incentivize CMOs to become more competitive. Different stakeholder groups would benefit from increased governance and transparency standards. Whereas rightsholders and commercial users would derive direct benefits from a surplus of information available to them, consumers and ‘cultural diversity’ would benefit indirectly through increased offers by online music service providers. However, CMOs would incur higher costs for compliance under Option A4 in comparison to all other policy options. Smaller CMOs could be exempted from the strict and burdensome supervisory functions under the new legislation, which would decrease their burden under new governance and transparency standards; the precise implementation would be left to national governments. The approach was also considered to be effective and proportionate as it would provide rightsholders with sufficient information on CMOs’ activities to participate in the decision-making process. Therefore, the goal pursued would be achieved. The legislative intervention, although not insignificant, would also be proportionate because the burden

\(^{1364}\) Impacts on the Internal Market, Impacts on the degree of competition, Impacts on stakeholders: in general (rightsholders, commercial users, collecting societies, cultural diversity, consumers) impacts on stakeholders: SMEs, micro-enterprises, effectiveness and proportionality, efficiency; cf. *Ibid.*, pp. 38-42.
imposed on CMOs would be justified by the outcome. The exact balance within Option A4 between self-regulation and legislative intervention would require further consideration. The Impact Assessment finally concluded that Option A4 would also be efficient, considering that the efficiency gains that could be achieved by higher governance and transparency standards would make up for the relatively high costs of that option.\footnote{Cf. Ibid., pp. 38-42.}

b. Multi-territorial licensing for musical works

The second set of problems addressed by the draft Directive with the supply of multi-territorial licenses and an aggregation of music repertoires. At the very beginning it became clear that the Commission mainly had large-scale online music services in mind, for which it deemed the licensing landscape unsuitable. It stressed, as one example, that at the time there was only one online music service in the EU that was available in all (then) 27 Member States. Music licensing was identified as one of a number of factors that contributed to this problem.\footnote{Among the other factors the Commission listed technological barriers, lack of legal certainty, payment methods, consumer trust in online transactions, illegal downloading and cultural and linguistic differences; see Ibid., p. 23.} The Impact Assessment explained the focus of the draft Directive with the difficulty of obtaining multi-territorial licenses for the aggregate repertoire for the rights of author’s for the use of their musical works. Clearing other rights of individual rightsholders, e.g. those of record producers and publishers, did not pose significant difficulties.\footnote{These and similar rightsholders usually possess the rights for all territories in which an online music service wishes to operate. Although a commercial user would be required to address a number of individual rightsholders, from each of these rightsholders he could obtain multi-territorial licenses.}

Two particular problems were mentioned. First, author’s collecting societies were not prepared to issue multi-territorial licenses. Neither would author’s CMOs possess the technological capacities to master the quantitative scale of reported uses, nor would they have the capacity to identify works and to organize the electronic exchange of data between themselves and online music service providers. Second, multi-territorial licensing for online uses by author’s CMOs was subject to legal uncer-
tainty. It was not clear, so the Commission in its Impact Assessment, what legal rules of the EU acquis would apply to the activities of CMOs and how EU legislation interacted with national legislation with respect to the granting of multi-territorial licenses.\textsuperscript{1368} The result of this constellation would be that online music service providers only made their services accessible in the most lucrative markets and excluded large parts of the European society from enjoying a wide offer of online music services; and that some services would only offer the major repertoires to the detriment of smaller artists who are represented by lesser known music labels.

i. Options

The Impact Assessment suggested five options for the set of problems connected to multi-territorial licensing. The first option (“Option B1 – Status quo”) would have left the existing framework intact; the second option (“Option B2 – The European Licensing Passport”) would have established a system under which CMOs that comply with a set of conditions (data-handling and invoicing capacities, transparency standards, dispute resolution mechanisms) would be allowed to issue multi-territorial licenses, and could aggregate rights and repertoires based on mandates from other CMOs which do not meet the requirements to issue multi-territorial licenses; the third option (“Option B3 – Parallel direct licensing”) would have permitted rightsholders to manage their rights individually without withdrawing them from CMOs; the fourth option (“Option B4 – Extended collective licensing combined with a country of origin principle”) would have established a presumption that all national author’s CMOs were entitled to represent the aggregate repertoire (with the possibility for rightsholders to opt-out) and combined this with a rule that would require users of rights to obtain a EU-wide license only from their national CMO; the fifth option (“Option B5 – Centralised Portal”) would have relied on voluntary cooperation between CMOs to establish a centralized licensing portal which would direct users to one competent CMO which would able to grant a multi-territorial, multi-repertoire licenses, however, due to competition law concerns this option was not

\textsuperscript{1368} Ibid., pp. 21-7.
further pursued. In the same way as Options A1-A4, Options B1-B4 were subjected to an impact analysis under a combination of largely similar factors.

ii. Policy choice

From the five policy options for multi-territorial licensing solutions, the Impact Assessment opted for Option B2, the licensing passport approach. This solution would promote cooperation between CMOs based on mutual trust and confidence by creating a common set of basic rules for licensors. This cooperation between CMOs would, it was expected, limit the market to a “reasonable number” of CMOs that grant multi-territorial licenses with overlapping repertoires. Rightsholders would be able to choose from a number of well-performing licensors and benefit from effective distribution of royalties. CMOs could avoid a splitting of repertoires between attractive and less-sought repertoires; smaller CMOs could, by mandating bigger CMOs with the administration of their repertoire, avoid investments in more sophisticated technical infrastructure for the management of multi-territorial licensing. The system under Option B2 would also do away with RRAs, but instead establish unilateral representation relations. Online music services would profit from licensing hubs that could offer aggregated repertoires with a good service offer, which would result in better online music services for consumers due to facilitated licensing mechanisms and a reduction of transaction costs that would increase the geographical reach of existing services and facilitate the development and launching of new services. Larger repertoires, coupled with multi-territorial licenses, would further increase cultural diversity by offering larger and more diverse repertoires. Option B2 was also identified as the most effective as it would create a market building on existing structures that could safeguard cultural diversity. It is this balance between effective management and a respect for smaller repertoires that would also make this option the most proportionate one. Because the cost burden would be shifted on bigger CMOs, from which services smaller collecting societies

1369 See Ibid., p. 47.
would also profit. The option was also considered to be the most efficient one.\footnote{Ibid., pp. 47-53.}

c. The proposed Directive on Collective Management

As opposed to the 2005 Recommendation, the two interrelating options were combined in a directive, which would safeguard the achievement of the policy aims while leaving Member States room for maneuver to adapt their national legal frameworks.\footnote{Ibid., pp. 53-4.} The choice of the legal instrument was a first reaction to the criticism pertaining to the lack of effective harmonization of the 2005 Recommendation and its failure to provide the expected results.\footnote{Cf. Lucie Guibault, “Collective Rights Management Directive”, in: Irini Stamatoudi & Paul Torremans, EU Copyright Law: A Commentary, (Cheltenham, Northampton: Edward Elgar Publishing, 2014), 696-795, para. 14.64.}

The “Proposal for a Directive on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market” (the draft Directive)\footnote{European Commission, COM(2012) 372 final.} was published on the same day as the final version of the Impact Assessment. The 44 Articles of the draft Directive were preceded by 44 Recitals which would have made the proposal the longest instrument of the copyright acquis.\footnote{Cf. Quintais, “Proposal for a Directive on collective rights management and (some) multi-territorial licensing”, E.I.P.R. (2013), p. 65.} The draft Directive was divided into three titles, of which the first provided the subject-matter, scope and definition for the following two titles. Title II on “Collecting Societies” reflected the considerations behind Option A4 of the Impact Assessment. Option B2 found its normative expression in Title III on “Multi-territorial licensing of online rights in musical works by collecting societies”. Two other titles dealt with enforcement (IV) and reporting and final provisions (V). The description here should only focus on the relevant provision of Titles II and III and will also include criticism of the relevant titles in academic literature pursuant to the publication of the proposal.

Two points that were regularly remarked with regard to the first title were the relatively broad definition of ‘collecting society’ and the lack of

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\begin{itemize}
  \item \footnote{Cf. Ibid., pp. 47-53.}
  \item \footnote{Ibid., pp. 53-4.}
  \item \footnote{European Commission, COM(2012) 372 final.}
\end{itemize}
differentiation between different classes of rightsholders in Articles 1(1) and (2) of the draft Directive. Under the draft Directive ‘collecting society’ was defined as “any organisation which is authorised by law or by way of assignment, licence or any other contractual arrangement, by more than one rightsholder, to manage copyright or rights related to copyright as its sole or main purpose and which is owned or controlled by its members” excluding those organizations that act as agents for their rightsholders on a commercial basis and the latter do not exercise membership rights.\footnote{1375} This referred to so called ‘Option 3 publishers’ to which, it seemed, the provisions would not apply; at best this question would remain open,\footnote{1376} at worst ‘real’ CMOs would find themselves at a competitive disadvantage \textit{vis-à-vis} Option-3 publishers.\footnote{1377} It was also argued that the definition reduced CMOs to mere service providers for licensing solutions and would neglect their cultural functions.\footnote{1378} The Impact Assessment had discussed the cultural implications of the suggested policy options. Cultural aspects were addressed indirectly through the gains in efficiency and effectiveness of multi-territorial licensing. Other cultural and social options were, however, missing from the discussion.

i. Governance and transparency

The horizontal provisions of Title II, as drafted, applied to all CMOs as defined in Article 3(1), disregarding the area of their activity. The title was divided into five subchapters which respectively dealt with the relations between CMOs and (1) their members and, related to that, (2) the management of revenues, (3) the relations to other CMOs (4) and users (5), and matters relating to transparency and reporting.

\footnote{1375}{Recital 4 European Commission, COM(2012) 372 final.}
\footnote{1376}{Rehse, “Europäischer Rechtsrahmen für Verwertungsgesellschaften”, \textit{ZUM} (2013), p. 192.}
\footnote{1377}{Tilo Gerlach, “Europäischer Rechtsrahmen für Verwertungsgesellschaften”, \textit{ZUM} (2013), 174-176, pp. 174-5.}
\footnote{1378}{Cf. Graber in: Frankel & Gervais, \textit{The Evolution and Equilibrium of Copyright in the Digital Age} (2014), pp. 247-8; the author took the position that the competition focus of the proposed Directive interfered with the sovereignty of Member States in cultural policy, this criticism can be applied to the final Directive as well.}
The draft Directive underlined that CMOs should act in the best interest of their members and any obligations imposed on rightsholders should be proportionate to the aim to protect the rights and interests of rightsholders.\textsuperscript{1379} The rights enjoyed by rightsholders include the right to mandate a CMO of their choice\textsuperscript{1380} with the management of rights, and also to withdraw mandated rights entirely (termination) or partially with regard to certain categories or types of rights and with regard to certain territories.\textsuperscript{1381} After withdrawing their rights, rightsholders should also be able to manage their rights individually.\textsuperscript{1382} Collecting societies are also required to accept applications for membership if the applicant fulfills all requirements for membership.\textsuperscript{1383} Compared to the 2005 Recommendation the provisions now were to apply horizontally to all CMOs and not only restricted to the limited scope of the Recommendation. And, of course, a directive elevated the provisions formally contained in the Recommendation to substantive rights as opposed to mere ‘recommendations’.\textsuperscript{1384} The Max Planck Institute for Intellectual Property and Competition Law criticized that this provision did not provide clarity as to whether CMOs were obliged to contract with every rightsholder,\textsuperscript{1385} and, moreover, that the

\begin{itemize}
\item \textsuperscript{1379} Article 4 European Commission, COM(2012) 372 final.
\item \textsuperscript{1380} Ibid. Article 5(2); Janik & Tiwisina, “Neuer europäischer Rechtsrahmen für Verwertungsgesellschaften – Einstieg in den Ausstieg aus dem System des „collective rights management””, ZUM (2013), p. 179; Robert Staats, “Der EU Richtlinienvorschlag über die kollektive Rechtswahrnehmung – Stellungnahme aus Sicht der Praxis”, ZUM (2013), 162-168, p. 166; Staats criticized that an obligation to contract was justified in a monopolistic market and reflected the pre-2005 situation where markets were territorially segmented, however, the 2005 Recommendation and the draft Directive sought to increase competition by breking national monopolies, and a duty to contact with rightsholders would, therefore, not be justified under the reformed system.
\item \textsuperscript{1381} Article 5(3) European Commission, COM(2012) 372 final.
\item \textsuperscript{1382} Ibid. Recital 9.
\item \textsuperscript{1383} Ibid. Article 6(2).
\end{itemize}
draft Directive did not establish a duty to contract with users, which existed under several national laws.\textsuperscript{1386} Once admitted, members should have ample opportunity to participate in the society’s decision-making process.\textsuperscript{1387} Further, rather detailed provisions were included on general meetings,\textsuperscript{1388} supervisory functions,\textsuperscript{1389} and the obligations of CMO managers.\textsuperscript{1390}

The revenues collected by a society should be handled diligently\textsuperscript{1391} and carefully separated from other sources of income.\textsuperscript{1392} Deductions from collected revenues for the use of rights may only be made for purposes related to the management of the collective revenues,\textsuperscript{1393} and the draft Directive established standards for the investment of revenues pending distribution to safeguard security, quality, liquidity and profitability of the portfolio.\textsuperscript{1394} Any other deductions from the royalties disbursed to members should be clearly specified and CMOs that offer other services (social, cultural or educational) than the simple management of rights, shall make these services available to their members on a non-discriminatory basis even after members have withdrawn their managing mandate entirely or partially.\textsuperscript{1395}

The draft Directive provided for a principle of non-discrimination with regard to rightsholders that are not members to a CMO, but who are represented under a representation agreement.\textsuperscript{1396} Deductions from royalties

\begin{footnotes}
\footnotetext{1386}{Ibid., para. 11; see also Janik & Tiwisina, “Neuer europäischer Rechtsrahmen für Verwertungsgesellschaften – Einstieg in den Ausstieg aus dem System des ‘collective rights management’?”, ZUM (2013), p. 179; considering that the draft Directive only foresaw minimum harmonization, CMOs in Member States that providet for an obligation to contract with users on request would find themselves at a disadvantage \textit{vis-à-vis} CMOs in Members States without such obligation. In the competition between CMOS the former societies would suffer because they could not refuse to contract with users that would be less profitable.}
\footnotetext{1387}{Article 6(3) European Commission, COM(2012) 372 final.}
\footnotetext{1388}{Ibid. Article 7.}
\footnotetext{1389}{Ibid. Article 8.}
\footnotetext{1390}{Ibid. Article 9.}
\footnotetext{1391}{Ibid. Article 10(1).}
\footnotetext{1392}{Ibid. Article 10(2).}
\footnotetext{1393}{Ibid. Article 10(3).}
\footnotetext{1394}{Ibid. Article 10(4).}
\footnotetext{1395}{Ibid. Article 11(2).}
\footnotetext{1396}{Ibid. Article 13.}
\end{footnotes}
paid to non-members shall, unless otherwise agreed with another CMO, not go beyond the management fees applicable.\textsuperscript{1397}

For the relation between CMOs and (commercial) users the draft Directive established a basic principle of good faith for negotiations with users, including the provision of all necessary information.\textsuperscript{1398} Tariffs shall be based on the economic value of the rights subject to administration and the service provided, the criteria for calculating licensing tariffs should be objective.\textsuperscript{1399} This also applied to rights of compensation and remuneration in the absence of national rules.\textsuperscript{1400}

The provisions on transparency were relatively extensive and listed particular information to be provided in different relations, including obligations to disclose information to the public\textsuperscript{1401} and to publish annual transparency reports.\textsuperscript{1402}

\textbf{ii. Multi-territorial licensing}

To enable multi-territorial licensing of online rights in musical works, the draft Directive defined a set of minimum criteria a collecting society which would intend to grant multi-territorial licenses must comply with. Compliance with the conditions was to be ensured by Member States. However, CMOs would not require further authorization to grant multi-territorial licenses. Under the provisions of the draft Directive, Member States would solely be obliged to ensure compliance with the five conditions via an \textit{ex-post} control. The conditions were the following: (1) the ability to identify musical works and (2) the relevant rights which a CMO is authorized to represent, (3) the use of unique identifiers, (4) the ability to react to changes in its repertoire and (5) the ability to cooperate with other CMOs to identify and resolve inconsistencies in data held by CMOs.\textsuperscript{1403} With regard to this provision it was criticized that CMOs could grant multi-territorial licenses without \textit{ex-ante} control over their capacity to

\begin{itemize}
  \item \textsuperscript{1397} Ibid. Article 14: see also Recital 17.
  \item \textsuperscript{1398} Ibid. Article 15(1).
  \item \textsuperscript{1399} Ibid. Article 15(2).
  \item \textsuperscript{1401} Article 19 European Commission, COM(2012) 372 final.
  \item \textsuperscript{1402} Article 20 Ibid.
  \item \textsuperscript{1403} Article 22(2) Ibid.
\end{itemize}
grant such licenses, and instead the draft Directive opted for an *ex-post* control mechanism and possible sanctions to be imposed at national levels for non-compliance with the implemented rules.\(^{1404}\) With a view to safeguarding that services rendered by CMOs an *ex-ante* control by some sort of certification or authorization would not have been too burdensome; in particular, as was expected, when competition would lead to a group of selected CMOs that would serve the market for multi-territorial licenses.

Articles 23-26 dealt with aspects of transparency and accuracy of information and invoicing and payment modalities to rightsholders and mirrored the purpose of certain provisions of Title II. Why payment modalities for rightsholders of online music rights should be different than for other rightsholders is not obvious, but the draft Directive left sufficient interpretative freedom to harmoniously approximate these differences.\(^{1405}\)

The substantive provisions on multi-territorial licensing were contained in Articles 27-33. Article 27 permitted the outsourcing of services “which relate to the multi-territorial licenses [a CMO] grants” without relieving the CMO of liability. Services that can be outsourced could be data processing services or other technological aspects of collective management that are more sophisticated or that could possibly form the scope of a


\(^{1405}\) Quintais pointed out that as regards the speed of payment the terminology used in Article 26 and Article 12 differed. Whereas the former provided that payments of royalties collected should be made “accurately and without delay”, the latter obliged Member States to ensure that a CMO “regularly and diligently distributes” the collected amounts; cf. Quintais, “Proposal for a Directive on collective rights management and (some) multi-territorial licensing”, *E.I.P.R.* (2013), p. 70.
joint-venture between a number of cooperating CMOs.\textsuperscript{1406} Articles 27 and 28 of the draft Directive formed the core of Tile II and, arguably, the core of the whole draft Directive. Under these provisions CMOs could enter into non-exclusive agreements under which one CMOs administers the repertoire of the other to grant multi-territorial licenses. The CMO that is mandated with the representation of the other CMO’s repertoire would be obliged to manage the rights “on non-discriminatory terms.”\textsuperscript{1407} CMOs which do not fulfill the conditions under Article 26, or for other reasons would not offer multi-territorial licenses, could approach a CMO granting such licenses to mandate that CMOs to manage the repertoire of the mandating CMO. The thusly mandated CMO would be obliged to accept the mandate if it already granted multi-territorial licenses against the payment of a reasonable service fee.\textsuperscript{1408}

Members of a collecting society that does not grant multi-territorial licenses or which has not mandated another CMO with the management of its repertoire may manage their online rights in musical works by granting multi-territorial rights themselves or mandate an “Article 26-CMO” with the management of their respective rights. The CMO that does not grant multi-territorial licenses could continue to grant the rights on a territorial

\begin{itemize}
  \item \textsuperscript{1406} See e.g., the cooperation between the German (GEMA), British (PRS for Music) and Swedish (STIM) CMOs for an integrated licensing and processing service: GEMA, “Pressemitteilung: Joint Venture: GEMA, PRS for Music und STIM gründen das erste integrierte Lizenz- und Verarbeitungszentrum für den digitalen Musikmarkt”, 20.07.2015 (GEMA), available at: https://www.gema.de/aktuelles/joint_venture_gema_prs_for_music_und_stim_gruenden_das_erste_integrierte_lizenz_und_verarbeitungs/ (accessed: 10.01.2016); GEMA, “Pressemitteilung: EU-Kommission stimmt Joint Venture von GEMA, PRS for Music und STIM zu”, 17.06.2015 (GEMA), available at: https://www.gema.de/aktuelles/eu_kommission_stimmt_joint_venture_von_gema_prs_for_music_und_stim_zu/ (accessed: 10.01.2016).
  \item \textsuperscript{1407} Article 27 European Commission, COM(2012) 372 final; the provisions also included information obligations between the CMOs and between the mandating CMO in relation to its members.
  \item \textsuperscript{1408} Ibid. Article 29; the provision also established information obligations for the requesting society. In case insufficient information would be provided the requested CMO could charge additional fees or refuse to exclude such works for which insufficient information has been provided.
\end{itemize}
basis for the territory of its establishment; a withdrawal of the rights from that CMO by the rightsholder was not necessary under that provision.\textsuperscript{1409}

The non-discrimination requirement that regulated the relation between CMOs was partly dropped for the relation between CMOs and users if a discrimination would enable novel services to be established.\textsuperscript{1410} The provision constitutes an exception to the provision of Article 15(2). Finally, Article 3 provided for an exception for simulcasting services and ancillary online material to such services produced by the broadcaster, to which the provisions of the draft Directive should not apply.\textsuperscript{1411}

d. Critique

The initiative to harmonize certain rules on collective management and multi-territorial licensing was generally appreciated.\textsuperscript{1412} The principle of transparency that formed the basis for a level playing field for CMOs in the EU would have a positive impact on the situation of rightsholders.\textsuperscript{1413} The second title of the draft Directive established the freedom of rightsholders to make an informed choice on the CMO by which they wish to be represented and removes territorial restrictions on CMO membership. However, there are practical reasons why smaller rightsholders would prefer to stay with their national CMOs, linguistic reasons being amongst them. Unless bigger CMOs develop into societies with a multi-lingual offer it could be expected that the smaller repertoires would remain with CMOs that are mainly active at national level and bigger CMOs would primarily administer the more ‘international’ repertoires. Representation

\textsuperscript{1409} Ibid. Article 32; Quintais considered this “[perhaps] the most MTL-enabling provision”, Quintais, “Proposal for a Directive on collective rights management and (some) multi-territorial licensing”, \textit{E.I.P.R.} (2013), p. 71.

\textsuperscript{1410} Article 32 European Commission, COM(2012) 372 final, see also Recital 34.

\textsuperscript{1411} Ibid. Article 33.

\textsuperscript{1412} The draft addressed the covered areas to a certain extent, without, however, harmonizing the field comprehensively, Quintais, “Proposal for a Directive on collective rights management and (some) multi-territorial licensing”, \textit{E.I.P.R.} (2013), p. 682.

of smaller repertoires at EU level would, however, be safeguarded by the ‘passport system’ so that smaller rightsholders from more regional markets would still be represented in the EU; or they could comfortably change CMOs, manage their rights individually or have their rights managed in parallel by different CMOs at different levels.¹⁴¹⁴

A general criticism of the proposed Directive was the narrow scope of the third title, which was limited to online rights in musical works.¹⁴¹⁵ Other rights would not enjoy the benefits of this novel approach, which would of course, in principle, not prevent the conclusion of RRAs or bilateral agreements between CMOs with the same effect. Mandatory representation would only be an option within the scope of the draft Directive, but, in any case, the draft Directive would only enable multi-territorial licensing without imposing it.¹⁴¹⁶

Moreover, the draft Directive, it was argued, would result in further fragmentation of repertoires and would also significantly worsen offers for strictly national services by continuing the erroneous approach of the 2005 Recommendation.¹⁴¹⁷ Fragmentation would not only increase between CMOs that manage topical repertoires, but also between rightsholders with attractive repertoires who would commence to license their repertoire through subsidiaries under multi-territorial licenses. Compared to the RRA system, the situation for commercial users would be further complicated at national and European levels.

The one-stop shop that would have immensely facilitated licensing for online music services was rendered impossible under the proposal, instead multiple CMOs would offer repertoires for multi-territorial licenses. But at least the number of negotiation partners would have been significantly reduced. A one-stop shop solution, it was argued, lacked a legal basis, and could therefore not have been realized; for the same reasons Option B5 was rejected, a one-stop shop, which by its nature would have constituted a monopoly, could neither be realized. It would have also meant the end

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¹⁴¹⁶ Cf. Ibid., p. 70.
for individual licensing of the different rights and would have required a reversal of recent trends in the direction of individual licensing outside a CMO system.\textsuperscript{1418}

Especially in comparison to the RRA-system, the passport approach would create a less efficient system from a user perspective with the disappearance of the one-stop shop system. Instead, if the market developed as anticipated, users would have several contact partners at national, or European level,\textsuperscript{1419} which would result in a “Few-Stop-Shop-System”.\textsuperscript{1420} Managing smaller repertoires would become increasingly difficult as the representation without the bigger repertoires would become increasingly expensive, an impact that had already been felt after the major US labels had withdrawn their repertoires to manage them individually through the Centralised European and Administrative Service GmbH (CELAS).\textsuperscript{1421} Whether the classical RRA-system could still be maintained remained uncertain after the publication of the draft Directive.\textsuperscript{1422} It was indeed suggested that CMOs should continue to be permitted to cooperate


\textsuperscript{1419} Janik & Tiwisina, “Neuer europäischer Rechtsrahmen für Verwertungsgesellschaften – Einstieg in den Ausstieg aus dem System des ‘collective rights management’?”, \textit{ZUM} (2013), p. 179; under the RRA-system users had one contact point at national level which was able to grant blanket licenses for the respective territory.


to issue multi-territorial blanket licenses for the entire EU by means of RRAs. The competition would then have been to attract rightsholders in a certain rights category, for which several CMOs could then conclude cooperation agreements to issue the same rights portfolio in the EU.  

Finally, it was argued that the draft Directive did not address the issue of technological cooperation in the sense of a centralized database for rights clearance at EU level, which would facilitate the establishment of smaller online services significantly. Neither did it address the cultural dimension of collective management in a binding form. It only left room for the possibility that CMOs offer services in the social, cultural and educational domain, and further provided that if such services were offered rightsholders should have access to them based on fair criteria.  

e. The final Directive

On 26 February 2014 the European Parliament passed the Directive on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, which was slightly, but not insignificantly, changed in comparison to the draft Directive. The symmetry between recitals and articles was abandoned by adding 14 more recitals. The more relevant changes were of a terminological nature, but also and concerned the rights of rightsholders.
i. Definition of CMO

Throughout the Directive the term “collecting society”, which had been used in the draft Directive was replaced by “collective management organization”. The substantive definition was also extended by reference to the purpose of a CMO, which, pursuant to the Directive, shall operate “for the collective benefit of [its] rightholders”.1427 Furthermore, the draft Directive had provided that a CMO must be “owned or controlled by its members”,1428 the Directive added an alternative by providing that an organization would also fall within the scope of the definition if it “is organised on a not-for-profit basis”.1429 This extension of the definition of a CMO, on the one side, underlines its non-commercial nature, but, on the other side, also included organizations that must not necessarily have members at all, but work on a non-for-profit basis.1430

The Directive also introduced another term, namely that of an “independent management entity” (IME).1431 It mirrored the definition of a CMO but differed regarding the organization of such entities, in that they are “(i) neither owned or controlled, directly or indirectly, wholly or in part, by rightsholders; and (ii) organised on a non-for-profit basis”. The provision was inserted as a reaction to development following the 2005 Recommendation, which saw the emergence of individual rights management by the major US labels.1432 Article 2 of the Directive specified which provisions would also apply to IMEs.1433 Such entities were in particular relieved from the obligation to represent other repertoires and most notably, due to their commercial nature, from a number of governance and transparency obligations.

1427 Article 3(a) Collective Management Directive.
1430 Cf. Recital 14 Collective Management Directive, this formulation was to make sure that organizations of any legal form (e.g. foundations) fall within the scope of application of the Directive.
1431 Article 3(b) Collective Management Directive.
1433 Article 2(4) Collective Management Directive reads: “Article 16(1), Articles 18 and 20, points (a), (b), (c), (e), (f) and (g) of Article 21(1) and Articles 36 and 42 apply to all independent management entities established in the Union.”
More significant was the change that pulled Article 31 of the draft Directive into Article 2 of the final Directive. The provision stated that “[t]he relevant provisions of this Directive apply to entities directly or indirectly owned or controlled, wholly or in part, by a collective management organisation, provided that such entities carry out an activity which, if carried out by the collective management organisation, would be subject to the provisions of this Directive.”\textsuperscript{1434} Thereby this provision was moved from the ‘vertical part’ of the Directive, which only applies to online rights in musical works, to the ‘horizontal part’, which applies to all CMOs.

ii. Governance and transparency

The biggest changes in the substantive part of the Directive occurred in Title II. Changes focused on an equitable treatment between members of CMOs and rightsholders; for this reason Article 4 of the Directive (General Principles) replaced the term “members” with the term “rightholders” in whose best interest CMOs should act.\textsuperscript{1435}

The general approach to the obligation of CMOs to represent rightholders was not altered, however, it was added that CMOs could refuse representation and management of rights of rightsholders on “objectively justified reasons”. One of such an objectively justified reason could be that a particular CMO does not represent a certain class of rightsholders in general.\textsuperscript{1436} A provision was also included that gives rightsholders the right to grant licenses for non-commercial uses. Unfortunately, the Directive does not specify whether this would require a withdrawal of rights, or whether such licenses can be granted in parallel to the commercial exploitation by CMOs. The provision could be read in the sense that it enables rightsholders to grant, for example, creative common licenses for

\textsuperscript{1434} Article 2(3) Collective Management Directive.
\textsuperscript{1435} It was further added that CMOs shall not “not impose on [rightsholders] any obligations which are not objectively necessary [...] for the effective management of their rights.”, Article 4 Collective Management Directive.
\textsuperscript{1436} Cf. Recital 19 Directive; cf. Staats interprets the provision differently, but probably overlooked Recital 19, criticizing that the obligation to represent could force a CMO for literary works to represent a rightsholder in theatrical works, cf. Staats, “Der EU Richtlinienvorschlag über die kollektive Rechtswahrnehmung – Stellungnahme aus Sicht der Praxis”, ZUM (2013), p. 165.
uses that are not licensed by a CMO. The position of rightsholders was slightly changed as to their possibility to termination of representation or withdrawal of rights. The draft Directive had given CMOs the option to make termination or withdrawal take effect at the middle or at the end of the financial year, the Directive limited this option to the end of the financial year. This provided for increased legal certainty for users as well as the CMOs, whose management costs and information obligations can be structured in a more efficient way.

The membership rules for CMOs were also slightly extended to include, after revision, “other collective management organisations and associations of rightholders” in addition to ordinary individual rightsholders, provided that “they fulfil the membership requirements. A refusal to grant membership would require “a clear explanation of the reasons” for that decision. The final Directive further added a provision on “Rights of rightholders who are not members of the collective management organisation”, which constituted a significant improvement for

1437 See also Recital 19 Collective Management Directive, second subparagraph: “as far as non-commercial uses are concerned, Member States should provide that collective management organisations take the necessary steps to ensure that their rightholders can exercise the right to grant licences for such uses. Such steps should include, inter alia, a decision by the collective management organisation on the conditions attached to the exercise of that right as well as the provision to their members of information on those conditions.” (emphasis added). See also Axel Metzger & Tobias Heinemann, “The Right of the Author to Grant Licenses for Non-Commercial Use”, (2015), 11-22, the authors underline that the term “non-commercial” is not defined in the Collective Management Directive and will require specification, which should, so the authors, come in form of a European definition, although this might come in conflict with Recital 19 of the Directive. The authors further suggest to establish a horizontal definition of the term “non-commercial” taking into consideration the practice of existing licensing schemes, Ibid., paras. 42-9.


1439 Article 6(2) Collective Management Directive.

1440 Article 7 Collective Management Directive; see also Recital 21: “In order to protect those rightholders whose rights are directly represented by the collective management organisation but who do not fulfil its membership requirements, it is appropriate to require that certain provisions of this Directive relating to members be also applied to such rightholders. Member States should be able also to provide such rightholders with rights to participate in the decision-making process of the collective management organisation.”
rightsholders who are affected by decisions of CMOs but are not involved in the decision-making, directly or indirectly.\textsuperscript{1441}

Some cosmetic changes for the purpose of clarification were made in the chapter on management of rights revenue, which again stressed that CMOs should work for the benefit of their members and other rightsholders.\textsuperscript{1442} However, a provision that was contained in the draft Directive was deleted, which would have given rightsholders the right to continue to benefit from cultural and educational services funded through deductions from rights revenue even after they had terminated the authorization to manage their rights, or who had withdrawn their rights under certain conditions. This provision was deleted without replacement.\textsuperscript{1443}

The Directive also changed a provision of the draft Directive which had given rightsholders to whom revenues could initially not be distributed a five year period to claim those revenues. The Directive limited this period to three years and made those revenues “non-distributable” after that period. The first draft had still granted rightsholders the possibility to claim revenues after the five year period, while CMOs could decide on alternative uses.\textsuperscript{1444} In both versions rightsholders retained the rights to claim those funds, limited by the respective statute of limitation of claims only in the final Directive. The Directive also added stricter rules for the distribution of funds collected under representation agreements, from which especially rightsholders who are represented through representation agreements will benefit.\textsuperscript{1445} With regard to the relation between CMOs and users, the Directive also pulled a provision from the ‘vertical part’ to the ‘horizontal part’; Article 16 of the Directive now provides for all CMOs that “[l]icensing terms shall be based on objective and non-

\begin{footnotesize}
\textsuperscript{1442} See the change in Article 10(3) European Commission, COM(2012) 372 final, which stated that a CMO shall not be allowed to use rights revenue for “its own account”, which was changed in Article 11(4) \textit{Collective Management Directive} into “for purposes other than distribution to rightholders”.
\textsuperscript{1443} Cf. Article 11(2)(b) \textit{Ibid.}, and Article 12(4)\textit{Collective Management Directive}.
\textsuperscript{1444} Cf. Article 12(2) \textit{Ibid.} and Article 13(4) \textit{Collective Management Directive}; however, Member States could limit the use of non-distributable funds according to Article 13(6) \textit{Collective Management Directive}.
\end{footnotesize}
discriminatory criteria. When licensing rights, [CMOs] shall not be required to use, as a precedent for other online services, licensing terms agreed with a user where the user is providing a new type of online service which has been available to the public in the Union for less than three years.\footnote{1446} This privilege for innovative online business models was thereby extended from online music services to all online services. Finally, Article 16(2) second subparagraph of the final Directive provides that tariffs for the use of exclusive rights should reflect “inter alia” the economic value of the use, whereas the draft Directive had limited this ‘reflection’ exclusively to the economic value.\footnote{1447} The Directive also added a short provision on the obligation of users to provide CMOs with certain information.\footnote{1448}

iii. Multi-territorial licensing

Title II on multi-territorial licensing of online rights in musical works maintained its essence. Although it had been criticized after the publication of the draft Directive in 2012, the Directive did not introduce an authorization procedure for CMOs which are permitted to grant multi-territorial licenses, but it stayed with the rather vague formulation that Member States “shall ensure” that CMOs have “sufficient capacity” combined with a set of minimum conditions.\footnote{1449} But Article 24 does not prohibit Member States from establishing an authorization procedure. However, if some Member States require prior authorization the conditions for CMOs would differ in a significant aspect between the Member States. Article 26(3) extended information obligations by CMOs that have been mandated with the representation of a repertoire by another CMO to rightsholders of that CMO; however, this obligation can be derogated from by contract between the cooperating CMOs. Article 30 of the Direc-

\footnotesize{1446} Article 16(2) first subparagraph Collective Management Directive.
\footnotesize{1447} Article 15(2) second subparagraph European Commission, COM(2012) 372 final.
\footnotesize{1448} Article 17 Collective Management Directive; this obligation related mainly to the time and format in which information on the use of rights has to be provided, which is necessary for the calculation of rights revenue.
\footnotesize{1449} Article 24 Collective Management Directive.
tive specified a number of obligations, mainly relating to information and procedures under the obligation to represent other CMOs.

The provision on access to multi-territorial licensing for rightsholders whose CMO does not offer such licenses and does not mandate another CMO with the representation of its repertoire was altered to the effect that rightsholders cannot only license their rights individually in such a case, but they can withdraw the respective rights. This solution prevents that rightsholders become locked-in with a CMO that is unable or unwilling to make use of the “passport-system” and to mandate a bigger CMO with the representation of its repertoire. Pursuant to the Directive, rightsholders could either withdraw their rights and assign the management of their rights to another CMO, or exercise their rights individually.

iv. Individualized exercise of exclusive online-rights

The reoccurring mantra of a high level of protection also appears in the Collective Management Directive in Recitals 1 and 27. This ‘principle’ of EU copyright law probably finds its strongest expression in the rightsholders’ right to manage their rights individually. If rightsholders are discontent with the exercise of their rights by CMOs they can either switch CMOs or simply withdraw their right entirely. The position of rightsholders is significantly strengthened with this option, which also grants them a high degree of flexibility. This individualized management of rights also extends to other uses than just online uses of musical works. In particular Article 5(6) underlines in a rather cryptical formulation that the right to individual management can be exercised for all classes of rights. The provision states that the withdrawal of rights

1451 Article 31 Collective Management Directive.
cannot be made conditional on the requirement that the withdrawn rights “be entrusted to another collective management organisation.” This means nothing else than that rightsholders can manage their rights themselves after having withdrawn them from a CMO. But, again, the criticism stands that not all rightsholders are able to shoulder the demanding task of managing their rights individually, but as a principle individualized management benefits rightsholders. De facto it remains to be seen how smaller rightsholders will react to this freedom.

As beneficial as individual rights management might turn out to be for rightsholders, the more burdensome it might become for users. From a user perspective, fully individualized management is most likely to create prohibitive transaction costs.\textsuperscript{1455} If, in the unlikely event that all rightsholders will withdraw their rights from CMOs, the operator of any service were to approach the task of clearing licenses, he would see himself faced with a multitude of negotiating partners who, however, could grant multi-territorial licenses.

With individualized licensing for rightsholders also comes a significant loss in bargaining power for probably the majority of smaller rightsholders. Therefore, it is improbable that an exodus of rightsholders from CMOs will occur. It is rather more likely that the bigger CMOs will appear attractive for flexible rightsholders that are willing to entrust their rights to one of the bigger – and most likely foreign – CMOs. Less flexible rightsholders could remain with their local CMOs that render their services in their language and also could continue to promote and support smaller local artists. Individual licensing will be reserved for bigger rightsholders that have the capacities and resources to manage their own rights efficiently.\textsuperscript{1456} Besides very popular artists, this will be the major US labels (as independent rights management entities within the meaning of Article 3) who will then compete with the bigger European CMOs.\textsuperscript{1457}

Article 5(2a), read in connection with Article 5(3) further increases flexibility for rightsholders by allowing them to grant individual licenses

\textsuperscript{1455} Ibid., p. 544.
\textsuperscript{1456} Ibid., p. 545.
\textsuperscript{1457} Cf. Ibid., p. 546; Gyertyánfy, “Collective Management of Music Rights in Europe After the CISAC Decision”, \textit{IIC} (2010), p. 79.
for non-commercial purposes.\textsuperscript{1458} It increases rightsholders’ freedom of choice and further improves their position. Not only can they rely on CMOs to manage their works and rights for lucrative commercial exploitations, but they can also permit uses individually that are not promising from an economic perspective. Of course, it still needs to be defined what uses for non-commercial purposes are, but this rule takes a step in the right direction, away from licensing monopolies of CMOs which exist due to economic necessities.

III. The future of multi-territoriality and modern digital distribution

Multi-territorial licensing under the provisions of the Directive will, for the near future, be limited to online rights in musical works. Other services will not be able to benefit from the relative ease of the passport-system. Whereas there are good reasons to assume that a consolidation of CMOs for musical works will take place, it can be doubted that this will happen for even more culturally-loaded works, such as literary works. Nevertheless, the Max Planck Institute for Innovation and Competition has suggested to start discussions to extent the passport system also to e-books and pictures.\textsuperscript{1459}

However, the Directive does not exclude the possibility that CMOs managing other rights to develop systems that can facilitate the licensing of their repertoires for multi-territorial uses. The foundation for competition between CMOs has been laid in Title II of the Directive which has horizontal effects on all CMOs, disregarding the types of rights they manage. Whether this will be necessary at all will depend precisely on the types of rights, and whether multi-territorial licenses are at all in demand.\textsuperscript{1460} There might also be repertoires managed by national CMOs

that do not appeal to a wider European audience, and that do not find a market outside their home states big enough that it would be worth exploiting.

The key to competition in licensing lies in the possibility for rightsholders to withdraw rights from one CMOs and entrust them to another. Whether the change of CMOs will be facilitated for rightsholders will largely depend on the willingness of CMOs to accept rightsholders from other Member States or, probably more important, rightsholders from other Member States that do not promise an increase in revenues. The situation might develop into a scenario in which rightsholders of popular works will concentrate in a few bigger CMOs, and the remaining rightsholders will remain with national CMOs.

Under the RRA-system, CMOs offered users of protected subject-matter national one-stop-shops to license the world repertoire. Users of content could license the full repertoire for national uses. A pan-European digital music service that limited its operations and the availability of its services to the territory of the EU would have required to conclude license contracts for the respective national licenses with 28 CMOs. After the implementation of the Collective Management Directive, CMOs will be able to issue multi-territorial licenses for the entire EU, but only for those rightsholders they directly or indirectly represent. Because CMOs are encouraged to compete against each other it is unlikely that any CMO will be able to license the entire world repertoire for music, or any other category of works, for the entire territory of the EU. This split in repertoires does not really improve the situation for commercial users, it can even develop towards a stronger fragmentation of rights if the competition-based approach fails to consolidate the landscape of European collective management.

1. Unadopted solutions and their merits and shortcomings

The choice for a passport-system for multi-territorial licenses was also a rejection of two alternative models of licensing, both of which had been
discussed leading up to the decision that took shape in form of the Collective Management Directive. Their rejection for licensing of online music rights does, however, not mean that they will not be considered for future adaptions of the current system. The discussion of their potential to complement the current system will be brief with a focus on online uses.

a. Extended collective licensing

Extended collective licensing (ECL) is a special form of collective licensing under which CMOs do not only represent their members but also all other rightsholders of the class of rights they are managing. The extension of their mandate is not based on a representation agreement but is effected by national laws. As an effect, CMOS that operate in an ECL system can grant mono-territorial licenses for an entire class of rights. ECL is practiced mainly in the Scandinavian countries where either one or a small number of CMOs receive the statutory mandate, sometimes on the condition of prior authorization, to manage rights of a certain class.\textsuperscript{1462} CMOs can then freely negotiate licenses with users and these negotiated contracts are automatically extended to rightsholders who are not members of the respective CMO.

ECL relies on a framework that is predicated on the assumption that all rights are managed by one society. The framework established under the Collective Management Directive, however, is based on the freedom of rightsholders to choose freely between collecting societies, and on competition between CMOs. An emphasis on increased mobility of rightsholders between competing CMOs prevents the legal assumption that all rights are pooled with one or a few CMOs and individual management is the exception. The more fragmented a market for collective management is, the more difficult would it be to statutorily impose ECL. In this sense the system of collective management for the use of works in online music services stands in systematic contrast to ECL. However, this does not mean that ECL would not be possible for other types of uses.

The biggest obstacle for ECL in a European single market is that any ECL system is naturally limited by the territorial reach of the legislation that establishes such a system. Without a unitary European copyright title, national laws can only establish ECL for their respective territories.\footnote{1463} In combination with the \textit{Collective Management Directive}, which favors rightsholders mobility between CMOs and an encouragement of individual licensing of rights, it is currently not feasible to establish ECL at European level for multi-territorial licenses. All efforts at national level are equally doomed because rightsholders can chose to join a CMO in a Member State other than their home state and have their bundle of rights managed by that CMO for the entire internal market. ECL at national or EU level would, therefore, be in contradiction of the object and purpose of the \textit{Collective Management Directive}.\footnote{1464}

b. The country-of-origin principle

In the 2012 Impact Assessment, the adoption of the country of origin principle was discussed in combination with ECL.\footnote{1465} In this case ECL would

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\begin{itemize}
\item\footnote{1464}{However, there is a preliminary reference pending before the CJEU that seeks to clarify whether the provision of the \textit{InfoSoc Directive} preclude national legislation that “that gives approved collecting societies the right to authorise the reproduction and the representation in digital form of ‘out-of-print books’, while allowing the authors of those books, or their successors in title, to oppose or put an end to that practice, on the conditions that it lays down”. In his Opinion, AG Wathelet argues that a statutory presumption of collective management cannot override the consent-requirement, even if authors have to possibility to op-out; in the absence of a relevant exception a statutory collective management scheme for e-book, as was contested in the case, would be incompatible with the provisions of the \textit{InfoSoc Directive}, see AG Wathelet, Opinion in \textit{Soulier and Doke} EU:C:2016:536, see also for a first comment: Sylvie Nérisson, “\textit{Opinion of AG Wathelet in the Soulier and Doke case (C-301/15): Licensing exclusive rights requires express prior consent of the author; opt-out doesn’t help}”, 15.08.2016 (Kluwer Copyright Blog), available at: (accessed: 20.08.2016); for a comment on te French law which was os object object of the dispute see:Oleksandr Bulayenko, “Permissibility of Non-Voluntary Collective Management of Copyright under EU Law. The Case of the French Law on Out-of-Commerce Books”, \textit{JIPITEC} (2016), 51-68.}
\item\footnote{1465}{European Commission, SWD(2012) 204 final, p. 32.}
\end{itemize}
be restricted to the national level and users planning to create an online service would only be required to clear the rights in the Member State of the operator’s origin. National CMOs would aggregate entire repertoires and be enabled to issue blanket licenses. The Impact Assessment already considered that it might be difficult to identify the country of origin for services that exclusively offered online and that work on a multi-territorial basis. Furthermore, it would probably create a ‘race to the bottom’ to attract online content services and a higher degree of harmonization of basic standards would be necessary to create a level playing field for CMOs. This would, most importantly, be necessary to safeguard appropriate and fair remuneration for rightsholders.

A country of origin approach could also work to the detriment of operators that, for some reason, are bound to a Member State that does not have efficient CMOs, or even no CMOs that are able to administrate online uses properly. It would also raise the question whether operators that only offer regional services would not be discriminated based on uniform tariffs calculated on the basis of a multi-territorial exploitation. A country of origin approach would indeed only work with efficiently working CMOs in every Member State and aggregated repertoires at national levels.

IV. Collective management in a digital environment

Ficsor, before the \textit{Collective Management Directive} had even been proposed, stated that digital technology would have a double impact on collective management: on the owners of rights and the individual exercise of rights through DRM.\footnote{Ficsor in: Gervais, \textit{Collective Management of Copyright and Related Rights} (2010), p. 42.} It will remain unclear whether both challenges have been met with success until the Directive is implemented in all Member States and the effects of its implementation can be traced. The legal framework that has been established by the Directive can only give preliminary answers to the question whether the Directive will ultimately be successful in its contribution to establish a digital common market that provides users with legal certainty and that establishes a just and fair balance between the interests of rightsholders and users. It is of course instrumental to compare the collective management landscape that existed
before the 2005 Recommendation with the one that is most likely to emerge in the near future.

The different impacts the Collective Management Directive will most likely have requires distinctions. On the one hand, the extensive provisions of Title II will have effect on all CMOs, whether they manage works of music, images, text or works of another nature. The harmonizing effect will benefit all authors and related or derived rightsholders equally due to their horizontal effect. On the other hand, the vertical dimension of Title III will only have effect on the management of musical works for online services. The provisions focus on an economically immensely important aspect of the digital market, while also having regard to the realities of collective management in relation to other types works and creative production.

The justification for CMO monopolies was linked to their dual function that included, besides the mere management of copyright on behalf of their members, functions to serve public policy interests and the immediate interests of their members. These monopolies have been broken up after the 2005 Recommendation, which already enabled, albeit in a non-binding form, rightsholders to manage their rights individually.

Under national monopolies, CMOs worked with RRAs to license full repertoires with territorial limitations. This system will most likely cease to exist for most classes of rights if the Directive has the anticipated effects of breaking national monopolies through increased competition. However, the convenience of one-stop-shop licensing and the legal certainty for service operators will be lost. For rightsholders this might bring increased income and faster royalty payments when CMOs begin to compete for members; the consequences for online music services cannot yet be foreseen from an economic perspective. In the end, the number of licenses required, and the number of negotiations that are necessary, could decrease for basic online music services. However, offering a full musical repertoire could require more licenses if also the smaller repertoires should be included in a given online music service. It will largely depend on how the competition process will shape the European CMO landscape. And then there might be artists or labels that prefer to manage their rights individually, which would further complicate the rights-clearing process to establish a fully lawful online music service.

The Max Planck Institute for Intellectual Property and Competition Law pointed out that the definition of “collecting societies” in the 2012 Proposal would not amply reflect the ‘collective’ character of CMOs. This
aspect of CMOs is important because it strengthens the bargaining position of rightsholders, in particular vis-à-vis large-scale commercial users.\textsuperscript{1467} The collective character, and the advantages it brings for rightsholders as opposed to individual management of their rights, or a number of small management organizations with weaker bargaining power, was the main reason why, for a long time, limitations to the contractual freedom for rightsholders were accepted under the EU competition rules. In addition, the definition failed to highlight the position of CMOs as trustees of rightsholders as a defining characteristic of CMOs as opposed to mere rights accumulators.\textsuperscript{1468} The Europeanization of collective management in the online music sector will have effects on the collective nature of CMOs. When membership of CMOs becomes more international and less regional, collective elements such as language, regional cultures and common cultural traditions will discontinue to be uniting elements. Whether collective services will remain at a level comparable to that of the pre-competition era of collective management is uncertain. The legally relevant provisions of the \textit{Collective Management Directive} certainly leave rooms for a more economic approach.

Related to this issue is that the freedom to contract with a CMO of their choice has been handed back to rightsholders; and they can even manage their rights individually. A critique by the \textit{Max-Planck Institute} that rightsholders were barred from withdrawing particular rights to enable certain non-commercial uses also found a response in the final Directive.\textsuperscript{1469} Whereas the Commission proposal had merely contained a vague reference to non-commercial uses in its preamble,\textsuperscript{1470} the \textit{Collective Management Directive} stated that “[r]ightholders shall have the right to grant licences for non-commercial uses of any rights, categories of rights or

\textsuperscript{1468} \textit{Ibid.}, para. 28.
\textsuperscript{1469} \textit{Ibid.}, para. 38.
\textsuperscript{1470} Recital 9 states: “[...] Finally, this Directive should not prejudice the possibilities of rightsholders to manage their rights individually, including for non-commercial uses”. This does not indicate if rightsholders are permitted to partially withdraw their rights, however, in the text of the Directive and reference to non-commercial uses was missing.
types of works and other subject-matter that they may choose.”. The
text of the provision does not make it entirely clear that this right exists in
relation to works that are managed by a collecting society, however
Recital 19 must be read as to allow rightsholders, under certain conditions,
to license their works for non-commercial purposes although their rights
are managed by a CMO for commercial purposes.

As a consequence, large-scale commercial uses (big online music
services) are covered by the scope of application of the Directive. The
passport system constitutes a mandatory legal framework for the operation
of collecting societies. Small-scale uses (non-online music services) could
technically be covered by the framework established by the Directive.
However, the option for rightsholders to grant individual licenses for non-
commercial uses could also be read as an escape clause for CMOs to avoid
high transaction costs implied by granting licenses to a large number of
non-commercial users. Leaving this task to rightsholders does not solve
the problem, as they are even less capable to deal with all potential
requests. Ideally, CMOs and rightsholders would find a modus operandi
that also includes the management of rights for non-commercial purposes,
at least in the form of an information-sharing system. In the absence of a
binding legal framework for non-commercial uses, it is more likely that
some COMs could establish licensing mechanisms to manage the use of
musical works for non-commercial online uses, and some will not.

After the Directive it is unlikely that initiatives in the field of collective
management will follow in the near future. What the provisions of the
Directive can achieve for online music licensing will have to be dealt with
differently for other media, if that is at all necessary. Its effect in the
Digital Single Market remains limited to online music services.

1472 Recital 19 Collective Management Directive, the relevant part reads: “As far as
non-commercial uses are concerned, Member States should provide that collec-
tive management organisations take the necessary steps to ensure that their
rightholders can exercise the right to grant licences for such uses.”
1. Transversal issues

a. CMOs and copyright L&Es

The *Collective Management Directive* is drafted to enable remunerated uses. The central parts of the directive deal with, *inter alia*, disbursement of royalties and granting of multi-territorial licenses. It created a framework for the economic exploitation of protected works to the benefit of authors, but also to the benefit of the internal market. The Commission has stressed on multiple occasions that online music services, as well as other online services, play an important role for the European economy.

In pursuance of this aim it has been forgotten to address other aspects of copyright for which CMOs could play a central role. Besides various cultural functions, CMOs concentrate on collecting money for rightsholders and disbursing it. One such case in which CMOs in many countries collect remuneration that does not come from licensing content to commercial users is the private copy exception, which has been implemented by most EU Member States.\(^{1473}\)

\(^{1473}\) For private reproduction that are assumed to be made on a variety of blank media, CMOs collect, usually from the producer of such media and also reproduction devices, specified amounts that are then partially disbursed to rightsholders for the economic harm suffered through private reproduction.

Above is has been argued that L&Es must not necessarily constitute free uses, but could be permitted on the condition that remuneration is paid. Similar to private reproductions it will be difficult to trace every single use, in particular with regard to content used, reproduced and disseminated through the Internet. However, similar to private reproductions, realistic estimates can be used to safeguard a just distribution of compensation for online uses that would fall under an L&E.

The use of protected works on social networking platforms shall serve as an illustrative example. On such networks immeasurable amounts of images, music and audiovisual material are shared in original or altered form. Many of these uses are hard to control and violations are difficult to police. Of course, operators of such platforms could be made responsible to enforce copyright on their networks, but this would require further regulation. To make sure that rightholders whose works are used online,

and where such uses fall under an L&E which would grant rightholders a 
right, waivable or unwaiveable, to remuneration, will receive protection 
similar to rightholders whose works are used by online music services, 
rules should exist corresponding to those contained in Title II of the 
Collective Management Directive.

As it happens, the Directive provided that Title II applies to CMOs 
disregarding whether they manage online music rights. Accordingly, 
members to any CMO already enjoy these rights once the Directive has 
been implemented. What is missing is the link between L&Es and CMOs. 

The private copy exception of Article 5(2)(b) InfoSoc Directive, to come 
back to this example, does not mandate that remuneration due for private 
reproductions must be collected by a collecting society. In other words, it 
leaves Member States a wide margin of discretion, if any, how compensa-
tion is collected, and Member States have indeed established different 
systems. This makes sense for physical reproductions that are made by 
physical devices and on blank media, both of which have to be marketed 
somewhere in the EU. It is usually at the place of the marketing of these 
objects, and where the harm then occurs, where private copy levies must 
be collected.1474

The situation is different when content is reproduced, or used differ-
ently under a potential other exception in an online environment. In such a 
case, it can be argued, more harmonized rules should govern the collection 
and disbursement of what is effectively a compulsory license. With a 
rightsholder-friendly system in place under the Collective Management 
Directive, CMOs are in the best position to shoulder this task.1475 A 
question that must be answered in this regard, but this is a much more 
fundamental issue, is where the relevant act takes place in order to deter-
mine the competent CMOs which would collect the levies and adminis-
trate them.

The connection to remunerated uses that do not fall within the scope of 
application of Title III of the Collective Management Directive must not 
necessarily be made in that Directive. A reference could also be included 
in the relevant exception to the effect that levies collected for certain 
L&Es for online uses are to be collected by a CMO. Ideally, this would be

1475 Axel Metzger, “Licensing and collecting in the 21st century: what’s in sight and 
the CMO to which the rightsholder whose rights have been used has already entrusted the management of his rights.

b. CMOs and TPMs, complementing or replacing?

The advent of technological measures that facilitate the individual exercise of exclusive rights especially in an online environment has challenged the way collecting societies work. It is this connection between individual licensing and TPMs, DRM technology and rights management information that Ficsor underlined. He argued that both, rightsholders and CMOs, are affected by digital technologies in the way they manage exclusive rights for digital uses. Technology could be used by individual rightsholders to withdraw their rights from collecting societies and manage them themselves, the revenues would directly flow to rightsholders and collecting societies would become obsolete.

This scenario is, of course, overly optimistic. There are good reasons why digital technologies will not, and in so far they have not, lead to a massive exodus of artists from CMOs. Many artists still rely on CMOs to manage their online rights, in particular with regard to musical works. Although it is in theory possible to monitor and bill for uses of protected works online by means of technological means, the employment of such means is expensive and requires a certain effort. Rightsholders will have to make the decision whether the investment in technological means that enable them to exercise their online rights individually justifies the increase in revenue compared to the management of their rights by CMOs. They would also take into consideration if individual exercise, even if the net revenue is lower than by management of CMOs is justified by other advantages. Such advantages could be a higher degree of flexibility to authorize certain uses of a commercial or non-commercial nature without remuneration, or just the feeling that they maintain control over the exploitation of their works on the Internet.

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1477 Cf. Gilliéron, “Collecting Societies and the Digital Environment”, *IIC* (2006), p. 967, the author argues that DRM and TPM technology is too expensive and too difficult to operate and to fine-tune for individual rightsholders.
More than 10 years ago, Hugenholtz argued that “in the more distant future” technology could permit the individual collection of private copyright levies. If this was possible there would be no reasons why other uses of protected works in digital form could not be managed individually. We have so far not seen the emergence of technology sophisticated enough to permit an individual exercise of exclusive rights.

But technological means can and will play a role in the collective exercise of exclusive rights by CMOs. And again, it will be the bigger CMOs that resent the economically more attractive repertoires that use digital technology to monitor and charge for the use of digital content. Although, so far, DRM, TPMs and rights management information have not enabled the large-scale exercise of exclusive rights, digital technology is relevant because it is used by CMOs to make the management of their own repertoires and the repertoires they represent under he passport-system more efficient, with, hopefully, beneficial outcomes for individual rightsholders.

2. The future of EU collective management

To conclude this section, the likely effects of the framework established by the Collective Management Directive should be discussed briefly, as far as this is possible at this point in time. It must be asked whether the Directive will have an enabling function for online services that are based on copyrighted content, and whether this system reflects a fair balance between the rights of rightsholders and users.

The Collective Management Directive has not yet come into force. Therefore, it is highly unlikely that its provisions will be altered anytime soon. Instead, its effects will be observed and its usefulness for the Digital Single Market must be assessed. At this point, predictions are difficult to make as to the direction in which collective management in the EU will develop.

Whether the effects within the scope of application of the Collective Management Directive will be as the Commission hopes remains to be seen. The implementation deadline for the Directive is 10 April 2016, and whether the current landscape of online music services will change significantly can only be assessed after that deadline. It can currently be

observed that a number of online music services operate in the majority of Member States, but only on a territorial basis, however, with the option for users to use that national service, within limits, also abroad. It would be beneficial for consumers if the Directive had the effect that operators of online music services would offer true pan-European services that can be joined from anywhere in the EU and that can be accessed anywhere in the EU. For this scenario the Directive has put in place a structure, which, however, only relates to the outcome and merely opens up the possibility to achieve this aim. It is yet another question if service providers will take full advantage of the system and if competition between CMOs with a ‘licensing passport’ will grant convenient access to licensing solutions for the aggregate repertoire.

The political choice for a legal framework that encourages multi-territorial licensing, albeit only for musical works, and further enables the individual management of rights for all exclusive rights is a choice against other licensing solutions. In particular, this choice stands in contrast to the idea of ECL and a country of origin approach. Whereas ECL requires a bundling of rights through legislative intervention as opposed to individual management of rights, the “country of origin” principle stands in stark contrast to multi-territorial approaches, precisely because the “country of origin” approach requires licenses to be acquired for only one territory. However, the multi-territorial passport system has only been established for online music rights. Accordingly, other options can still be explored for different modes of digital exploitation.


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1479 At least a temporal option to use is what seems to be in store for content-based online services, for which the Commission has proposed legislation in December 2015, European Commission, COM(2015) 626 final, “As a first step, the Commission is presenting together with this Communication a proposal for a regulation on the ‘portability’ of online content services, to ensure that users who have subscribed to or acquired content in their home country can access it when they are temporarily in another Member State.” (pp. 5-6). The proposals seems to limit the scope of application of the draft directive to certain situations: “Cross-border portability concerns online content services to which consumers have lawful access, or content that they purchased or rented online in their country of residence and to which they want to continue to have access when travelling in the EU” (emphasis added), European Commission, COM(2015) 627 final, p. 1.
Their rights can be licensed on a multi-territorial basis for online music services directly by a CMO that fulfills the non-exhaustive minimum criteria under Article 24 of the Directive. Alternatively, rightsholders can entrust their rights to a CMO that does not offer multi-territorial licenses for online rights in musical works but is represented by another CMO which offers such licenses. It might be necessary for rightsholders to change CMOs to contract with a collecting society that either directly or indirectly manages their rights for the entire European market. In the absence of an obligation of CMOs in the Directive, the possibility remains that rightsholders will not be able to access the market for multi-territorial licenses, whether this concern will materialize remains to be seen. The main advantage for rightsholders under the new legal framework is that they can switch between CMOs with relative ease. This will enable them to take full advantage of competition between CMOs and select the CMO that offers the best service. If a rightsholder is discontent with a chosen CMO, for whatever reason that might be, he can withdraw all or selected rights within a maximum period of six months.\footnote{1480}

For operators of online music services and other users of musical works online, the possibility to acquire licenses that cover the entire territory of the EU is certainly beneficial, and within the scope of a license they can be sure that they have acquired all necessary territorial rights. However, the repertoire a particular license covers can change subject to two factors. On the one hand, rightsholders can change CMOs and drop out of the repertoire of a CMO which has granted a license to a particular user. On the other hand, a CMO that does not qualify to grant multi-territorial licenses for online uses can chose to have its repertoire represented by another CMO, again with the effect that a user loses coverage for a particular work or a smaller repertoire. Compared to the RRAs system, under which rightsholders were limited in their choice of CMO, but users could acquire multi-territorial licenses for the world repertoire,\footnote{1481} the Directive

\footnote{1480} Article 5(4) Collective Management Directive.
\footnote{1481} See Kerremans et al., “Collective solutions for cultural collections online: Search and select!” , JIPLP (2011), p. 643, with an increase of “entry points” to the world repertoire, operators of online music services face, as a result of increased fragmentation and increased information costs, have come down on the losing end of the developments of the last 10 years from the 2005 Recommendation to the 2015 Collective Management Directive.
has made the clearing of rights more inconvenient for users. The possibility for rightsholders to change CMOs, which had already been introduced by the 2005 Recommendation, has added an element of legal uncertainty.

Operators of online music services can decrease the risk of using musical works for which they have not cleared all rights by contracting with all CMOs that grant multi-territorial licenses and those independent management entities that manage the Anglo-American repertoire. For most commercial operators this will be sufficient. Commercially successful artists who decide to manage their rights individually will have the means to contract with the most important online music services. Smaller services will find it more difficult to acquire all necessary rights, in particular if they intend to offer less popular content. Such content will not necessarily be administered by one of the bigger CMOs directly. Certain smaller repertoires, which have in the past been managed by one national CMO, might split and be represented by either one of the big collecting societies, a national collecting society that does or does not offer multi-territorial licenses, or a smaller collecting society that specializes in a particular genre of content. In such cases, the transaction costs could therefore increase because the information costs to identify which artists are managed by which CMO will be higher than under the RRA system.

Because more licenses are more difficult and more expensive to obtain, service operators will most likely focus on the popular repertoires, including the Anglo-American repertoires. Rightsholders whose CMOs also represent fragments of the entire Anglo-American repertoire will benefit from this development. Smaller artists, with a more regional popularity and who are affiliated with a smaller CMO could suffer from neglect by the big online music services. In the long run, the Anglo-American

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1483 Cf. Quintais, “The Empire Strikes Back: CISAC beats Commission in General Court”, JIPLP (2013), p. 682; already the introduction of the passport system with a fluid state of rightsholder representation has added to legal uncertainty and has, therefore, disadvantages in comparison to the RRA system with regard to legal certainty.
repertoires could, as far as they have not done yet, push smaller regional European repertoires out of such services.\textsuperscript{1484}

Collecting societies will have to work in a competitive market,\textsuperscript{1485} which is based on European-wide competition and which has eradicated national monopolies. The foundation for competition has been laid by the 2005 Recommendation, confirmed, as the basic approach in the \textit{CISAC} judgments, and has been manifested in binding legislation by the 2015 \textit{Collective Management Directive}. Intra-European competition between CMOs requires certain minimum standards. Competition in an unharmonized field would put CMOs in Member States with little regulation at an advantage. The Directive has addressed those concerns. At least within the scope of the Directive, more precisely the provisions of Title II, national laws will be partially harmonized. This does not mean that CMOs in certain Member States will not be subjected to conditions CMOs in other Member States have to comply with, for example an obligation to contract with rightsholders.\textsuperscript{1486} Nevertheless, the strict standards and the management capacities required to grant multi-territorial or even pan-European licenses could create European monopolies, at least for the repertoires which are not managed individually. This would not necessarily be a bad result given the relatively positive experiences with national monopolies with regard to copyright management.\textsuperscript{1487}

The future of European regulation of CMOs will remain interesting with the final date for implementation of the \textit{Collective Management Directive}.


\textsuperscript{1485}Cf. Gilliéron, “Collecting Societies and the Digital Environment”, \textit{IIC} (2006), p. 968, the arguments the author used in 2006 are also valid in 2015.


\textsuperscript{1487}Cf. Graber in: Frankel & Gervais, \textit{The Evolution and Equilibrium of Copyright in the Digital Age} (2014), pp. 245-46; it should be noted here that, even if in a monopolistic position, “European” CMOs would continue to be subject to the competition rules of the treaties and would not enjoy privileges under Article 106 TFEU as undertakings that are entrusted with the operation of services of public interests, CJEU, Judgment in Case C-127/73, \textit{Belgische Radio en Televisie} und \textit{société belge des auteurs, compositeurs et éditeurs} \textit{v SV SABAM} and \textit{NV Fonior}, EU:C:1974:25, para. 23, and CJEU, Judgement in Case 7/82, \textit{Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL) v Commission of the European Communities}, EU:C:1983:52, para. 32.
Directive in April 2016 and several references for preliminary rulings pending. As so often with European legislation, it can be expected that the Court of Justice will have a significant role to play in resolving the ambiguities of the legal provisions.\textsuperscript{1488}

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Chapter 4. Efficient and Balanced European Copyright for the Digital Single Market

The “Digital Agenda” in 2010 and the “Digital Single Market Strategy” in 2015 both set out to create an enabling European legal framework for copyright that content-based businesses can rely on to offer more and better digital content to European users and consumers. Chapter 3 has outlined those areas of copyright law currently subject to harmonization. In this context, a number of issues were identified which require clarification and modest changes to certain existing rules were suggested. Those interventions, it is argued here, are necessary to make the core of EU copyright a reliable foundation for an efficient system of rules that could govern copyright in a digital market environment, and on which supplementary rules can build upon.

A debate on managing of copyright in the digital single market cannot – and should not – be limited to mere technical and transactional aspects. It must rather scrutinize and challenge the system of copyright and the system of copyright legislation. Therefore, it has to rethink the balance of interests between rightsholders and users. Readjusting the balance, which has suffered not only from the rightsholders-friendly provisions of the InfoSoc Directive, but also the interpretation and application of its provisions, is a necessity. A balanced legal framework will be better suited to incentivize the creation and operation of online services that respect the interest of rightsholders and intermediaries and that are attractive for users.

This chapter recapitulates and consolidates the findings of the preceding chapters with each other, and it evaluates whether the current plans of the Commission are sufficient to achieve the aims it has set out in the two Communications mentioned above. It does, furthermore, and more importantly, take a look at how these findings, individually, as well as in combination, change the trade-off of interests in European copyright law. The ongoing process of copyright reform is also taken into consideration when attempting to identify trends that are influencing the delicate balance struck by the existing copyright legislation.

The challenges for a copyright reform with regard to the management of protected subject-matter have been summarized, *en passant*, by
Derclaye, when she criticized the interpretative approach(es) taken by the CJEU: “As the court has already stated several times now, the strict interpretation must be complemented with the requirement of legal certainty for authors and right holders, the proportionality principle, teleological interpretation and the respect of the exceptions’ effectiveness and of human rights.” What holds true for the interpretation of L&Es also applies to an efficient and balanced normative framework for managing copyright. It must be sufficiently clear and must provide answers to pertinent questions for service providers and consumers, it must be flexible in order to accommodate technological changes, and it must respect the interest of creators and those that consume and transform digital content. Much of this, it is argued can be achieved by legislative clarifications and slight systematic changes to parts of the existing copyright acquis.

Finally, this Chapter discusses three options for legislative interventions that could be used to update the current EU copyright rules. These will be presented below in Part C: “Legislative Options for the ‘Copyright Dilemma’”. There are still other options, but these three options have been chosen to demonstrate different degrees of harmonization and unitization. It would be, of course, possible to combine the three options in multiple ways, but to illustrate their advantages and their effects on legal certainty and the balance in copyright their isolated description and discussion will be instrumental in identifying a reasonable and realistic solution.

A. Essential Pillars for a European Copyright System

Efficiency and balance are two aims which are not necessarily exclusive or contradictory. The conundrum of current European copyright law reform is to bring these two aims in concert, which is admittedly, not an easy task. Many other aims of copyright and copyright reform are also implied by these two notions, or can be derived therefrom. For example, fostering cultural diversity through copyright law can be described as a sub-aim of the right balance in copyright law; and also as a sub-aim of an efficient system for copyright in the single market. Efficiency and balance are, therefore, the meta-aims which should be pursued in order to enable a

digital single market that can foster all the aims set out in the various
policy documents the Commission has produced over the last six years. If
the European copyright system becomes efficient and balanced, it is
argued here, the other aims will be the results of such a system.

The changes to the core of the EU copyright system, the InfoSoc Direc-
tive, and a robust legal framework for collective management are of
fundamental importance for efficient and balanced European copyright
law and the management of copyright in, and for, a digital single market.
These core elements must, however, be flanked and supported by other
rules and mechanisms. But their efficiency and balance do depend on
the rules that form the foundation of European copyright law.

The existing EU copyright rules, and in particular it’s the InfoSoc Direc-
tive at the core, suffer from imperfect and uncertain interaction of the
core provisions themselves, a lack of harmonization across EU Member
States, and undefined terms and concepts. All these issues have been
addressed in Chapter 3.

The following observations, based on the example of Chapter 3 and its
subchapters, seek to evaluate improvements in efficiency and the balance
in copyright. This comparison will be of a temporal nature, comparing the
status quo ante with the changes that have been suggested above to the
central elements of the European copyright acquis in their relevance for
managing copyright in the digital single market.

I. Efficient copyright management

The copyright rules as they existed before the “Digital Agenda”, and still
continue to exist, were deemed not to be suitable for a digital single
market. Because not much has changed since, it is not unreasonable to
assume that the current copyright rules suffer from similar deficiencies as
they did in 2010. Two additions to the acquis were made with the Orphan
licensing for very specific situations. The Orphan Works Directive
permitted the use of protected works or phonograms for which the rightsh-
holders cannot be identified or located. For that purpose, the Directive
introduced exceptions to the making available and reproduction right in

1490 Articles 2 and 6 Orphan Works Directive.
order to digitize, make available, index, catalog and preserve or restore works that have been assigned orphan status.\textsuperscript{1491} In order to facilitate a cross-border use of orphaned works, a work recognized as an orphan work in one country shall be recognized as such in all Member States.\textsuperscript{1492} The \textit{Collective Management Directive} facilitates licensing of musical works for online uses in the internal market. Both instruments deal directly or indirectly with the clearing of rights and contain elements that are important for the establishment of a digital single market. However, as both instruments only deal with very specific cases, all digital content, which rightsholders can be identified and located and which is not music, have been left untouched by the legislative innovations brought about by the “Digital Agenda”.

Unfortunately, the heart of EU copyright has, so far, been left untouched, and its systematic structure has also not been explicitly questioned. Instead, both directives that have been introduced try to avoid a reform of copyright proper by ‘managing’ the shortcomings of the \textit{InfoSoc Directive}, and EU copyright law as such. Aside from the new exceptions introduced by the \textit{Orphan Works Directive}, Article 5 has remained unchanged and continues to be the weak spot of EU copyright legislation that prevents many digital uses. The impact of potential extensions of L&Es to enable access to knowledge, education and research cannot be determined yet. However, it does not appear that these future proposals will significantly change the structure of Article 5. The lack of efficiency is not only caused by the failure to include L&Es that correspond to the needs of a digital market, but also by the lack of full harmonization.\textsuperscript{1493}

The steps that have been made towards the aim of creating a legal framework for a digital single market are partly efficient. They are efficient in conserving a high level of protection for rightsholders, which continues to be the mantra of EU copyright,\textsuperscript{1494} and they are efficient in facilitating the clearance of rights for commercial music-based online services. They are inefficient, though, in providing solutions for small-

\textsuperscript{1491} Article 6(1)(b) \textit{Orphan Works Directive}.
\textsuperscript{1492} Article 4 \textit{Orphan Works Directive}.
scale non-commercial uses, which are nevertheless important elements of a vibrant and diverse offer of digital content.

The changes have in so far also failed to introduce any degree of flexibility into the copyright *acquis* that would make the management of digital content significantly easier. Taking into account that future adjustments to the EU copyright rules will include additions to the list of exceptions as well as provisions on the temporal portability of online services, the European Commission continues to pursue its reactive approach to copyright-lawmaking, instead of actively developing a vision for a copyright law that outlasts technological developments for more than 10 years.

Efficiency in managing protected subject-matter in the EU that can be measured in terms of a reduction of transactions costs has not been achieved and will probably not be achieved in the near future. The absence of substantial changes in the core provisions of the *InfoSoc Directive* and a new collective management framework that enables cross-border licenses at the cost of fragmentation and instability of repertoires are ill-suited to attain this objective. Copyright licensing has not become easier through the limited interventions at EU level, and the number of uses permitted without authorization has not increased significantly in critical areas.

Instead of taking further steps to develop solutions that facilitate licensing solutions, the European Commission plans to rely on industry-led initiatives that could facilitate cross-border and small-scale licensing of protected works. After the failure of the “Licenses for Europe” initiative the Commission continues to support non-legislative initiatives that will facilitate the licensing and monitoring uses of works in the single market and across borders. Among the measures envisaged are “ready-to-offer catalogues” and licensing hubs, but with the primary goal to “bring more European works in the digital market”. These measures will be accompanied by support for dubbing and subtitling European audiovisual works, enhanced exploitation of existing films and new models to finance and produce animated films. All these measures will rather help to promote European cultural production than to facilitate access to works

across borders. Licensing hubs, which had already been suggested in the “Hargreaves Report”,1496 will be difficult to develop; in the UK, the envisaged UK Digital Copyright Exchange has not yet taken shape in such form that it would actively enable licensing of works. Furthermore, supporting industry-led solutions leaves the trade-off between the interests of rightsholders, intermediaries and users to a bargaining process between these parties. Interventions for specific interests should, nevertheless, be supported by legislative interventions.

II. Defining the balance in copyright - “Guided Flexibility”

“[T]he concept of the ‘fair balance’ is, without further elucidation, vacuous and unhelpful. It only becomes useful when understood as a metaphor for, or a description of, a detailed exercise of comparison between the requirements of competing rights.”1497 Griffiths captured the conundrum of the “balance of interests” rather succinctly. Subsequently, he criticized the CJEU’s treatment of the balancing exercise for being insufficiently precise, and often just absent.1498 Therefore, the lack of a genuine discussion of the balance, or at least a thorough description of the interests and fundamental rights that form part of this balance, is a matter to raise concerns. It does not help to develop an understanding of the balance or of its components and it does not reveal whether the Court itself has developed a systematic approach, or whether its jurisprudence is an ad hoc evaluation of a particular set of facts; or whether the Court intends to leave the task of striking the balance to national courts.

The direction in which the balance in copyright tilts is, first and foremost, a political decision. Which interests receive more weight must be decided in a democratic process. However, there are constitutional concerns of a fundamental rights nature that need to be considered. It has been argued, and the arguments have to the extent possible been summarized in the relevant chapters of this study,1499 that fundamental rights

1498 Ibid., pp. 76-7.
should play a more important and visible role in the copyright *acquis*. Their role has been acknowledged by the CJEU in a growing number of cases that make express reference to interests rooted in fundamental rights. However, the December 2015 Communication on “Towards a modern, more European copyright framework” only mentioned fundamental rights in relation to copyright enforcement. But fundamental rights should be recognized horizontally as elements that guide the drafting, interpretation and application of copyright. They should not replace the more utilitarian justifications for copyright protection, e.g. the paradigm of a high level of protection, but they must interact with them as a counterweight if economic arguments threaten to extend the control of rightsholders over their works to a disproportionate level.

In this context it is also necessary to take a literal approach to the term balance, which suggests “a state of equilibrium or equipoise”. One party in this balancing game should not gain the advantage over the other(s). The respective legislative texts at EU level do not contain an express definition of that balance, although the balance is referred to in some of the recitals. The main principle of copyright in the EU is, still, a high level of protection for rightsholders, which significantly disadvantages users of protected works. Any interpretation based predominantly on this principle cannot achieve a fair and just balance. The position the CJEU has adopted in relation to L&Es, but also when interpreting monitoring and filtering obligations of ISPs reflects a balance which does not favor either party. Nevertheless, if only for the sake of clarity, this balance should be reflected in relevant legislation.

That the balance in copyright is not fair is a matter of little dispute in academic circles. Under this assumption, in Chapter 3 in the respective subchapters on territoriality, L&Es, TPMs, and CMOs, it is discussed

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1500 European Commission, COM(2015) 626 final, p. 7: “An effective and balanced civil enforcement system, which takes full account of fundamental rights, is required to reduce the costs of fighting infringements, particularly for small businesses, and keep up with their increasing cross-border nature.” (footnotes omitted).


1502 See again Akester, “The new challenges of striking the right balance between copyright protection and access to knowledge, information and culture”, *E.I.P.R.* (2010); Geiger, “Copyright and free access to information: for a fair balance of
whether legislative changes could, in a normative perspective, alter the balance as regards the current status quo. It is obvious, that this approach cannot establish an ultimate standard against which the rights of rightsholders and users, commercial or non-commercial, of protected works could be reconciled. One of the purposes of this study is to discuss the changes brought upon copyright by technological developments and to suggest potential legislative reaction to these changes. It must be underlined that such changes cannot possibly achieve an absolute, future-proof balance given the fluid and ever changing nature of the interests involved. Which is why, for example, an open norm for L&Es that could flexibly react to technological changes, but also to changes in society, is better suited as a legal instrument to react to changes in fields that are regulated, directly or indirectly by copyright. It is argued that open norms, or possibly abstract definitions of the scope of application of exclusive rights jeopardize legal certainty. Such norms also put persons who do not have access to qualified legal advice at a disadvantage vis-à-vis persons who can afford qualified legal advice. The former are usually users and consumers who are already finding themself at the lighter end of the copyright weight scale.

An efficient and flexible copyright framework that can enable novel uses must display flexibility if it is to avoid regular legislative interventions. But in order to provide stability, legal certainty and, in general, a reliable legal environment, requires guidelines. It is difficult to imagine to conceptualize a copyright reform without considering greater flexibility, which will ultimately have to be ‘administered’ by the judiciary as the “ultimate balancer” of copyright. The judiciary will require guidelines, pointers, orientation, to strike the balance in every particular case, and to develop precedents, at EU and at national levels. Fundamental rights, as one orientation, have already been discussed as a set of principles that give indications on the interests involved and, furthermore, lend a constitutional dimension to copyright. It would therefore be suggested to include a

concept of “guided flexibility” into the copyright acquis that permits spontaneous and reasonable adaptations, but prevents surprising and excessively unsystematic results. Before discussing the search for a balance in more detail, two prejudicing elements should be briefly addressed.

1. Terminological injustice

The Centre d’Études Internationales de la Propriété Intellectuelle (CEIPI) suggested, as a response to the European Parliament’s Resolution on the implementation of the InfoSoc Directive, to adopt a consistent terminology for the interests of users.\textsuperscript{1504} The Resolution had used the term “consumer rights”, which does not find an equivalent in the copyright acquis.\textsuperscript{1505} This term might also be misleading and be interpreted narrowly to exclude certain activities exercised by users. The CJEU and academic commentary had already before occasionally referred to “user rights”, which would possibly constitute a broader category and better captures the flexible categorization of consumers and (commercial and non-commercial) re-users of protected works.\textsuperscript{1506} This expression elevates the status of the users to a position at eye level with owners of copyright and related rights, at least on a terminological level. The effects a terminological equality of arms should not be underestimated. It is more likely that courts would lean towards a more user-friendly interpretation of L&Es if these were to be considered rights of users instead of “exceptions” to a general rule (which must be interpreted strictly). The first step in this direction would be to


\textsuperscript{1505} European Parliament, T8-0273/2015, paras. 59 and 67.

recognize the user as a subject of rights in the legal instruments that create these rights. The term “user” only appears thrice in the *InfoSoc Directive*,\(^\text{1507}\) as opposed to 46 instances where the term “rightholder” appears. The user as a subject of copyright law is almost absent from the provisions that grant this class of actors certain privileges or rights. A reform of EU copyright should therefore start by adjusting its terminology.

2. Defining the actors

The *InfoSoc Directive* pursues a concept of copyright law from the perspective of rightsholders. Other actors do either not feature in the legal texts, or they are only passive elements. Creating a balance also requires giving each group of actors a place within the legal framework.

a. Users

Users, or more widely understood, the public, could be broadly defined as the counterweight to exclusive rightsholders.\(^\text{1508}\) A strict adherence to the exclusivity paradigm that is based on control of rightsholders over uses of their works ignores how creativity has developed in the information society, and it ignores that creativity is not only original creativity, but also derived creativity that builds on existing works. Derived creators are thus not only creators but fall into the user category as well. Precluding derivative creators from using protected works, either by accessing them, or by directly using them as parts of their works, would strangle a great portion of contemporary digital creation. *Cohen* expresses her concern that “a legal regime concerned with fostering intellectual and creative progress should [not] reserve its solicitude only for established pattern.” Such patterns are, in particular as an element of the information society, uses of protected works.\(^\text{1509}\)

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1507 Recitals 29, 31 and 46.
The *InfoSoc Directive*’s intention, as stated in its preamble, is a fundamentally economic one. Creativity is considered an instrument to foster economic growth. Rarely is the existence of copyright, and therefore also the harmonization efforts of the EU, put in context with the interest of users, albeit only indirectly. Recital 9 for example underlines the importance of a high level of protection for intellectual creation. A system that protects rights would, so the Recital, “ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large.” This is, again, referred to creativity in a property-context, implying a certain degree of exclusivity, and thereby a relatively strict demarcation between exclusive rights and free uses.

If one understands creativity as the nucleus of copyright as a dialogue between authors and users, as Drassinover suggests, a strict separation of exclusive rights and the public domain is ill-suited to provide for a legal environment that enables legal creativity. In this sense, a focus on the protection of exclusive rights can hardly pay justice to new creators whose works rely on existing expression. Cohen puts forward the idea, although admitting herself that it is a rather bold one (“radical” in her words), that the fundamental structure of copyright, its basic rules, including the substance, moreover the notion of exceptions, should be re-examined. As a standard for re-examination she introduced the so-called “situated user”. This user, as opposed to the economic and romantic user, “engages cultural goods and artifacts found within the context of her culture through a variety of activities, ranging from consumption to creative play. The cumulative effect of these activities, and the unexpected

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1510 See e.g. Recitals 2 and 4 *InfoSoc Directive*.
1511 (Emphasis added).
1512 Recital 9 *InfoSoc Directive*: “Intellectual property has therefore been recognised as an integral part of property.”
1513 Critically on the danger of submitting copyright to a metaphor-guided rationale: Craig, “Locke, Labour and Limiting the Author’s Right: A Warning against a Lockean Approach to Copyright Law”, *Queen’s L.J.* (2002). The author argues that the notion of property in its Lockean understanding cannot properly take all interest into consideration, but would result in a one-sided representation of interests. Instead, “[c]opyright must operate in furtherance of the public interest in maximizing production and communication of intellectual works.” (p. 58).
cultural juxtapositions and interconnections that they both exploit and produce, yield what the copyright system names, and prizes, as “progress.” This model of the situated user suggests that the success of a system of copyright depends on both the extent to which its rules permit individuals to engage in creative play and the extent to which they enable contextual play, or degrees of freedom, within the system of culture more generally.”

Indeed, a multitude of activities characterizes users in a digital environment. Access to, and sharing of, information are the paradigms of the Internet, rather than possession and ownership. A copyright system based on exclusivity which restricts user rights to the minimum necessity of interactive uses fails to understand the value a more active user can have for the digital economy. Therefore, a first step towards defining the balance between rightsholders and users would be to define the user, or, at least, categorize uses that characterize the user. However, one should not make the mistake to enumerate a number of uses, similar to Article 5 InfoSoc Directive, but a more abstract definition would be more appropriate, precisely, as Cohen argues to avoid limiting the scope of copyright to certain predefined acts.

The “situated user” can serve as such an abstract definition. It is a user who consumes, but this consumption is only a means to create information, data and content through different services. But there are (still) users, who also want to own, to possess, who see value in their digital files. The user we are talking about is a heterogeneous one, but none whose interests should be ignored when rethinking, or at least adapting copyright to opportunities offered by the already well established technological environment.

b. Intermediaries

Intermediaries and service providers are represented as actors in the rules of the InfoSoc Directive, but they are burdened with obligations under the rules of the Collective Management Directive. They are, however, indispensable for the functioning of a digital single market. They act as administrators and distributors of copyright royalties, they generate income by linking users and rightsholders, and by providing users with the opportunity to disseminate their own works. Nevertheless, it is not strictly necessary to make them subject to rules under the core provisions of the EU
legal framework for copyright. It will suffice that their contractual relations with users and rightsholders take these central rules into consideration. Accordingly, in designing their relationships to authors, rightsholders, customers and users, intermediaries and other service providers should not be permitted to override mandatory rules by contract. Contractual rules that derogate from mandatory legal obligation or rights can create legal uncertainty and have a disabling effect on creativity and the marketing of digital content. Accordingly, contract provisions between intermediaries and their counterparts should also be interpreted in the light of general principles and fundamental rights, and not, as for example the courts in the German e-books cases did, based on assumptions and a counter-literal interpretation of the contractual terms (within their ordinary meaning).

3. Finding the balance

Recent literature on the concept of balance is scarce, in particular literature that would cover copyright as a system. In every single subchapter of this study – on exhaustion, L&Es, TPMs and collective management – elements of a balance which, in a bigger picture, could also constitute the elements of a fair and just equilibrium in copyright, have been analyzed, and modest proposals for changes were suggested. For the sake of completeness, it would also be instrumental to consider exclusive rights, which are taken here in this study as a given. Their scope would also be altered as a result of the change of the regime for L&Es. More importantly, exclusive rights have not been subject to discussions at the policy level, until recently.

Therefore, this study will only consider whether existing developments or suggested changes are able to shift the ‘balance’ in either way, although then, technically speaking, a balance would not exist anymore if one had existed before. Therefore, it is important to reiterate that it is assumed that, currently, the EU copyright acquis does not provide for a true balance, but


rather a distribution of rights that disadvantages non-rightsholders. This is due to the introduction by the InfoSoc Directive of a disturbing element into the EU copyright acquis. The principle that rightsholders should enjoy a high level of protection for their exclusive rights unsettled the balance that has been created by the early case-law of the Court of Justice.

a. The balance must be flexible

New copyright legislation that will be more than a short-term fix will need inherent flexibility. This flexibility, in order to be able to adjust the balance, must be laid into the responsible hands of national and European courts which would thus be enabled to adapt general rules to concrete circumstances. In order to safeguard legal certainty, foreseeability, and to stabilize the balance of interests courts should receive guidance on how to interpret all elements of the future copyright acquis. The interests of the interested groups must be defined in abstract terms, and collision rules between these interests must also be defined. One could imagine rules that give certain interests which are an expression of fundamental rights priority over purely economic interests, and which protect reasonable economic interests against unreasonable free uses.

The CJEU’s jurisprudence in the recent years has developed tendencies to give the balance in copyright a more prominent standing in its discussions on the interpretation of the copyright directives. This initiative should influence the legislature more than it currently does, by finding answers to the questions that are raised, implicitly and explicitly, by requests for preliminary rulings. Jurisprudence could again, as it did in its early copyright case-law, serve as a “compass” for the other EU institutions. The Commission in particular should draw more inspiration from the significant amount of jurisprudence when drafting its policy agendas. In this sense, balance in copyright law must not only be found in existing legislation, but also in the political discourse in relation to the reform of the EU copyright acquis.

One of the tools that can administer the balance is the proportionality principle, but even this principle is merely a mechanism which requires

guidelines when considering whether a particular measure is proportionate in pursuing a specific aim. Balancing is part of the proportionality test, and balancing only works with weights, which are, in this context, the interests of rightsholders, users, intermediaries, and other interested parties. If any one of these weights proves to be too heavy, the balancing scale cannot move, it will remain inflexible. Therefore, the elements that guide the balance cannot predetermine certain results. A strong fixation of the balance in favor of rightsholders, which is created, for example, by an interpretation that favors economic exploitation over free uses, results in an inelasticity of the legal rules and, as a result, an inability to react to technological and other changes.\textsuperscript{1518} The courts will be unable to create room for new uses within such legal framework. A purposeful interpretation of existing rules, as the CJEU has applied in \textit{Nintendo}, where the Court allowed the circumvention of TPMs that do not protect exclusive rights but mainly prevent interoperability is one way to achieve flexibility. It would, however, be more efficient to locate flexibility within the legal norms. There remains, again, a political decision to be made how flexible such a system should be. Some degree of flexibility must, in any case, be available to national and European courts to adjust the balance in copyright law when it is disturbed by developments of whatever nature. This flexibility must then be used to adjust the balance either in favor of users, or in favor of rightsholders. There are good reasons why in certain cases exclusive rights should receive stronger protection, online exhaustion could be one such example. The final decision must be informed by factors that guide this flexible balance.

b. The balance must be based on principles

A European copyright framework that respects different interests should build on the legal traditions of the European legal order, which is based on the respect for fundamental rights, when drafting and applying legislation. The digital single market should, accordingly, be considered to be an extension of the ‘normal’ single market, which involves the principle of free movement of goods and services. Copyright legislation should enable

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the exercise of fundamental rights as well as the fundamental freedoms, if necessary at the expense of the protection of intellectual property.

However, copyright as well is a property right, and as such it is protected by the EU Charter and the ECHR. But still, property finds its limitations in the rights and interests of third parties. In the same way as real property can be burdened with servitudes, holders of copyright and related rights similarly must accept certain restrictions to the exercise of their exclusive rights. And these restrictions cannot only determine the “if” of an exercise of rights, but also the “how”. This is the idea that was the basis for the development of the notion of the “specific subject-matter” as the core of intellectual property rights in general, and copyright in particular, in the common market. The specific subject-matter describes the essential, and possibly inviolable core of the respective right protected. It includes, pursuant to the jurisprudence of the CJEU, the first marketing of physical objects that embody the exclusive right and a reasonable economic exploitation within the borders of the EU. The specific-subject matter is the historical basis of intellectual property in the EU and could therefore form the core of the interests of rightsholders. The notion is even more powerful because it was developed in a context that did not include L&Es, but solely served to mitigate the legal frictions between the protection of IPRs and the realization of a common market. It defined copyright, while at the same time limiting its exercise. It further gave substance to copyright in the form of certain specific rights, which can be exploited by their rightsholders. It is certainly instrumental to resort to this principle when shaping a framework for a digital single market 45 years after Deutsche Grammophon.

The principles that can form the foundation of copyright will often collide, as has been demonstrated in relation to fundamental rights in the case-law on the interpretation of the InfoSoc Directive, and likewise in relation to the fundamental freedoms already in the early case-law of the CJEU. How this balance must be struck has hardly been discussed by the Court, the relative weight of fundamental rights and fundamental freedoms still remains unclear. But the CJEU’s jurisprudence has given slight indications, for example in Scarlet Extended and Netlog, but also in FAPL/Murphy and Deckmyn, that basic principles of EU law can lead to a

reasonable interpretation of the EU copyright rules. The task of balancing is widely left to national courts, but for a uniform interpretation of these rules the CJEU should be encouraged, in order to safeguard their uniform application, to provide better guidance.

It is difficult, if not impossible, to define a hierarchy between different fundamental rights, freedoms and other general principles. However, a set of legal rules which aims at providing flexibility and a certain degree of foreseeability requires guidance. As far as this guidance cannot be expressed in precise legal rules, the highest courts must be charged with the task of creating that balance. They cannot afford to strike the balance on a case-by-case basis, which might create unwanted precedents based on peculiar fact-patterns, the foundation of the balance must be laid down in legislation, which must contain the basic principles and an obligation for the judiciary to carefully balance principle-based interests against each other. A fundamental political decision could facilitate finding the balance in copyright, namely whether the primary goal of copyright in the EU is to create a digital single market or a proper balance within the copyright system.\textsuperscript{1520} This is also a decision whether copyright only serves one purpose, or whether it is a systemically sound set of rules.

This leaves us with the question what a principle is, a notion so fundamentally important for the system which is suggested here. Dworkin makes a distinction between arguments of principle and policy.\textsuperscript{1521} Arguments based on principle are rooted in individual rights, whereas arguments of policy are based on collective goals. Translating this to the notion of a principle would mean that a principle is an expression of individual rights; and collective interests, or even policy interests, cannot form the substance of a principle. To adhere to such strict distinction would require to reduce and trace back the justification of copyright to individual rights. A rationale for copyright based entirely on fundamental rights comes immediately to mind. And there is a certain elegance in this argument to trace back the subject matter of this study, moreover in a digital context, to the brazen foundations of modern democracies; and with it to the historical foundation of continental modern copyright. And the multitude of individual rights concerned by copyright would neither pose a

\textsuperscript{1520} Henning Wiese, “The justification of the copyright system in the digital age”, \textit{E.I.P.R.} (2002), 387-396, p. 395; arguing that, first and foremost, copyright should create a balance of interests.

problem if it was agreed that within the system of fundamental rights there existed a hierarchy. But then it would suffice to base a (modern) copyright system simply on the pillars of fundamental rights, effectively the ECHR and the EU Charter.

As much as a stable basis this could be, it would exclude certain utilitarian foundations of copyright which should also be included in the interests (of individuals and society) that are subject to a fair balance and which equilibrium should create an efficient system of copyright rules. Considerations of short-term policy, as constituent elements of this corpus of principles should, however, be excluded. Because principles should give the European copyright system stability and foreseeability in its application, such policy arguments are not suited to fulfill the role of stabilizers and conservators of this system. Policy is subject to the tides of political discussion and could therefore bring instability to a system that would take policy into consideration. Policy consideration would also be an element that cannot be fixed in a legislative instrument. Collective interests that are of an enduring nature (such as the advancement of the arts and sciences) can. Such interests must, however, in order to be included in a catalog of principles, form part of the rationale of copyright that cannot be unambiguously reduced to individual rights.

Therefore, such a strict Dworkinian distinction between individual rights and collective interests as the watershed for principles and non-principles seems problematic. Instead, principles in this context should be understood as including individual fundamental rights, but also collective interests that are rights-like, or that support the realization of certain rights. Geller, for example suggests a total of ten “tentative principles” in which we “shall thus seek insight into the overall logic of copyright and authors’ rights.”\textsuperscript{1522} The principles he enumerates in very much detail also contain collision rules between principles that contain different competing rights (e.g. the right to disseminate). The debate between Merges and Blankfein-Tabachnick, on the question whether so called “midlevel principles” exist, distinguishes between foundational principles and midlevel

\textsuperscript{1522} Paul Edward Geller, “Beyond the Copyright Crisis: Principles for Change”, \textit{J. Copyright Soc’y U.S.A.} (2008), 165-199, p. 178; though Geller builds his ten principles based on the rights of creators and does not expressly put user rights at the same level; instead he sees conflicting interests as limits to the exercise of such rights.
principles,\textsuperscript{1523} where the latter, according to \textit{Merges}, have developed historically under the influence of “legal decisionmakers”.\textsuperscript{1524} They serve as a link between foundational principles and specific doctrine.\textsuperscript{1525} Whereas \textit{Blankfein-Tabachnick} rejects the idea of mid-level principles, he does not dispute the existence of foundational principles of intellectual property.\textsuperscript{1526} At European level, the debate is developing, with contributions from \textit{Pila},\textsuperscript{1527} \textit{Dusollier}\textsuperscript{1528} and \textit{Ohly}.	extsuperscript{1529} However neither defines the precise nature of these principles. Beyond these exploratory contributions such a debate is missing beyond the developing notion that fundamental rights should play a more important mediating role between the colliding interests on the copyright battlefield and that principles most likely exist.

The nature of the principles that could provide stability and legal certainty to a European copyright system \textit{de lege ferenda} should be those of overarching principles that provide justification and legitimacy to such system. They should reflect individual as well as rights-like collective interests, which would also combine the continental and Anglo-Saxon copyright traditions.\textsuperscript{1530} They should, in short, constitute the foundational

\textsuperscript{1523} The four midlevel principles that \textit{Merges} identified are: proportionality, efficiency, nonremoval, and dignity, see. Robert P. Merges, “Foundations and Principles Redux: A Reply to Professor Blankfein-Tabachnick”, \textit{Cal. L. Rev.} (2013), 1361-1386, p. 1365.
\textsuperscript{1524} \textit{Ibid.}, p. 1365.
\textsuperscript{1525} And \textit{Merges} also argues that midlevel principles would make it often unnecessary to resort to foundational principles in order to argue on matters of IP policy, which is particularly convenient when disputes of the foundational principles persist, \textit{Ibid.}, p. 1383.
\textsuperscript{1527} \textit{Pila}, “Pluralism, Principles and Proportionality in Intellectual Property”, \textit{OJLS} (2014), the author identifies certain \textit{operational} principles in EU copyright, first amongst them the fundamental freedoms and certain fundamental rights (pp. 193-4).
\textsuperscript{1530} Böckenförde considers principles as a special element of continental legal traditions and part of the ethos of jurists from this particular legal family, however he also argues that principles do help to counter the consequences of a strict legal
principles of European copyright that serves to promote and incentivize creativity and access to such creativity.

These principles would then serve to support the judiciary in interpreting flexibly drafted legislation and provide for coherence in the application of the positive norms. Their role in the development of the application of such norms could also have regard to changing technological environments and business models, providing that the supporting legislation is phrased with sufficient flexibility.

c. The balance must be fair

The balance in copyright should have regard to the interests of both, rightsholders and users, and not only focus on the interests of rightsholders alone. It must, if it is to be a European legal framework, reflect all EU policy interests.\textsuperscript{1531} The current legal framework by its high level of protection of rightsholders cannot create a balance that is fair and just, because it systematically disadvantages non-rightsholders. Instead, rightsholders should receive reasonable protection for their rights, and this protection may well differ in its intensity. A balance implies value distribution (so \textit{Drassionover}) which makes copyright also as a system that apportions economic entitlements.\textsuperscript{1532} On the one side, this means that rightsholders should receive fair remuneration when appropriate, and reasonable. On the other side, users of protected works should be freed from an obligation to pay remuneration in certain cases, as an expression of negative economic entitlements. It would further seem reasonable that users should not be required to suffer economic losses for the exercise of fundamental rights, or other privileges they have been granted by legislation. To safeguard these user privileges, rightsholders should also be prevented from reclaiming these privileges through private ordering.\textsuperscript{1533}

The underlying question is: How much exclusivity do authors deserve? Or, to which extent should rightsholders be permitted to exploit their rights? These questions are also part of the justification for copyright law. A European copyright law that is, at least partially, based on a balance of interests, must consider a fair apportionment of rights and privileges without an inherent bias for rightsholders. If it did, copyright would indeed form an “end in itself” for the benefit of rightsholders. A neglect of other interests would be the result. To avoid this bias, and to create greater fairness, copyright rules must permit users certain uses without prior authorization. Users must also be enabled to enforce their ‘rights’ against rightsholders who attempt to artificially disturb the balance. Technological measures or deterring contractual terms should not replace copyright rules, but should merely enable to automatize and refine the legal framework where appropriate.

Recent initiatives to extend the scope of L&Es and to enable the (temporary) cross-border consumption of online services reflect a reasonable degree of fairness. However, the current state of implementation of European rules, as well as their current formulation still leaves users underprivileged. It is particularly worrying that UGC has disappeared from the political agenda, other than could have been expected midway through the “Digital Agenda”. A stronger constitutionalization of copyright and a stronger influence of fundamental rights and the free movement provisions would help to make European copyright a much fairer system.

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1534 Cf. Yu in: Drahos, et al., Kritika: Essays on Intellectual Property (2015), p. 304; in relation to L&Es the author discusses whether certain exceptions reduce the potential income for rightsholders and turns then to the question whether rightsholders should have the opportunity to earn that income in the first place. Yu relocates the balancing exercise prior to the creation of exclusive rights, which questions the existence and the scope of the latter fundamentally.


1537 Grégorie Marino, “The future of user-generated content is now”, JIPLP (2013), 183.
B. The Pieces and the Puzzle

The basic elements outlined in this study will have to interact with each other in order to create a copyright management system that is efficient and that is balanced. Only because each isolated set of rules is balanced and efficient in itself does not automatically mean that this holds true for the interaction of the rules in their application. It is in particular the interaction of each of its elements that also reflects the balance of a copyright system.

The UsedSoft v. Oracle case can be taken as a good example for the interrelation between the different elements that are contained in the InfoSoc Directive. To recall, the CJEU has permitted the resale of computer programs under the Software Directive based on a wider interpretation of the ‘sale’ criterion of Article 4(2) and an application of the ‘necessary use’ exception of Article 5(1). The Court encouraged the use of technological measures to make sure that users do not retain reproduction of software that could be legally resold.\footnote{1538 Graber, “Tethered technologies, cloud strategies and the future of the first sale/exhaustion defence in copyright law”, QMJIP (2015), pp. 397-8.} The application of TPMs, if they are to receive a similar interpretation under the Software Directive as they do under the InfoSoc Directive after Nintendo v. PC Box, must be applied in a proportionate manner so as to ensure that users can exercise acts that do not require authorization from the rightsholder.

The elements of an efficient legal framework for copyright must work in concert to achieve a balance, but also to enable an efficient copyright system that enables a diverse cross-border offer of digital content. An imbalance in the interaction between these elements would result in a legal framework that puts certain players at an advantage in comparison to others. As a consequence, either rightsholders would be more hesitant to market their digital content if they would lose control over their works and related subject-matter, or users would be hesitant to accept new business models which do not give them the freedom to consume and interact with the content they are given access to. In this regard, a suboptimal interaction between exclusive rights and their interpretation, L&Es and TPMs can slow down, or even disable a digital single market.

Fortunately, the main pieces for a EU copyright law that enables the digital single market already exist. Nonetheless, their interplay is not
perfect, just yet. It lacks clear rules on the interaction of the different pieces, which are all necessary to make digital content accessible across borders, while providing creators and service providers sufficient (financial) incentives. Such rules are difficult to formulate, considering the technological changes that have taken place over the last years, and which can also be anticipated over the next years. Therefore, a set of guiding principles and sufficient flexibility in legislation should influence the interaction between exclusive rights and L&Es, between L&Es and TPMs, and between exclusive rights and exhaustion; including, in all cases, the role of contractual agreements between rightsholders, service providers, and users. Such principles can direct the individual pieces and resolve tensions within the puzzle that could be a comprehensive legal framework for digital copyright and the management thereof.

The impossibility to draft legal rules that are applicable to all possibly conceivable future scenarios further supports a robust set of rules which reflects flexibility and balance. In any case, changing technological possibilities and business opportunities will require new legal solutions to new legal challenges. The application of moderately flexible copyright rules by the judiciary can, it is argued, resolve most tensions if this application is guided and based on general (and copyright specific) principles. Such application would also make copyright rules and their application more efficient, by providing legal solutions relatively quickly through guided judicial interpretation, rather than delayed legislative interventions. The continuous adaption of copyright rules to new technological developments would thereby constantly (re)adjust the balance in copyright while maintaining efficiency of the legal framework. A too rigid and inflexible legal framework cannot achieve a stable balance over a longer period of time because the application of old rules to new digital uses will, eventually, create legal uncertainty that can hamper new business models, disadvantage both users and rightsholders, and slow down the development of the digital single market in the EU.

It is illusionary to believe that harmonization, and even unification of the EU copyright rules can create a set of rules that interact perfectly with each other, but also with other fields of EU law. Therefore, the pieces of the puzzle will always require some room to move to create a balanced image of copyright in the EU. A more flexible system that will allow the pieces to alter their respective relations by interpretation of existing flexible rules is more likely to improve efficiency than one that required regular legislative readjustments.
C. Legislative options for the “Copyright Dilemma”

Vinje, taking stock of IP legislation of the EU in 1996, predicted a “more attractive business climate for producing and marketing intellectual property in the European Union”\textsuperscript{1539} This is not necessarily true for copyright about 20 years later; unless a fragmented framework that is difficult to navigate and mostly confusing for users is “attractive” for businesses. In his defense, at the time, the copyright \textit{acquis} only consisted of the \textit{Software Directive} and a draft of the \textit{Database Directive}. The current state of EU copyright is even less satisfactory for users. But there is a certain intensity in the activities of the European Commission, and more recently also of the European Parliament, in relation to copyright-related issues. It seems undisputed that more draft legislation will be tabled in the near future, it is, however, unclear, what the content will be and what form it will take.

\textit{Joseph} argued that the tradition of the great copyright instruments, the Statute of Anne, as the first European copyright act of our time, the \textit{Berne Convention}, the first international instrument on copyright, and the \textit{InfoSoc Directive}, the centerpiece of European copyright harmonization, would command that copyright be developed “in a manner that is coherent, clear and balanced.” He underlined that copyright law should pursue these goals and not just respond to business needs.\textsuperscript{1540}

The requirements of a digital single market are, nevertheless, a declared goal of current policy initiatives, and it would be negligent to disregard the needs of online service providers whose business models rely on digital content, although businesses are probably better equipped to cope with an imperfect copyright system than users. Therefore, \textit{Rosati} also stressed the importance of a “common framework for copyright protection” for an “integrated and fully functioning market”.\textsuperscript{1541}

In its current state, the fragmented approach of copyright harmonization in the EU is not coherent, it is far from clear and the paradigm of “a high

\textsuperscript{1540} Joseph, “Copyright reform: end of a dream?”, \textit{JIPLP} (2015); businesses, \textit{Joseph} argued, “can flex and change and can refine distribution models to make money from (within reason) whatever copyright system is in place.”
level of protection” indicates that it is not very balanced. What is required to achieve Joseph’s vision of an ideal copyright law is a change in policy approach, which should be reflected in new or adapted legislation at EU level.

An adaption of the current copyright *acquis* with the aim of facilitating the offer of digital content online should start with the centerpiece\(^{1542}\) of the legal copyright framework. It will be necessary, under either of the three paths discussed below, to adopt other aspects of the copyright *acquis*. For example, the rental and lending right should equally be adapted to the digital marketplace,\(^{1543}\) the relation between computer programs protected under the respective directive and software that is, pursuant to the jurisprudence of the CJEU in *Nintendo v. PC Box*, protected under the provisions of the *InfoSoc Directive* should be clarified and an equal treatment of both be considered, not least with regard to the exhaustion of the distribution right. Moral rights should also not be forgotten, as has become apparent in the *Deckmyn* case.

The suggestions outlined above for territoriality and exhaustion, L&Es and TPMs are modest. They seek clarification with a view to facilitate the management of copyright in a multi-territorial digital market. And, of course, an aspect that this study has not endeavored to approach, is the scope of the exclusive rights under Article 2-4 of the *InfoSoc Directive* with regard to online uses, which must be clarified; an aspect which had already been underlined by stakeholders in the 2014 Public Consultation.\(^{1544}\) Ideally, the suggestions would be flanked by a reconsideration of the nature and scope of exclusive rights.

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1542 The the term “centre-piece” has been used by Griffiths (Griffiths, “Unsticking the centre-piece – the liberation of European copyright law?”, *JIPITEC* (2010)) in relation to L&Es, the centerpiece, it is argued here, for the management-related aspects of copyright is the *InfoSoc Directive* as a whole.


The suggestions would require adoption by the EU legislative organs, and in this process a decision would have to be made with regard to the form of legislative intervention. The EU has a number of legislative instruments in its arsenal, which each have their strengths and weaknesses. The choice of a legal instrument is important as it can also affect legal certainty and flexibility within the *acquis*.

A first option would be to change the *InfoSoc Directive* in its relevant points. This would leave those aspects of collective management untouched that have been pointed out above. A second option would be to create a European Copyright Code in replacement of the *InfoSoc Directive*, and possibly also a number of other directives of the copyright *acquis*, if not all. Thirdly, Article 118 *TFEU* could be used to create a unitary copyright that replaces or complements national copyright titles. These options have been discussed thoroughly in academic literature, mainly, however, as to their substantive content. Here, their effect on management of copyright and the realization of a digital single market are discussed, limited, of course, to the scope of this study.

### I. Update of the *InfoSoc Directive*

Further harmonization is unavoidable to attain the goals set by the Commission. If the legislature will fail to act, necessary impulses must come from national courts and the CJEU. The amount of preliminary references on the provisions of the *InfoSoc Directive* alone demonstrates that the current provisions are far from clear. The questions raised in front of the CJEU concern, for example, the definitions of *communication to the public* and *adaptation*.

I. Update of the *InfoSoc Directive*

Further harmonization is unavoidable to attain the goals set by the Commission. If the legislature will fail to act, necessary impulses must come from national courts and the CJEU. The amount of preliminary references on the provisions of the *InfoSoc Directive* alone demonstrates that the current provisions are far from clear. The questions raised in front of the CJEU concern, for example, the definitions of "communication to the public" and "adaptation."
of national and European judiciaries should be understood as a mission for
the European legislator to clarify, and possibly to rethink the current copy-
right *acquis*. Whether it is digital exhaustion, e-lending or the scope of
application of L&Es, any of the questions raised in judicial proceedings
would deserve a definitive answer reflected in binding legislation. Legisla-
tion as a reaction to legal problems identified by the judiciaries is not an
optimal approach, which is, moreover, further limited by the scope of the
current legislative framework, on which litigation is based. Instead, legis-
lation should be, as far as possible – and there are certainly practical limi-
tations – forward-thinking, and it should consider all interests involved.
This would be, to a certain extent, possible by updating the current direc-
tive-based copyright *acquis*.

The *InfoSoc Directive* is currently limited to three essential areas of
harmonization: exclusive rights, L&Es and TPMs. A revision of the Direc-
tive could extend its substantive scope to cover other aspects of copyright
harmonization. It would also be conceivable that the relation between the
Directive and other vertical harmonization instruments in the field of
copyright would be clarified. It is unlikely, however, that a revision would
see a merger of the instrument with other elements of the EU copyright
*acquis*. It is more likely that the Directive would be altered in a number of
relevant points, having the effect of a short-term adjustment to modern
forms of exploitation of protected works.

The differences in national laws could only partly be addressed as
harmonization by directive still reserves a considerable discretion for
Member States. Unless the provisions of a directive are absolutely clear
and unambiguous, implementation carries the danger that national laws
differ in important aspects. The best example remains the open list of
L&Es of Article 5 *InfoSoc Directive*. Even if all L&Es were made manda-
tory there would remain a small but potentially decisive margin of discre-
tion for the implementing legislatures. As the example of private copyright
levies demonstrates, the exercise of that margin at national level can still
result in obstacles for the realization of a digital single market.

Further harmonization based on directives currently in force would
have a further negative effect on the pace of effective change. In addition
to the cumbersome legislative process, directives would require additional
time to be transposed into Member States’ national laws. Any real changes
or even only slight modifications to the existing *acquis* would take effect

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only with a significant delay.\textsuperscript{1545} This puts the benefits of harmonization by means of directives with regard to adaptions to technological changes in question. This delay alone would support arguments to take a more comprehensive review of EU copyright into consideration and increase the level and intensity of harmonization. The time it takes for EU legislation to become effective could be significantly shortened by a change of legal instrument from directive to regulation.

Unfortunately, in the short term, further fragmented harmonization is the most likely perspective. Possible changes to the \textit{InfoSoc Directive} would probably be limited to the elements of the copyright \textit{acquis} already covered by the Directive. In addition to those elements here discussed so far, three sections will follow to briefly outline issues related, first, to exclusive rights, second, to the re-modeling of L&Es, as well as, third, to changes of the legal framework that could become necessary outside of the \textit{InfoSoc Directive}.

1. Defining exclusive rights

One aspect of copyright that has been neglected so far are the exclusive rights of Articles 2-4 \textit{InfoSoc Directive}. Although they have been touched upon, for example in the context of digital exhaustion, they have not been analyzed thoroughly as a separate issue. They have been considered as given, although their precise scope is not yet fully clarified. Most policy discussions have only briefly referred to exclusive rights, partly because their definition has only recently generated uncertainties. Especially the rights contained in Article 3 have been the subject of preliminary references to the CJEU with regard to hyperlinking,\textsuperscript{1546} framing,\textsuperscript{1547} and linking behind paywalls.\textsuperscript{1548} Article 4 has been addressed, but not linked to digital uses.\textsuperscript{1549} The lack of clear definitions has been addressed in the

\begin{footnotesize}
\begin{enumerate}[\textsuperscript{1545}]
\item CJEU, Judgment in \textit{Svensson an Others} EU:C:2014:76.
\item CJEU, Order in \textit{BestWater} EU:C:2014:2315.
\item CJEU, Judgment in \textit{C More Entertainment} EU:C:2015:199; see also AG Wathelet, Opinion in \textit{GS Media} EU:C:2016:221.
\item CJEU, Judgment in \textit{Art & Allposters International} EU:C:2015:27.
\end{enumerate}
\end{footnotesize}
“Public Consultation on the review of the EU copyright rules”, but no action at policy level has resulted therefrom. In any case, if the Commission will assess the current definitions of exclusive rights it will most likely fine-tune elements of currently existing definitions. For example, a clarification on the elements of the “communication to the public right” would help to describe its precise scope. In particular, the elements developed by the CJEU in its recent case-law could be revisited and adjusted. An overhaul of the rights structure is not only a very unlikely scenario, but it would furthermore violate international obligations.

It would indeed be instrumental to provide a clarification as to which acts require authorization and which acts users can exercise without prior authorization. The preliminary references in Svensson and BestWater have illustrated that a more extensive interpretation of the scope of Article 3 InfoSoc Directive could indeed paralyze the Internet. Defining the scope of the rights more precisely, and possibly attempting a less extensive approach to exclusive rights, could already resolve some of the tensions in European copyright law. In the course of a revision of the exclusive rights, in particular the right of communication to the public, it could be imagined to introduce a comprehensive exploitation right for online uses. This right would include a reproduction right similar to the construction the CJEU adopted in Ulmer. The relevant right to publish content online would include an ancillary reproduction right, because the communication to the public right, it can be argued “would risk being rendered largely meaningless, or indeed ineffective” if at the same time the reproduction right would continue to exist as a parallel right applicable to digital exploitations. Such a solution would facilitate licensing and reduce transaction costs and would make the creation of online services

1550 European Commission, Public Consultation on the review of the EU Copyright rules, section B.
1551 However, the Commission is likely to approach the issue if the December 2015 Communication will be followed up: “In this context, the Commission will examine whether action is needed on the the definition of the rights of ‘communication to the public’ and of ‘making available’.” (emphases omitted), European Commission, COM(2015) 626 final, p. 10.
1552 Lionel Bently et al., Opinion of the European Copyright Society: The Reference to the CJEU in Case C-466/12 Svensson (15.03.2013), paras. 43 and 68.
1554 Ibid., para. 43.
for copyrighted works easier. The reproduction right could be limited to its application to physical reproduction and permanent digital copies.

Furthermore, the (re-)definition of the exclusive rights could also address the problematic issue of online exhaustion. By following the CJEU in its Rafael Hoteles/Del Corso and FAPL/Murphy judgments the ‘reach’ of exclusive rights could be limited to a reasonable and appropriate exploitation, which grants rightholders economic control over their works and related subject-matter within the limits of a normal exploitation. A “reasonable interpretation” of the three-step test can serve as an orientation not only for the application for L&Es, but, in contrast, as a definition of the scope of exclusive rights.

But whatever the structure and substance of the exclusive rights might be, efficient mechanisms for authorized and (legal) unauthorized uses and a just and fair balance require additional elements in the copyright legal framework.

2. The Pandora’s Box of L&Es

The central, and probably most disputed element of a revision of the InfoSoc Directive, is likely to be Article 5. This is also the provision that defines the balance of interest in EU copyright law. Accordingly, a revision of L&Es would require a higher regard for the interest of users, and possibly the introduction of a new terminology that underlines the relation between exclusive rights and what could be termed the rights of users, or the public. A continuation of the closed list-approach would certainly prove to be detrimental for the acceptance of copyright among users and disadvantage European businesses compared to their US counterparts. Although the Commission plans to introduce exceptions for text- and data-mining and teaching and research, these adoptions are unlikely to prove sufficient to put many online services on a sound legal foundation.

The very first step on the way to reform Article 5 is to declare all L&Es contained therein mandatory. Only mandatory exceptions that have to be adopted by Member States can achieve efficiency by limiting information costs and provide legal certainty. And only by making L&Es mandatory can a stable and just balance be achieved throughout the EU. If L&Es were to remain optional, users would most of the time be the losing part in the trade-off of interests that is reflected in the relation between exclusive rights and L&Es. This should go together with a clarification of the
contractual disposability of L&Es. Ideally, this disposability would be subject to express agreements between a user and a rightsholder, and could not be conditional on the acceptance of general terms and conditions. This would put users and rightsholders at equal footing without threatening the principle of a high level of protection of exclusive rights. However, Article 5 could also be the starting point to question this paradigm and move from a “high level of protection” to a reasonable level of protection by allowing broader and more flexible exceptions to the general requirement of authorization.

3. Complementary additions

As compared to a comprehensive overhaul of the entire EU copyright acquis, which is discussed in the following two subsections, a revision of the InfoSoc Directive promises to pose the lowest political obstacles. At the same time, though, it has the lowest potential for a real change in the current approach to copyright law, including the balance of interests. The InfoSoc Directive taken in isolation cannot tackle the ambitious goals of the European Commission. Their achievement would also require a revision of many of the other copyright directives and a reconsideration of their respective relations. A mere review of the InfoSoc Directive would also bring with it an extension of the scope of harmonization of EU copyright law. However, in the short term, a revision of the InfoSoc Directive is by far the most realistic scenario. The other two options should nevertheless not be forgotten.

II. European Copyright Code

The second option that would incorporate, and integrate the changes suggested above is a comprehensive codification of copyright in the EU. A European Copyright Code, one which would deserve its name, must

1555 Burrell & Coleman, Copyright Exceptions: The Digital Impact (2005), p. 276, the authors only discuss copyright exceptions, but taking the Information Society Directive as a starting point for a general copyright reform would also benefit from the fact that revising the Directive is a more realistic approach than replacing it with an entirely new instrument.
have a higher ambition than to codify certain aspects of copyright in the knowledge economy. It should aim at harmonizing copyright for the single market more profoundly and more comprehensively. Whereas the idea of a comprehensive reform of copyright, which would also entail a consolidation of the existing copyright *acquis*, is favored by many academics, the idea seems to have lost its appeal for policy makers, at least in the short-to medium-term.

A “European Copyright Code” could, but must not, include the more recent additions to the European copyright corpus, the *Collective Management Directive* and the *Orphan Works Directive*, but the focus of such an endeavor should lie on the horizontal recalibration of the relations between exclusive rights and L&Es. In this sense a codification contributes to greater legal certainty, its effect on the balance between the interests involved would depend on the precise formulation of the rules. The preamble to the “European Copyright Code” stated that “copyright legislation should achieve an optimal balance between protecting the interests of authors and right holders in their works and securing the freedom to access, build upon and use these works”. The provisions of the code, or at least their systematic idea, could form the basis for a recast of Article 5 by offering a certain degree of flexibility without abolishing the traditional European approach completely. The Code is, aside from its indeed provoking provisions, a reasonable demonstration how different exclusive rights could be integrated in one legal instrument and how L&E could apply to different types of works. For a European copyright codification to be efficient it would also require to include related rights and their respective L&Es.

Realistically, a European copyright codification cannot be expected under the current “Digital Single Market Strategy”, other adjustments enjoy priority. But the idea should form the background already for current additions to the existing directives to guide future initiatives for reform. Therefore, it is, although not of immediate relevance, useful to discuss the idea of a comprehensive harmonization in form of a systematic code. A more profound revision would be a long term project that also necessitates further research into the shortcomings of the current *acquis*

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and should be supplemented by an evidence-based approach to legislating, also in regard to issues not covered by this study.

1. Advantages of coherent and directly applicable legislation

A more or less complete harmonization of the European copyright rules would bring with it a number of advantages over the current state of fragmented harmonization. A directly applicable regulation that harmonized at least the essential elements of EU copyright law avoids the legislative time lag that usually results from implementation deadlines. The *InfoSoc Directive* took a number of years to be negotiated and upon passing left Member States another 19 months to implement its provisions into national law. Eleven of the then 15 Member States failed to implement the Directive entirely or in parts. Taking into account that technology will continue to develop during the negotiation process, and even thereafter, an application of the rules contained in a regulation beginning at a point in time relatively close to its enactment would increase its effectiveness. In the same way, future changes to the instruments would not suffer from belated application, this equipping the new legal framework with greater flexibility and the ability to react to technological developments.

A regulation that would take immediate and direct effect could also avoid differences in national legislation caused by implementation of European rules by national legislators. Especially with regard to L&Es, this would constitute a significant advantage compared to harmonization by directive, and that is even so if all L&Es were declared mandatory. Next to the territoriality principle, the differences in national legislations are the most important reason why the current European legal framework for copyright has been criticized.

A more comprehensive review of EU copyright would also bring about the opportunity to reconsider not just its core elements in the *InfoSoc Directive* but also other aspects that are certainly important for copyright as a system, but also to a certain degree for copyright management. Codi-


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fication of copyright law in one more extensive document that consolidates the existing *acquis* could begin by addressing criticism that has been raised in relation to the jurisprudence of the CJEU. As one example, a comprehensive copyright code could address the exact scope of the *Software Directive*, or better integrate the provisions of the *Software Directive* into the code. The often confusing effects of the *lex specialis* arguments the Court has made in *UsedSoft* and in *Nintendo v. PC Box* could be corrected by integrating software protection, granting computer programs the same exclusive rights and the same L&Es as are accorded to ordinary works which are protected by the *InfoSoc Directive*. In this context, the EU could also develop a reasonable approach to digital exhaustion that would apply to all digital content, or at least clarify that some types of digital content are subject to exhaustion and some not so, justified by a reasonable, policy-based argument.

In general, a codification that clarifies the relation between the different directives, ideally by consolidating the majority of existing rules into one legal instrument, would help to remove some “uncomfortable distortions”.1559 Opposed to a mere re-drafting of the *InfoSoc Directive*, complementary additions that go beyond the existing *acquis* could probably not be avoided in order to safeguard the systemic coherence of a copyright codification at EU level. A side effect would be that the *acquis* would become significantly slimmer as several directives could be merged. At least those directives that contain substantive copyright rules, including the *Software Directive*, the *Rental and Lending Right Directive*, and the *InfoSoc Directive* could find a new home in a European copyright codification.

By a more comprehensive harmonization European copyright could be given a systemic backbone with general rules (and possibly principles) that apply horizontally to all types of works, with reasoned exceptions for ‘special cases’. How some of these rules could look like has been suggested in Chapter 3. But whatever policy choices were to be made for exhaustion, L&Es and TPMs, European copyright would become more transparent and accessible for users and rightsholders, as well as intermediaries that rely on exceptions to provide their services. In addition, based on such a codification the further development of EU copyright law would

become more foreseeable and changes to the legal framework could be anticipated.

2. Territoriality, again! The inefficiency of ‘mere’ harmonization

_Svantesson_ stated in an article on the application of law to the Internet: “If all legal systems were identical, it would not matter that they are geographically structured – complying with local law would mean also complying with the law in all other jurisdictions.”

In relation to copyright in the EU this holds true for breaches of copyright and the exercise of L&Es. If all national copyrights were identical, an act that constitutes an infringement in Denmark would also constitute an infringement in Romania; and an exception to an exclusive right could be relied upon in every single Member State. For such aspects of copyright law full harmonization would bring about legal certainty for rightsholders and users. However, identical copyright rules in all Member States would not do away with the effects of territorial fragmentation and the problems of multiple rightsholders in relation to one work. The effects of national laws are still restricted to the territory of the Member States which enact such laws. Therefore, full harmonization without unification still requires efficient licensing mechanisms in order to facilitate multi-territorial licensing.

Harmonization can provide solutions to the barriers territoriality erects for the free flow of digital content. A European-wide “country-of-origin” principle would be the easiest solution, which would also mimic the exhaustion principles in a digital environment. Rules to determine the country of origin would have to be drafted. But this would be a matter for political negotiations; whether the country of origin is the country of the establishment of the service provider, whether it is the country of the top-level domain of the website through which the service is accessed, or from which the software required to operate the service is downloaded.

Harmonization cannot erase territoriality and the need to find solutions to ‘work around’ its effects. The only feasible way is to create one unitary title for all the territories for which a common digital market is to be established. Unification would be the last step toward an efficient system,

for copyright in the EU, from a licensing perspective. It is the ultimate means to overcome the shortcoming of fragmented or full harmonization.

III. Unitary Copyright

The idea of an EU copyright title has more recently found many proponents. In late 2009, a reflection document from the European Commission had already brought up the idea of a unitary copyright title. It stated: “A Community copyright would enhance legal security and transparency, for right owners and users alike, and greatly reduce transaction and licensing costs. Unification of EU copyright by regulation could also restore the balance between rights and exceptions – a balance that is currently skewed by the fact that the harmonisation directives mandate basic economic rights, but merely permit certain exceptions and limitations.”

Whereas the idea is only occasionally and uncommittingly floated at the policy level, academia is lobbying for a more concrete approach, at least in the long term. More recently the “Public Consultation on the review of the EU copyright rules” asked whether a single EU copyright title should be pursued. The answers differed significantly. Users and institutional users were generally in favor of a unitary title. But authors and performers, and especially CMOs and publishers, producers and broadcasters, as well as intermediaries, and distributors were in support of different solutions. In the “Reda Report” the idea of a EU copyright title was considered only briefly. The final Resolution merely

1562 Authors and performers opined that a reorientation toward an “EU authors’ right” would be more important than a single EU copyright title, CMOs and publishers and performers feared the long process that would, in their opinion, run the danger of focussing on the wrong issue (mainly a reduction of the scope of exclusive rights by an extension of L&Es), an unitary title would further lead to a weakening of cultural diversity and the EU should rather focus on better enforcement of existing laws and the support of market-led solutions; intermediaries and distributors as well as Member States also saw no need for a unitary title but rather underlined the need to further harmonization (pp. 90-2).
1563 European Parliament - Committee on Legal Affairs, 2014/2256(INI), para. 4. The explanatory statement to the report suggested, again very tentatively, that

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suggested to study the potential impact of a single European copyright title.\textsuperscript{1564}

As stated above, academia was more committed to the idea of a unitary EU copyright title. Eventually, it was the “European Copyright Code” of the \textit{Wittem Group} that re-sparked a wide debate on the topic, with contributions and commentary also coming from other jurisdictions.\textsuperscript{1565} Ironically, the Code was not meant as a suggestion for a unitary title. The \textit{Wittem Group} wrote in the introduction to the “European Copyright Code”: “the Group does not take a position on the desirability as such of introducing a unified European legal framework.”\textsuperscript{1566} This hesitant position was criticized by \textit{Rosati}, who would have wished that the drafters had made a more bold statement with a view to “influencing and orienting European law-making in the field of copyright.”\textsuperscript{1567} She suggested that a group of “leading European academics” could indeed have an influence on the direction of EU copyright policy. \textit{Rosati}, by the way, was largely posi-

\textsuperscript{1564} European Parliament, T8-0273/2015, para. 28.
\textsuperscript{1565} See e.g. Jane C. Ginsburg, “‘European Copyright Code’ – Back to First Principles (with some additional detail)”, \textit{J. Copyright Soc’y U.S.A.} (2010-2011), 265-300, Hugenholtz read a critique into Ginsburg’s article (P. Bernt Hugenholtz, “The Wittem Group’s European Copyright Code”, in: Tatiana-Eleni Synodinou, \textit{Codification of European Copyright Law: Challenges and Perspectives}, (Alphen aan den Rijn: Kluwer Law International, 2012), 339-354, p. 343, at fn. 5) claiming Ginsburg had misunderstood the nature of the Code, which was intended as a non-comprehensive draft. In her introduction Ginsburg merely states that certain elements were not addressed (e.g. remedies and voluntary formalities), but not by way of critique, but more to demonstrate the scope of the proposal.

\textsuperscript{1566} Wittem Project, “\textit{European Copyright Code}”, (Wittem Project), available at: http://www.copyrightcode.eu (accessed: 10.01.2016); the focus of the group was more to “promote transparency and consistency in European copyright law” based on the shared “concern that the process of copyright law making at the European level lacks transparency and that the voice of academia all too often remains unheard.” The Code was meant as a reference too for the future harmonization, but also unification at EU level; in this sense the Code was also misunderstood by Rainer Kuhlen, “Richtungsweisend oder eine nur begrenzt wahrgenommene Chance? Der Copyright-Code des Wittem-Projekts”, \textit{JIPITEC} (2011), 18-25.

\textsuperscript{1567} Rosati, “The Wittem Group and the European Copyright Code”, \textit{JIPLP} (2010), p. 864; however, she later acknowledges that the Code itself is an implicit recognition of the desirability of such an endeavor (p. 867).
tive about the substance of the proposal which, she argued, was successful in achieving a fair balance between the common law and the civil law copyright traditions, and also by suggesting a legal framework for copyright that delicately struck a fair balance between the interests of rightsholders and the general public.\footnote{1568} Five members of the drafting committee of the \textit{Wittem Group} later joined the \textit{European Copyright Society} which wrote the letter to European Commissioner Guenther Oettinger on the occasion of his nomination as Commissioner for Digital Economy and Society.\footnote{1569} This letter was entirely dedicated to promote an EU unitary copyright title. This seems to be at odds with the statement from the introduction to the “European Copyright Code” in 2010. However, interpreted literally, it does not imply that all members of the \textit{Wittem Group} were, at that time, opposed to an initiative for a European copyright title, it merely suggested that disagreement prevailed.\footnote{1570} The Group as such was unable to “take a position” that would have promoted a unification of copyright law in the EU, but this does not exclude the possibility that a number of its members had more sympathetic feelings for a unified approach. Be it as it may, a few years later those five members, with 15 other European copyright scholars were “convinced that the time is now ripe to start work on a European Copyright Law that would apply directly and uniformly across the Union. “ This should be achieved, so the European Copyright Society, by a “true unification of copyright by way of a European Copyright Law (Regulation) that would replace national legal titles“ based on Article 118 \textit{TFEU}.\footnote{1571}

The CEIPI recommended to take a cautious approach to unification, which would gradually unitize certain rights and L&Es. Because the CEIPI statement was a reaction to the “Reda Report”, it suggested to begin unification, as a testing ground, with the exclusive rights that are particularly relevant for cross-border exploitation (i.e. the communication and making available rights for literary and musical works, in other works, digital music and e-books). This corresponds to the approach the European Copyright Society suggested to Commissioner Oettinger. Although it was not suggested to take a step-by-step approach, the Society warned that “[...] any unification of copyright law in the EU will be a project of the middle or long term. This has led those opposing such an initiative to label it as unrealistic. The position of the European Copyright Society is, however, that “the fact that unification of copyright will be time-consuming is no reason not to initiate it. Quite to the contrary: given its potentially positive impact on the European creative economy, work on such a project should [in the Society’s opinion] be initiated as soon as possible.”

In any case, the “European Copyright Code” inspired a vast literature on a unitary title and further codification of EU copyright law, that would, as some argued, create a new generation of EU copyright law.

1572 The CEIPI first suggested such an approach in; Stéphanie Carre et al., Response of CEIPI to the Public Consultation of the European Commission on the review of the European Union copyright rules of 4 March 2014 (2014), pp. 1, 3 and 7.
1573 Cf. Geiger et al., Reaction of CEIPI to the Resolution on the Implementation of Directive 2001/29/EC on the Harmonisation of Copyright in the Information Society adopted by the European Parliament on the 9th July 2015 (2015), p. 9; the CEIPI qualified its suggestion to the extent that it did not push for a unification of copyright but subtly noted that “[i]f a replacement in the long run of national copyright laws by a performing EU copyright legislation appears desirable in order to ensure the proper functioning of an internal market for cultural goods and services, it is certainly a sensitive issue.”
1574 See also Ibid., p. 9; after limiting the scope of a short term unification of certain exclusive rights and limitations the comment went on: “A more ambitious and detailed mandatory EU copyright law could be the long term project.”
1576 See Trevor Cook & Estelle Derclaye, “An EU Copyright Code: what and how, if ever?”, I.P.Q (2011), 259-269, the authors termed the harmonization decades
However, criticism continued that a political consensus for such a project could hardly be established.\textsuperscript{1577}

It is also not the purpose of this section to discuss how a unitary copyright title would exist together with national titles, or if it would be necessary to replace national titles with a unitary title. This is, of course, contingent upon the applicable international rules, the principle of subsidiarity at EU level and the legislative competence of the EU. Fischer has written an impressive analysis of the feasibility of a unitary EU copyright and suggested a model in which an EU title, which would require registration, could co-exist next to national titles. Rightsholders would have the choice to register for the unitary title, or benefit from the protection of multiple national jurisdictions.\textsuperscript{1578} Nevertheless, the three conceivable variants will be briefly presented here.

1. Scope of a unitary copyright title

If a unitary title for the EU were to be introduced, the legislator would have three options with regard to the scope of such a title. First, and this is the most radical option, a unitary title could completely replace national copyrights by replacing the currently 28 national territorial scopes by one European title. The second option would only introduce partial unification of EU copyright rules for certain purposes. For example, only the “digital rights” of making available and communication to the public, and only “digital exceptions” \textit{de lege ferenda} would be subject to unification. In other words, those aspects of copyright would be harmonized that are of high relevance for cross-border exploitations of protected works and subject-matter. Third, national titles and an EU title could coexist. Rightsholders would, by default, enjoy protection under a number of national titles, but could opt to have their creations protected by a unitary title instead.\textsuperscript{1579}

\textsuperscript{1577} Hilty, “Declaration on the Three-Step Test: Where do we go from here?”, \textit{JIPITEC} (2010), para. 19.

\textsuperscript{1578} Oliver Fischer, \textit{Perspektiven für ein Europäisches Urheberrecht} (Bern: Stämpfli Verlag, 2014).

a. Replacing national titles

Unitization in its extreme form would replace national copyrights by one European title. This approach is unprecedented in EU intellectual property law, as both the unitary trademark and design titles permit the coexistence of national titles,\(^\text{1580}\) so does the unitary patent.\(^\text{1581}\) Copyright, however, does not require registration, as do other intellectual property rights, with the exception of unregistered designs. Registration offers rightholders to choose for which protection framework they would like to opt depending on the territorial scope of their activities. A complete replacement of national copyright would take this choice away from creators, as they would instantaneously receive, once the system is in place, a European copyright title instead of a national one. The difference to designs, trademarks and patents would be that a unitary copyright which replaces national titles would not require the prospective rightsholder to pay a fee, but the title would be granted automatically as long as the creation meets all criteria for the protection. A unitary title requires that legislation is made in form of a regulation that applies directly in all Member States without the necessity to implement the provisions of the legal instrument.

b. Sectoral protection

A sectoral copyright, which would only apply to certain areas of copyright law could also be conceived. In this scenario, national copyright laws would only apply when European copyright law does not regulate a certain activity. Hilty has suggested that such a legal construction could commence with a regulation which would cover certain important aspects of digital copyright law, instead of gradual harmonization through further directives.\(^\text{1582}\) This regulation could then form the central element for an extension of the unitization of EU copyright law. In Hilty’s model, this

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\(\text{1580}\) See e.g. Recital 6 Community Trade Mark Regulation.

\(\text{1581}\) Recital 26 Unitary Patent Regulation.

\(\text{1582}\) Reto M. Hilty, “Reflections on a European Copyright Codification”, in: Tatiana-Eleni Synodinou, Codification of European Copyright Law: Challenges and Perspectives, (Alphen aan den Rijn: Kluwer Law International, 2012), 355-372, p. 361; Hilty ultimately suggests a four level European Copyright codification that consists of a regulation, several directives, recommendations and national legislation. The first level would be subject to extension in scope over time, in

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unitized area of European copyright law would then apply exclusively to the defined scope, all non-harmonized areas would continue to be subject to harmonization directives or remain within the competence of national legislators.

c. Parallel existing titles or replacement of national copyrights

Ideally, an EU title would replace national titles. But also parallelism of rights is not uncommon in the EU. Parallel regimes of protection exist for trademarks and designs. However both rights, at EU and at national level, require registration and are further widely harmonized in their substantive effects. Interestingly, in both cases harmonization preceded unification. Copyright does not require registration, which is why any efforts of unification would require a simultaneous harmonization of national titles. In the absence of accompanying harmonization of national copyright laws, and a parallel existence of rights which do not require registration, the beneficial effects of unitization would be frustrated by the continued existence of national titles.1583 As one example, a rightsholder could, although a certain use is permitted under a unitary copyright regime, still prevent that use for the respective territories if a corresponding exception would not exist under one or more national copyright laws.

If a unitary right were to replace national copyright in their entirety the unitary system would have to be drafted carefully and comprehensively, which is a task that would take a significant amount of time. A parallel existence of a unitary title and national copyright could be a temporary model that would exist until national copyrights phase out. A transition phase in this model would have to be very long. Given the current life expectancy of humans (and therefore authors) at least about a 150 years. During this transition phase authors would automatically acquire a unitary title if, in accordance with the Berne Convention, they are entitled to protection in any of the Member States. The consequences for legal certainty would be disastrous. Transaction costs would initially increase because of the necessity to manage a multitude of national copyrights and, general, Hilty’s system would, probably, develop towards one level with a further strengthening of the European copyright acquis.

in addition, a unitary title. A more convenient model would morph existing national copyright titles into a unitary title. If the unitary title offered a similar level of protection, rightsholders were not expropriated but their existing rights replaced by a title with an equally strong level of protection.\footnote{The biggest obstacle to replacing national titles by a right with a different or lower scope is the long term of protection rightsholders enjoy. Divesting owners copyright and related rights would in most cases constitute a violation of the First Protocol to the ECHR, cf. Tatiana-Eleni Synodinou, “Copyright Law: an ancient history, a contemporary challenge”, in: Andrej Savin & Jan Trzaskowski, Research Handbook on EU Internet Law, (Cheltenham, Northampton: Edward Elgar Publishing, 2014), 81-109, p. 104; and Yves Gaubiac, Brigitte Lindner, & John N. Adams, “Duration of copyright”, in: Estelle Derclaye, Research Handbook on the Future of EU Copyright, (Cheltenham, Northampton: Edward Elgar Publishing, 2009), 148-192, p. 148: “[W]hen the term of copyright is altered, it should not be done in a way which divests owners of the unexpired part of their copyright term.”}

It is also conceivable that both systems exist in parallel to each other without a perspective to abolish national copyright laws. Rightsholders would have the choice to either protect their creations under national law or under an EU title. The second option would only be available upon express choice by the rightsholder. This raises the question when and how a rightsholder would opt for protection under the unitary title. A requirement by express choice upon creation of a work would violate the prohibition of formalities under the Berne Convention and would furthermore be unpractical considering the sheer amount of works created every day. Therefore, the default option could be that works and other related subject-matter are protected by national copyrights, without any need for registration. Rightsholders could opt for unitary protection within a reasonable amount of time after the creation of a work and before rights have been assigned or licensed for a certain territory which does not correspond to the territorial scope of protection of the unitary title. If rightsholders opt for unitary protection, this choice should be irreversible to safeguard legal certainty for users. The information about registered rights must then be available in a public register. Because national protection would still be available without registration, a registration requirement for a unitary title, it can be argued, would not violate Article 5(2) of the Berne Convention. The exercise of those rights at national level would be available without any registration or notice, but the mode of their exercise, in
form of a multi-territorial, pan-European exercise would require a decision for one of the (sets of) titles.

For a sectoral protection with regard to certain uses (e.g. digital uses) by default, registration would not be necessary, as long as uses that fall under unitary protection and uses to which national copyright applies could be easily identified and distinguished. The demarcation between digital uses and analog uses might, however, prove to be difficult.

At some point in time it would be unavoidable to abolish national copyright titles if a unitary EU copyright should create a basis for a more efficient EU legal framework for copyright that could overcome territorial restrictions in the EU. The CEIPI argued in reaction to the European Parliaments Resolution on the implementation of Directive 2001/29/EC that copyright reform would require a more unified approach, which would be “crucial for the development of a truly European information society.” It can be argued that a unitary title would serve this goal better than the existence of parallel national titles, especially if these titles differ significantly with regard to their substantive rules.

2. An ‘elegant’ solution

The introduction of a unitary title would have many advantages, they have been succinctly summarized by the European Copyright Society: “A Euro-

1586 Bernt Hugenholtz, “Is Harmonization a Good Thing? The Case of the Copyright Acquis”, in: Justine Pila & Ansgar Ohly, The Europeanization of Intellectual Property Law: Towards a European Legal Methodology, (Oxford: Oxford University Press, 2013), 57-73, p. 72; the author already interprets Article 118 TFEU to the effect that it would permit for the abolition of national titles, without, however, giving insight in to his reasoning. Neither the unitary titles for trademarks and designs (both still based on Article 308 TEC), not the European patent with unitary effect, have abolished their respective national counterparts. Fischer analyzed the problem in more detail and came to the conclusion that a unitary copyright could replace national copyright, but tested his model against the fundamental right to property under Article 17(2) of the EU Charter; Fischer, Perspektiven für ein Europäisches Urheberrecht (2014), pp. 437 et seq.
European Copyright Law would establish a truly unified legal framework, replacing the multitude of—often opaque and sometimes conflicting—national rules that presently exist. It would have instant Union-wide effect, thereby creating a single market for copyrights and related rights, both online and offline. A European Copyright Law would enhance legal security and transparency, for right owners and users alike, and greatly reduce transaction and enforcement costs, including those resulting from the still pending issues of jurisdiction and applicable law to copyright infringements online. Moreover, codifying a European Copyright Law would enable the EU legislature to re-establish itself as a global leader in copyright norm setting.1588

It would indeed be the most elegant solution to introduce a unitary copyright title that has effect throughout the territory of the EU and that would grant rightsholders equal rights under one property title in every Member State—and that would grant users the same privileges in every Member State. The unitary character would further make any discussions on territoriality in the EU obsolete. The question is, whether a unitary title is necessary to achieve legal certainty, and provide for a fair balance of rights between rightsholders and users. Or whether these goals could not be achieved differently. The following discussion is, therefore, not so much focused on the substantive content of a possible unitary title, but on the necessity of such a legal construction to enable a digital single market, in the light of manifold political impediments that will predictably be encountered.

For the sake of simplicity, we will assume for the moment that a unitary copyright would replace national copyrights, in the long term. In fact, a parallel existence of national and EU copyrights would most likely make matters even worse. A model under which rightsholders could choose between a bundle of national titles and one EU copyright would make sense for markets which use works that would habitually be registered. Dealing with rights that are either European or national would multiply licensing problems significantly.

And also with regard to other uses that require authorization, or for which authorization is waived by law, a coexistence of rights would, in the

absence of increased harmonization at national levels, decrease legal certainty for rightsholders as well as users. Such a solution could only be workable if, for example, L&Es would be very similar at national and at EU (unitary) level. National copyrights that exist in parallel cannot, under any circumstances, achieve the same level of legal efficiency than a unitary title can.\textsuperscript{1589} Even a very high degree of harmonization, either by directive or by regulation, cannot create a situation similar to that of unification.

A unitary copyright title for the EU only makes sense if the basic copyright rules (exclusive rights, L&Es, TPMs) are altered to reflect a fair and just balance. Otherwise it would suffer from the same substantial problems which the current \textit{acquis} is suffering from. If, for example, a unitary title would only define exclusive rights for the entire territory of the EU and would leave L&Es and TPMs subject to harmonization by directive, the balance in copyright law would further tilt in favor of rightsholders. Whereas the latter could rely on strong and robust, and most important rather clear, protection of their rights at EU level, commercial and non-commercial users would have to rely on a large number of national laws as the foundation of their ‘user-rights’. As a side-effect, a unitary EU copyright would have beneficial effects for the balance in copyright, albeit to a limited degree. L&Es would automatically become part of the laws of the Member States and their exercise would not depend on implementation by national legislators.\textsuperscript{1590} Unitization would, therefore, have to cover the core of copyright and include at least those elements that are covered by the \textit{InfoSoc Directive}, and ideally do away with the substantive distinction between copyright proper, copyright in databases, and copyright in software. This is notwithstanding the protection of \textit{sui generis} rights for databases.

Unification of copyright law that follows a comprehensive approach can achieve the goal of fostering a digital economy. This would still hold true if copyright was only unitized sectorally, for example for digital works, or works that have been digitized. From an aesthetic point of view a complete unitization of copyright law in the EU would be more pleasing


for supporters of systematic legal frameworks.1591 However, it would not be strictly necessary to lay the legal foundation for a digital single market. A distinction between copyright rules that apply to digitized works and one set of rules that applies to embodied works could be an option, including separate rules for L&Es and TPMs. Such an approach would also justify a separate framework for collective management of cross-border licensing of digital content. Collective management for a unitary title under the new competitive model would have to cope with a fragmentation of repertoires as they would be represented by different collecting societies. The passport-model established by the Collective Management Directive, if it works as anticipated, already created a comparable situation, in which users of digital content will have to gather all required licenses from different CMOs that hold bundles of national rights for the online use of musical works. With this system in place, even unitization cannot create one-stop-shop licensing solutions for the entire world repertoire for music, or any other type of content. The introduction of a unitary title, as opposed to increased harmonization by directive or regulation, could also spark a re-evaluation of the fresh collective management system;1592 not so much in relation to governance and transparency, but regarding the collective administration of exclusive rights for online uses (possibly beyond the sphere of music). Nevertheless, the beneficial effects of unitization for managing copyright as the most elegant solution would be significant for users of protected works, but also for rightsholders.

Finally, the rights in one work could only be distributed among a number of individuals, which is dictated by the number of exclusive rights

1591 Samuelson suggested a project to initiate copyright reform with a more systematic approach to “restore a positive and more normatively appealing vision of copyright as a ‘good’ law”. She remarked that continuous additions to the 1976 US Copyright Act have created “inchoate visions” of what a principle-based and coherent copyright law should look like, Pamela Samuelson, “Preliminary Thoughts on Copyright Reform”, Utah L. Rev. (2007), 551-572, p. 557. Although the US Copyright Act cannot be compared to the harmonizing directives in the EU, the criticism of that it compares to an “obese Frankensteinian Monster” can also be applied to the EU acquis, albeit its fundamental differences in structure and evolution.

available. Of course, there could be multiple authors for a particular work, but a unitary title cannot be split territorially if a similar model is adopted that is also reflected in EU patent, trademark and design law. This unity of rights cannot be achieved by mere increased harmonization, which would always be subject to a higher degree of fragmentation and accordingly an increase in transaction and information costs. These factors make the establishment of a digital single market for the EU more difficult because they can prevent the creation of innovative content-based services by posing significant hurdles for cross-border online offers.

3. The perspective for a unitary copyright title

Work on a EU copyright title has not yet commenced, and the Commission has only timidly considered to begin a thought-process. Tilman, but that was still in 2011, expected a unitary copyright in the foreseeable future. The unification of trademark and designs was a two-step process, which started, respectively, with the introduction of a directive that harmonized certain aspects of the respective subject matter and then created a unitary title by means of a regulation. The European patent with unitary effect took more than 50 years to come to life, with little harmonization pre-existing the establishment of the unitary patent. For copyright, the situation is incomparably different. A total of ten directives would first require consolidation to form the substantive basis for a unitary copyright title. Indeed, a lot of work to be done, and it seems very unlikely that something will happen in the near or even “foreseeable future”.

IV. One out of three?

The effects of a unitary title could, to a large extent, be achieved by increased harmonization in form of a comprehensive “European Copyright Regulation”. The added advantage unification could bring is the complete abolition of territoriality in the EU. An approximation of substantive copy-

1593 See Article 1(3) Community Designs Regulation, Article 1(2) Community Trade Mark Regulation, and Article 3(2) Unitary Patent Regulation.

right law, in particular the establishment of widely similar or even identical rules for L&Es and TPMs could in fact also be achieved with less intrusive means. The question therefore is, whether the advantage of a unitary title would justify legislative action based on Article 118 TFEU. In this context, Article 118 must not be understood as an obligation, or even as a statement of a political intention to introduce an unitary copyright title, considering that the provision was introduced with the unitary patent in mind. And compared to patents, designs and trademarks, copyright does not require registration. But it was, amongst other reasons, the registration requirement and its associated costs that constituted a barrier to intra-community trade that justified the introduction of the European patent with unitary effect.

The fragmentation of copyright and the coexistence of currently 28 national copyright titles in the EU weigh heavier than in the cases of the IPRs that have received unitary protection at EU level. The barriers to trade and especially the cross-border provision of (online) services are incomparably higher for the exploitation of works protected by copyright and other related rights than for industrial property rights, not for their acquisition, but for the ensuing transaction costs. Already to reduce transaction costs and increase the viability of content-based services, a unitary copyright title would seem to be justified.

Changes to the current acquis, in substance and in system, are necessary and cannot leave Member States with a margin of discretion too large if the aim is, amongst others, to create a well-functioning digital single market. Continued harmonization at a low level can result in significantly increased differences between national laws. Initiatives to improve the management aspect of EU copyright law can best be achieved by a regulation, which would be directly applicable in the Member States. In terms of legal basis this approach does not require to resort to Article 118 TFEU if the regulation would not aim at establishing a unitary right, but instead were aimed at establishing a core of European copyright law that would erase certain disparities that hinder the establishment of a digital single market. At the same time, the possibility of a unitary title should not be abandoned altogether when opting for a regulation that merely harmonizes instead of creating a unitary title.

C. Legislative options for the “Copyright Dilemma”
1. Urgent problems need quick responses

It has been suggested to take a step-by-step approach to copyright reform. The changes suggested require either a directive with little discretion for Member States for its implementation, or a regulation that unambiguously prescribes a number of essential elements of European copyright law. This regulation could form the nucleus for a unitary right that would come in some intermediate future.

It is also clear that mere cosmetic changes to the *InfoSoc Directive* by way of an adaption of the provisions to technological developments would probably fall short of creating the necessary legal framework that would enable the use of protected works and other subject-matter in a digital single market of 28 Member States.

A unitary copyright title would require reflection on the entire copyright *acquis*, and it would require solutions for aspects of copyright and related rights that are currently not subject to EU harmonization. In principle, nothing can be said against a rethinking of copyright, but with the current speed of copyright reform under the “Digital Agenda” and its successor, the “Digital Single Market Strategy” it must be reasonably feared that concrete results could not be expected within a tolerable time perspective. However, relatively quick solutions for some of the pressing concerns stemming form the current state of the EU legal framework for copyright are absolutely necessary, at least if the goals set by the Commission itself should be achieved at all. Drafting and negotiating an EU copyright instrument that would introduce a unitary title, in whichever form, could have the effect of stalling ongoing reform plans. In the meantime, rightsholders and users alike would be left with a legal framework that does not deliver practical solutions for the management of copyright. The balance in copyright would be surrendered to the tides of technological developments.

Leaving European business and users in a lasting legal limbo neither contributes to legal certainty nor to efficient management solutions for digital content in the single market. If work on a unitary title were to commence it would require parallel work that supplements the current *acquis* with punctual improvements that lead a process that can eventually result in unitization. Such accompanying measures are necessary and unavoidable in order to maintain an appropriate copyright framework in the EU, especially because Member States only have limited flexibility to legislate individually. These intermediary solutions would form the
substance of a short- to medium-term copyright reform (or more of a step-wise adjustment) but must already reflect a turn in copyright policy towards a more balanced trade-off between the interests of users and rightsholders. Instead of, or in addition to, inserting new exceptions to the existing list of Article 5 *InfoSoc Directive*, a moderate opening clause could be added that permits the application of existing L&Es by analogy to similar cases. This approach could then be developed into a genuine open norm.

Therefore, the question of copyright reform should not be which of these three options should be chosen, but how a continuation of incremental harmonization can be used as a catalyst for a more comprehensive and more systematic reform of the existing EU copyright rules.

2. A word on competence

Pursuant to Article 5 of the *Treaty on European Union*,\(^{1595}\) the EU can only act in accordance with the principles of conferral, subsidiarity and proportionality.\(^{1596}\) Under Article 5(1) the EU may only act in such areas, in which the Member States have conferred competence to attain the aims set out in the Treaties.\(^{1597}\) These powers shall only be exercised, outside the exclusive competences of the Union, when the aims pursued cannot be better or equally well achieved by the Member States themselves,\(^{1598}\) and the actions taken by the EU shall not exceed what is necessary to achieve the aims.\(^{1599}\)

Substantive copyright law has traditionally been harmonized under the non-exclusive competence of the EU (or earlier the EC) based on Article 114 *TFEU* (ex Article 95 *TEC*), certain aspects relating to the cross-border provision of services have also been based on Articles 51(1), 53(1) and 62 *TFEU*. With the introduction of Article 118 *TFEU* another provision within the scope of the Union’s non-exclusive competence was added.

\(^{1597}\) Article 2 *TEU*.
\(^{1598}\) Article 5(3) *TEU*.
\(^{1599}\) Article 5(4) *TEU*. 

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Under Article 167 TFEU the EU is barred from enacting directives or regulations in the wider realm of culture. Accordingly, within the scope of competence the EU has to observe the principles of subsidiarity and proportionality with regard to form and substance of legislation.\textsuperscript{1600}

The subsidiarity requirement should not hinder further harmonization of L&Es to enable uses that are particularly relevant in a digital context. The creation of UGC, but also uses that provide access to knowledge, research and education are already partly included in the \textit{InfoSoc Directive}. Therefore, an extension or modification of Article 5 would not be blocked by subsidiarity, neither would a modification of Article 6. Due to their potential cross-border effects, exercises of L&Es in a digital context, and the protection of content by TPMs should be harmonized at EU level. To achieve maximum legal certainty that provides service providers with a sound legal framework for their business models, and that can enable the exercise of user rights and fundamental rights, action at EU level is warranted. For the same reasons that had the EU Commission chose a regulation as legal instrument for its content-portability initiative, a regulation as a stronger instrument for legal harmonization with immediate direct effect would also be justified to “digitize” European copyright law.

A reform of the core of copyright is certainly within the competence of the EU, especially because these areas are already subject to harmonization. Such a modification of the existing \textit{acquis} would not extend the scope of existing copyright harmonization, but would merely alter the substantive legal provisions. However, an enlargement of the scope to areas that are not yet subject to harmonization could possibly violate the principle of subsidiarity. In particular aspects of copyright that apply exclusively to analog distributions can also be regulated at national level, with none or minimum harmonization at EU level necessary. Areas of copyright that fall within the political domain of the “Digital Agenda” and the “Digital Single Market Strategy”, in other words those areas that are directly linked to the cross-border offer of digital content require regulation at EU level, and they also require a higher degree of harmonization.

As a result, a competence for the EU can be assumed for all the aspects of copyright law discussed in this study. Accordingly, the legislative powers certainly cover the subject matter. Regarding the form of a

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possible legislative intervention that would continue existing harmonization, neither a directive nor a regulation would pose any problems. Whether a European copyright title under Article 118 would also be possible depends on the scope of that title and its interaction with existing national copyright titles. In the medium-term, a European Copyright Code, which would cover the subject matter of the *InfoSoc Directive* and achieve a higher degree of harmonization than the Directive currently does, is the most realistic option under the current competences of the Union, but it must remain open whether that is ultimately also politically feasible.

**D. Perspective**

Six years after the “Digital Agenda for Europe” the “Digital Single Market Strategy” has produced almost unprecedented activity. With more and more consultations and communications there is a lively discussion on copyright in the EU single market. And the initiatives that were started in 2015 have are now delivering results. Although it is too early to cast judgment on these developments they certainly allow for a first assessment on the direction EU copyright seems to be moving in.

In September 2016, the European legislator substantiated its policy plans with concrete proposals for legislation. A new Communication (which was, keeping with young traditions, again leaked a few days prior to its official presentation) accompanied and introduced a number of new legislative proposals.\footnote{1601 European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Promoting a fair, efficient and competitive European copyright-based economy in the Digital Single Market*, COM(2016) 592 final, Brussels, 14.09.2016.} Amongst the instruments that were put on the negotiation table were two instruments that dealt in particular with the implementation of the *Marrakesh VIP Treaty*. A directive would permit certain persons and authorized entities to make accessible format copies of works or other subject matter and, for the authorized entities, to make such copies available, lend them or distribute them to persons who are entitled
to benefit from this exception. A corresponding regulation would permit the authorized entities referred to in the draft directive to export and import accessible format copies. It would further oblige such entities to exercise certain functions, amongst them to prevent unlawful reproductions and other infringing act of such copies and limit the distribution of such copies to beneficiary persons or any other authorized entities.

A draft directive titled “On Copyright in the Digital Single Market” contains provisions on further exceptions for text and data mining, cross-border teaching activities and the preservation of cultural heritage. All these exceptions are planned to be mandatory, however the provisions on the exception for text and data mining contains a clause that would prevent that the exception could be overridden by contract, the other two exceptions do not foresee such a rule. Article 6 of the draft directive states further that the three-step test of Article 5(5) InfoSoc Directive and the provisions on TPMs would apply unchanged to the new exceptions. Recital 7 illuminates the EU legislator’s approach that entrusts the rightsholders with ensuring the accessibility of works under exceptions by voluntary measures and the fallback provision of Article 6(4) InfoSoc Directive. Article 7 provides for a territorial ECL mechanism to access out-of-commerce works. This mechanism should, however, only work to the benefit of cultural heritage institutions, which can acquire licenses from

1602 European Commission, Proposal for a Directive of the European Parliament and of the Council on certain permitted uses of works and other subject-matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, COM(2016) 596 final, Brussels, 14.09.2016, see in particular Article 3 (“Permitted uses”), Article 4 would then oblige Member States to ensure that authorized entities exist in their territories that can make copies and make them available, lend and distribute them to individuals concerned by the exception.


1605 Article 3(2), Ibid.
collecting societies to digitalize, distribute and communicate such works or other subject matter to the public which are permanently in their collections. Licenses acquired this way\textsuperscript{1606} would be, by virtue of Article 8, valid for all Member States. A very short provision on the access to and the availability of audiovisual works on video-on-demand services aims at facilitating the licensing of audiovisual content. Member States should indicate such an “impartial body with relevant experience” (so not necessarily a CMO) that can assist with negotiations and the conclusion of agreements.\textsuperscript{1607} The draft contains further provisions on a new exclusive right for publishers for their press publications (Article 11),\textsuperscript{1608} (possibly) slight modifications to the existing rules on intermediary liability (Article 13),\textsuperscript{1609} and a mechanism that would allow authors to re-negotiate existing licenses to react to the changing modalities and potentially increasing success of the exploitation of their works (Article 14). The draft regulation on rules “on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisation and retransmissions of television and radio programmes”\textsuperscript{1610} establishes a country of origin regime for “ancillary online services”. These are services which, according to Article 1 of the draft, consist “in the provision to the public, by or under the control and responsibility of a broadcasting organisation, of radio or television programmes simultaneously with or for a defined period of time after their broadcast by the broadcasting organisation as well as of any material produced by or for the broadcasting organi-

\textsuperscript{1606} The license must be acquired from a collecting society that has a certain attachment to the work or other subject matter, see Article 7(4).
\textsuperscript{1607} Article 10, Ibid.
\textsuperscript{1609} This has been heavily criticized by a number of academics in an open letter to the European Commission, see Sophie Stalla-Bourdillon et al., “Open Letter to the European Commission - On the Importance of Preserving the Consistency and Integrity of the EU Acquis Relating to Content Monitoring within the Information Society”, 30.09.2016 (SSRN), available at: http://ssrn.com/abstract=2850483 (accessed: 12.10.2016).
sation which is ancillary to such broadcast”. Article 2 provides that the relevant place for the act of communication to the public of ancillary online services is the Member State in which the broadcasting organisation has its principal establishment. The draft further provides in Article 3 that rightsholders other than broadcasting organisations may only exercise their rights for retransmissions through a collective management organization and would establish a legal fiction to the effect that the rights of formally unrepresented rightsholders are represented by and can be cleared through a CMO that manages that category of rights in the relevant territory.

These reform proposals do not break with the language of earlier communications and legislation by reiterating the importance to maintain a high level of protection for rightsholders and the necessity to achieve a fair balance between the competing interests. They also extend the use of mandatory collective management to new areas and introduce a country of origin mechanism for certain online uses. A number of transactional facilitators in form of independent bodies are foreseen in the proposals that would help to deal with existing copyright rules, rather than to change them. Necessary additions to the catalog of L&Es are suggested, without breaking with the established approach to provide for lists rather than for open norms. The rules for TPMs are not subject to revision and the three-step test is neither altered, nor is its uncertain scope and application explained in more detail.

It is indeed too early and of little use to discuss the details of these drafts and to discuss their potential impact on the specificities of marketing and making available of digital content; this is what the proposals are essentially about. And this is also not the aim of this study. Instead, this study will conclude by positioning the approach the European legislator has taken, and continues to take, in the bigger picture of European copyright reform.

1613 Interestingly, the proposal differentiates between ‘limitations’ and ‘exceptions’ (cf Articles 3 and 4, European Commission, COM(2016) 593 final), without however, explaining its systematic differentiation.
A reform of copyright law in the EU that aims to establish a digital single market on which content-based services are offered that are directed at consumers, but that also enables a participatory Internet, which permits users to express themselves in a variety of ways, cannot only focus on transactional licensing solutions, punctual improvements and legal fictions. Such a reform ignores the wider interests of users and neglects essential functions of copyright. In the current reform proposals, private users are merely considered as passive recipients of services. Instead they should be treated as active participants and users of services in which they consume and generate content. Only by including all involved interests can a reformed copyright system constitute and reflect a (fair) balance.

It is also advisable that copyright in the analog world and copyright in the digital world do not become two different set of rules. The InfoSoc Directive indicated in its Recitals 29 and 31 that certain rules that apply to embodied works protected by copyright do not necessarily apply equally to digital works but that (in this context in relation to L&Es) certain rules have to be “reassessed in the light of the new electronic environment.” This should, in a reformed copyright framework, remain the exception. As far as possible, legal rules should apply irrespective of the particular format of a work, and interpretative approaches to these rules should also not differ depending on whether the technological context is analog or digital. Otherwise the “Digital Agenda” and the “Digital Single Market Strategy” continue the tradition of European copyright law as an economically-oriented legal framework that fails to strike a proper balance between the interests of rightsholders and public policy in general, and users in particular. The European Commission should address these shortcomings by formulating further reform proposals based on sound policy objectives that are informed by fundamental rights and fundamental freedoms.

1614 Arguing that separating digital copyright law and copyright law proper would be impossible: Synodinou in: Savin & Trzaskowski, Research Handbook on EU Internet Law (2014), p. 108; the author makes this argument by pondering the idea of creating a separate (global) legal framework for information technology, of which the digital aspect of copyright law would form an element, not only because of the infeasibility of a codification of such magnitude the idea is ultimately rejected.

For the medium term, the long term vision of a unitary copyright, or at least a European copyright code, would only have beneficial effects if it leads to a more comprehensive approach to increased harmonization in the shorter term. In the absence of a comprehensive vision that directs immediate copyright reform a potential future unitization would necessitate a complete overhaul of existing rules and a systematic rethinking of EU copyright against a background of an even larger and more fragmented copyright acquis. It would also question current reform proposals retrospectively.

In March 2015, the European Commission announced that it would modernize “copyright law to ensure the right balance between the interests of creators and those of users or consumers”. The abolition of geo-blocking was only referred to with regard to online services and the rerouting to “local stores”.¹⁶¹⁶ In how far geo-blocking will be addressed in relation to copyright is still unclear. The proposal for a Content Portability Regulation addresses geo-blocking only within a very limited scope and can hardly be seen as an ultimate response to this issue. Neither the proposed regulation nor the latest communications mention geo-blocking expressly.

The 2015 Communication “Towards a modern, more European copyright framework” that introduced and announced legislative proposals to the existing acquis set out a vision for a unitary EU copyright. This vision was carefully phrased. The drafters acknowledged the importance of a uniform application of the EU copyright rules and a “shared understanding of EU copyright law”. It was also acknowledged that market-led solutions as responses to novel uses of protected works require monitoring. This can be interpreted as an expression of a slight mistrust towards such solutions, possibly as to their effect on the balance of interest in copyright, but this is merely speculation. The long-term vision for copyright in the EU is, in the Commission’s own words, “one where authors and performers, the creative industries, users and all those concerned by copyright are subject to the very same rules, irrespective of where they are in the EU.” To define and to shape this vision, the Communication does not exclude the possibility to “call upon experts to assist it with defining further need for

reform of EU copyright rules.” The experts that can help in this context have been cited, not necessarily exhaustively, above: academics that have had this vision already for a number of years. However, the Commission also acknowledges that the establishment of a unitary title will take time and would need to cover areas of copyright law that have so far escaped harmonization, especially those areas with high cultural sensitivity. In addition the Commission underlines that these difficulties should not discourage efforts to unitize copyright law in the EU, because the EU (digital) single market cannot function perfectly without such a title.

For the near future the bad habit of punctual legislative interventions will probably be continued. For L&Es it is planned to introduce new exceptions “closely related to education, research and access to knowledge”. It has been furthermore announced to consider whether it is necessary to clarify the definitions of the exclusive rights and existing systems of remuneration. These are all important aspects, but their legislative roll-out is planned in stages and it must be feared that this approach will fail to establish a more comprehensive and principle-based EU copyright framework. It will, of course, depend on the precise formulations of the legislative proposals whether this mini-reform will help to rebalance copyright, but also in this regard the future seems rather bleak. With the focus set on redefining rights and introducing new rights, extending L&Es only very carefully, and adding copyright enforcement to the mix the Commission pursues its rightsholder-oriented copyright policy.

From an economic perspective, a unitary copyright would be beneficial for European businesses enabling them to compete with actors on other important international markets. Services that are first established in the EU would find a more efficient legal environment that allows the setting-up of cross-border online services based on digital content. Hilty even considered a unitary title necessary for the European economy to be able to preserve its competitiveness vis-à-vis other important economies and

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suggested a unitary title as a “common (European) way forward”.\footnote{Hilty in: Synodinou, \textit{Codification of European Copyright Law: Challenges and Perspectives} (2012), pp. 355 and 359.} An EU copyright title would facilitate rights clearance for content-based services that are offered in multiple territories and that services once established could be easily extended to other Member States of the EU. This constitutes a clear advantage even over advanced harmonization in form of a European copyright code that would not result in a unification of EU copyright but merely an increased level of harmonization.

Maybe the foreseen and suggested minor alterations of the legal framework will feed into a more comprehensive review of the copyright rules that go further than just a long-term vision, and which has shone through in the policy debate every now and then.\footnote{Cf. Gotzen in: Synodinou, \textit{Codification of European Copyright Law: Challenges and Perspectives} (2012), see also already European Commission, \textit{Creative Content in a European Digital Single Market: Challenges for the Future. A Reflection Document of DG INFSO and DG MARKT}, pp. 18-9.} And, indeed, a more comprehensive reform of copyright is necessary to fix the current legal framework.\footnote{Suzy Frankel, “The International Copyright Problem and Durable Solutions”, \textit{Vand. J. Ent. & Tech. L.} (2015), 101-137, p. 113, though Frankel discusses copyright reform at a global level and advocates for a different interpretation of copyright rules.} The elements that have formed part of the analysis in Chapter 3 require attention, but they can only contribute to a bettering of the current state of affairs if they are put into a wider perspective of a copyright reform. In this context copyright rules for digital uses are also only one of many ends for which new means have to be created. Creating these means provides the opportunity to re-strike the balance between the interests of rightsholders and users.\footnote{Cf. Rosati, “The Wittem Group and the European Copyright Code”, \textit{JIPLP} (2010), p. 868.} If the reconsideration of the copyright equilibrium were to be approached in every incremental adjustment of the European copyright rules this would hardly result in a copyright system that is founded on the same set of principles. It is necessary to establish these principles first, and then approach a readjustment of the legal norms through which the principles find expression and application.

The principles that should be parts of the foundation of copyright must include fundamental rights and fundamental freedoms, and guidance on their interaction. As a mitigating factor a standard of reasonableness could
be introduced. Such a standard has crystallized in the jurisprudence of the CJEU when it developed the requirement that L&Es must be interpreted to enable a particular exception to be exercised effectively. The same interpretation could also be adopted for exclusive rights, exercise of which should be effective, with the result that the rightsholder can exploit the rights to a reasonable extent, without, however, maximizing his profits. This interpretation borrows from the third element of the three-step test and also bases itself on the early case-law of the CJEU in relation to the exhaustion principle. The fundamental freedoms, which are founded in the Treaties, and the general principles of EU law, including legal certainty and proportionality, must safeguard that the rules are predictable and apply to new forms of uses and exploitation brought about by technological innovation.

A reform of the EU copyright rules could then commence with the provisions of the *InfoSoc Directive*. In this process, other existing Directives could be absorbed to reduce the fragmentation of norms at European level. For example, the provisions of the *Software Directive* could be merged with those of the *InfoSoc Directive*. The *lex specialis* rules for computer programs would be united with the *lex generalis* set of rules for ‘normal’ works. The same could happen with a number of other directives, including the *Database Directive* and the *Rental and Lending Rights Directive*. The new extended centerpiece would encapsulate the guiding principles and, as their expression, a new balance in copyright. Future reform and harmonization could then take this new legal instrument as a point of orientation and departure. Such a fresh start, if it were to reconsider the existing rules in their foundation, would have to consider existing differences of national copyright traditions. A higher degree of harmonization inevitably requires abolishing national traditions, which will have to give way for a more European copyright framework.\(^\text{1622}\)

The flexibility offered under international law is considerable. The three-step test governs the realm of L&Es, however, without prescribing too many concrete exceptions. The fair use precedent does not make the adoption of a moderate open norm impossible, in particular if that open norm would borrow from the language of the test itself. Similarly, the

\(^{1622}\) Cf. Synodinou in: Savin & Trzaskowski, *Research Handbook on EU Internet Law* (2014), pp. 101-2; the author sees obstacles in finding common ground between the common law and civil law traditions, but in general between different traditions of national copyright laws.
provisions on TPMs in international treaties do not prevent the EU from adopting rules that protect rightsholders to the extent that violations of their rights can be prevented, but intentional overprotection is avoided. The exclusive rights are not exhaustively defined in international instruments, neither are the details of exhaustion prescribed, in particular international norms do not prevent exhaustion for digital works. Other aspects of copyright that fall outside the scope of the international copyright rules leave the European legislator even more room for reform.

It should be noted positively that the European Commission has repeatedly expressed the intention to create a vision of an EU unitary copyright title. Unfortunately, it has failed to link the existing legislative works to such a long-term vision. In order to avoid a violent break in copyright policy at a later stage it can only by instrumental to build a bridge from short-term fixes to a long-term development of a more comprehensive European set of rules. It would therefore be necessary to conduct work on both in parallel. Ultimately, only a reconstruction of the legal framework for copyright in the EU can restrike the balance of interests. Such a reconstruction carries with it the opportunity to create legal rules that enable the establishment of a digital common market without borders that offers users a multitude of diverse online services and which safeguards an appropriate income for creators as well as intermediaries.

In view of the relative urgency of changes that are required to existing legal rules a more targeted legislative agenda would be a more realistic option than that of a general overhaul of most of the existing rules at EU level. As a matter of fact, a systematic approach and incremental changes are not mutually exclusive if the latter are made with the vision of a bigger reform in mind. This would mark the departure from a segmented and fragmented approach to copyright harmonization that has so far displayed tendencies of rightsholder-fixation, towards a bigger, more coherent and principled approach that understands the rules that make up the acquis as a system of rules which, founded in a principle-based approach, respect a fair balance between the interests of all concerned stakeholders. Such a course of action can further prevent the risk of failure in interaction

1624 Cf. Westkamp, “Copyright Reform and Necessary Flexibilities”, IIC (2014), p. 499: “Any reform must clarify that copyright protection does not simply exist to create additional income for existing right holders. It must, on the contrary,
between a multitude of legal instruments and the loss of a long-term vision in the daily business of political lobbying.

A more far-reaching copyright reform is not yet on the horizon, neither is a more systematic legislative agenda. Full unitization, which is preferred by some\textsuperscript{1625} is certainly an unrealistic option for the near future, but as a distant goal a European copyright system could already now influence and inspire legislative proposals. The core provisions of the existing EU copyright *acquis* may well serve as a starting point. But instead, the European Commission pursues fragmented alterations and public discussions and is losing itself in skirmishes, far away from a structured and balanced debate.\textsuperscript{1626} With a view to a systematic and well-balanced set of rules, small cosmetic changes that are reactions to far more pressing problems, copyright in the “Information Society” is, indeed, “too vast a subject”.

\textsuperscript{1625} Adolf Dietz, “Perspektiven für ein Europäisches Urheberrecht”, *GRUR Int.* (2015), 1186-1190, criticizing Fischer for his more differentiated approach (cf. Fischer, *Perspektiven für ein Europäisches Urheberrecht* (2014)).

\textsuperscript{1626} Cf. Eleonora Rosati, “Editorial: Are EU policy-makers fighting the right copyright battles?”, *JIPLP* (2015), 651.
Digital technologies have made it more difficult to control the circulation of protected works and subject-matter and the ubiquity of acts of reproductions on the Internet has increased the relevance of copyright immensely. However, the very same copyright rules apply to modern digital exploitations as well as to traditional analog uses of copyright protected material. Under these rules every reproduction, but also other acts of exploitation, such as the communication of such works to the public, or the making available for download of such works, require authorization from the respective rightsholders. For services that aspire to offer a wider variety of content the requirement to seek prior authorization creates high transaction costs. In addition, the advent of modern digital technologies has enabled users, who previously were limited to mere consumption of content, to use existing content and create new works, which they can then disseminate through different platforms.

In 2010 the European Commission formulated the “Digital Agenda” in which context it also intended to create European legal framework for copyright that would enable the establishment of a Digital Single Market. The “Digital Agenda” resulted in two pieces of legislation, the Orphan Works Directive and the Collective Management Directive but failed to change the existing copyright rules, most notably the relevant provisions of the InfoSoc Directive (Directive 2001/29/EC). However, the agenda has suggested modifications especially with regard to limitations and exceptions to the exclusive rights. The policy process was accompanied by a large number of different stakeholders, whose participation was formally integrated by a number of consultations, the most prominent of which was the 2014 “Public Consultation on the review of EU copyright rules”. In 2015, a newly composed Commission published its “Digital Single Market Strategy”, which, again, called for a reform of EU copyright rules to create a borderless market for digital content in the EU.

The increased activity of the Commission indicates what many scholars have repeatedly pointed out: the existing EU copyright rules are unsuitable to create and foster a digital economy based on creative content. The rules do not provide the necessary flexibility to accommodate new forms of economic exploitation that can form the basis for innovative business
models. In addition, existing copyright rules favor rightsholders. The primary goal of the current instruments of the EU copyright *acquis* is to provide a high level of protection for rightsholders. Other aims of copyright harmonization in the EU seem to have been subordinated to this principle.

This study isolates four elements which are, it is argued, essential for a reform of copyright in a digital single market. These are the (1) principle of territoriality and the doctrine of exhaustion, (2) limitations and exceptions (L&Es) to exclusive rights, (3) technological protection measures (TPMs), and (4) collective management of copyright. In their current state, these elements of the EU copyright *acquis* merit review as to their suitability to enable the creation of a borderless digital market in the EU. At the same time, many of the relevant rules are dating back to the beginning of the last decade and therefore possibly require slight to moderate adaptations, at least. This review and a potential reform of the rules must also take into consideration whether to sacrifice a just balance of interests between rightsholders and the public for economic efficiency.

The principle of territoriality, which has long been identified as the main stumbling block for the provision of cross-border digital content, has deep roots within the European single market. Its hindering effects for the free movement of goods have traditionally been mitigated by the principle of exhaustion, which provides that once a rightsholder has consented to the marketing of an item within the community, he or she cannot object to the further circulation of that item based on intellectual property rights. In the digital environment, the exhaustion doctrine has lost its enabling effect for a number of reasons. First, exhaustion, it has been submitted, does only apply to tangible items. This interpretation is not only based on the case-law of the CJEU and the express wording of the *InfoSoc Directive*, but also on the relevant provisions of international agreements. Second, it is argued that exhaustion, in principle, does not apply to services. Nevertheless, attempts have been made to base new business models, in Europe as well as in the US, on the re-sale of digital content, without requesting authorization from rightsholders. The reactions of the judiciaries have been different, but most notably, different national courts in the EU have come to different results. This uncertainty requires clarification on whether exhaustion applies to digital content. The national courts that refused digital exhaustion adhered to a strict interpretation of the respective legal provisions, which could, however, be changed if the political will existed. But exhaustion should not be extended to digital content.
without considering if such extension would not unduly shift the balance in copyright in favor of the general public, and users of content in particular. Whereas the CJEU in UsedSoft v. Oracle focused on a textual interpretation of the Software Directive as lex specialis and a wide interpretation of the term ‘sale’, it is suggested here to analyze whether there exists a functional equivalency between analog media and digital content. Arguments for and against have been raised in front of Dutch and German courts in relation to the resale of eBooks, as mentioned, with differing results. However, there are good arguments that a reasonable application of TPMs could justify an application of exhaustion to digital content. However, this would require legislative clarification, and an interpretation of the existing copyright rules to the effect that exhaustion applies to digital content does not seem realistic. Arguments that digital exhaustion per se would endanger existing business models and give rise to excessive copyright infringements should be considered with caution. The introduction of new cloud- and streaming-based business models might, in the near future, make this question redundant. The principle of territoriality as such is unlikely to disappear anytime soon, unless the EU were to introduce a unitary copyright title that would entirely replace national copyright.

The InfoSoc Directive, as the centerpiece of EU copyright law, contains two elements that are indispensable for a proper functioning of a digital single market. As the first element, L&Es enable the use of protected works and other subject-matter protected by copyright without prior authorization, thus significantly reducing transaction costs for users and re-users. Moreover, L&Es serve to uphold the interest of the general public within a copyright system by enabling uses that permit the exercise of the right to freedom of expression and the creation of new works. In addition, some L&Es exclude certain acts from the requirement of authorization that are necessary to operate digital technologies. At EU level, L&Es are not fully harmonized, which has led to different rules at national levels. These differences constitute a significant barrier to the cross-border dissemination of digital content, because certain uses of a work can be legal in one Member State and at the same time illegal in another. Due to the ubiquitous nature of the Internet this can have deterring effects on users and secondary creators. In order to improve the current system of L&Es in the EU a number of suggestions were made. First and foremost, all L&Es should become mandatory in all Member States and not be at the disposition of national legislators. Second, national legislators and courts require a certain degree of flexibility to adapt L&Es to changing techno-
logical developments. Although it is argued that the three-three-step test of the *InfoSoc Directive* could offer at least some degree of flexibility, the interpretative room for maneuver under the current *acquis* is limited. In particular with regard to mass-uses of digital content, such as the *Google Books* project, inspiration is drawn from the US fair use system, an adoption of which is, however, rejected. Instead, it is suggested to allow for flexibility by way of an inspired open norm, which provides national courts with a tool that can be used to accommodate unforeseen uses, which are justified on grounds of public policy and fundamental rights. Such a norm should be based on the three-step test of the *Berne Convention*, without limiting its application. The open norm should employ the elements of the test to enable uses rather than restricting them. Such an open norm, which would draw inspiration form the existing list of L&Es, but would also permit analogies would create sufficient flexibility to safeguard the interests of users in a constantly changing digital environment, while also preserving the reasonable interests of rightsholders by underlining their fundamental interest of economic compensation for uses of their works.

The second enabling element of the *InfoSoc Directive* is Article 6 on the protection of TPMs. Such measures permit rightsholders to exercise automatic control over digital content by employing technology that disables certain functions of digital files. In principle, TPMs enjoy only protection in so far as they prevent unlawful uses, which has also been confirmed by the CJEU in *Nintendo v. PC Box*. The application of TPMs gives rightsholders or licensees the confidence to expose digital content to users. However, users might be significantly restricted in their use of content they have acquired legally. The disabling effect, by prevention of certain acts, can also spill over to uses that do not require authorization from rightsholders, for example the exercise of L&Es. This has the effect of limiting the exercise of lawful acts by users and consumers, while effectively extending the scope of protection of copyright. In order to adjust the balance between the legitimate interests of rightsholders and their licensees and the interests of the public to use digital content within the limits permitted by law and contracts, it is necessary to set appropriate limits to the protection against the circumvention of TPMs and to give users legal access to digital content when a spill-over effect of TPMs cannot be avoided. However, legal adjustments also require new technological measures that are better fine-tuned than existing technological applications. In any case, a fundamental change with regard to the protec-
tion of TPMs must concern the ability of rightsholders to increase protection not only by contract, but also by the application of self-executing technology. Legal protection against the circumvention of TPMs under copyright law must be limited to such measures that effectively prevent the violation of exclusive rights. Otherwise, the balance in copyright would suffer significantly and the trust of users in such technology could further have negative effects on the marketability of content protected by TPMs.

The last element considered essential for a smooth functioning of a digital single market is the regulation of Collective Management Organizations (CMOs). Here, the Commission has successfully intervened and passed the Collective Management Directive in 2014. The Directive is aimed at establishing, by way of horizontal harmonization, standards for governance and transparency for all CMOs, and at enabling the grant of multi-territorial licensing for the online use of musical works in the internal market. With these means, the Directive should create competition between CMOs by providing rightsholders with the right to mandate a CMO of their choice to manage their rights. It further improves the position of rightsholders by setting certain minimum standards for the governance of CMOs, in particular with regard to the modalities of the disbursement of royalties. The new provisions break with industry initiatives for cross-border licensing that relied on reciprocal representation agreements, which were, though, formulated in violation of the EU competition rules. Of direct concern for a digital single market are the provisions on multi-territorial licensing of musical works. Under these rules, CMOs which do not have the capacities to offer multi-territorial licenses can mandate another CMO to manage their repertoires. The so-called “passport system” should enable smaller repertoires to access the entire European market, even if the respective CMOs cannot manage their repertoires themselves. The main criticisms are that the provision of the Collective Management Directive will lead to competition that will concentrate the market for the granting of multi-territorial licenses, and that the system is restricted to the management only of online music rights.

The four elements of a more efficient and balanced European copyright management system only constitute the core of the legal framework. They must be supplemented by further measures. The developments of such measures, but also, and especially, the interaction of the core elements should be based on general rules and principles that reflect a balance of
interests. It is argued that a more balanced system will also have the effect to create a more efficient system that will see the creation of a more attractive offer of commercial and non-commercial content offers on the Internet by removing obstacles in form of high transaction costs. New technological developments will continuously challenge the balance of interests, which is why it will be important to create mechanisms within the legal framework that permit flexibility. Due to the dilatory effects of legislative interventions flexibility should to a certain degree, be applied by the judiciary. In order to enable the judiciary to create and readjust the balance between the interest of users and rightsholders, it is suggested to provide judges with a set of principles that will guide the exercise of that flexibility. These principles should stem in particular from the justifications for the existence of copyright which are reflected in the case-law of the CJEU with regard to the specific subject-matter of copyright, but also from basic fundamental rights and the fundamental freedoms on which the single market is based. It is, however, not sufficient to just provide a set of principles, their interaction must also be guided to avoid contradictory judgments by different courts.

Lastly, the introduction of adapted or new rules requires expression in a legislative instrument. The study discusses three potential options. The first option, which would only concern the rules of the *InfoSoc Directive*, would see a revision of the Directive to include flexibility and a more refined balance between the interests involved. Although the central element of the copyright *acquis* could, and should form the point of departure for a reform of the existing rules, this minimalistic approach could too easily result in mere cosmetic changes and bears the risk of getting lost in political debate. Therefore it is argued, as a second option, that a re-codification of the *InfoSoc Directive* in form of a directly binding regulation could establish the foundation for a revised European copyright system. Such a regulation could introduce another supplementary elements and possibly do away with the currently fragmented state of EU copyright legislation by including the *lex specialis* provisions of, for example, the *Software Directive* and the *Database Directive*, into the core of the copyright *acquis*. Still, a regulation, which could then take the form of a more comprehensive European Copyright Code, would not eliminate the effects of territoriality, as it would simply lead to a higher degree of harmonization. The problem of territoriality could be approached, as the third option, by means of an EU copyright title based on Article 118 TFEU that would either exist in parallel to national titles, or would abolish them altogether.
Such a title requires a much more comprehensive approach to copyright at EU level and raises questions as to competence, but also very technical issues in relation to the co-existence of national copyrights and an EU title and possibly the phasing-out of national copyrights. As this is, as the European Commission has acknowledged in its last Communication “Towards a modern, more European copyright framework”, a more ambitious endeavor, it will require thorough conceptualization and preparation. Therefore, an intermediate solution in form of a regulation should adopt changes to the existing rules and introduce flexibility into the existing legal framework. An EU copyright title should, however, not be abandoned as a guiding vision for the future.

Currently, the European Commission has dedicated itself to such a vision, but recent legislative proposals for a Content Portability Regulation and the September 2016 package do not fit into the picture of a more comprehensive, principle-based approach. It is therefore unlikely that a more efficient legal framework for copyright management in the digital single market will take shape in the foreseeable future. Rightsholders, intermediaries and users will have to continue their struggle to cope with slightly outdated legal rules for copyright which reflect the technological realities of a relatively distant technological past.
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