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# Review of the EU copyright framework

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## European Implementation Assessment

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STUDY

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**Ex-Post Impact Assessment Unit**

PE 558.762 - October 2015



# **Review of the EU copyright framework: The implementation, application and effects of the "InfoSoc" Directive (2001/29/EC) and of its related instruments**

## **European Implementation Assessment**

### **Study**

In October 2014, the Committee on Legal Affairs (JURI) requested from the European Parliament Research Service (EPRS) an **Ex Post Impact Assessment on Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (InfoSoc)**.

This EPRS publication was originally commissioned in the context of JURI's own-initiative implementation report, which was adopted in Plenary in July 2015, Rapporteur Julia Reda MEP. However, it is also relevant to the work of JURI Committees' Working Group on Intellectual Property Rights and Copyright (CWG), chaired by Jean Marie Cavada MEP.

Furthermore, this request was made in the wider context of the Commission's review of the EU legislative framework on copyright, and the ensuing legislative proposals, which have been a long time in the planning and which are now expected for the 4th quarter of 2015. The objective of these proposals is to modernise the EU copyright framework, and in particular the InfoSoc Directive, in light of the digital transformation.

Accordingly, in response to the JURI request, the Ex-Post Impact Assessment Unit of the European Parliament Research Service decided to produce a **"European Implementation Assessment on the review of the EU copyright framework"**.

Implementation reports of EP committees are now routinely accompanied by European Implementation Assessments, drawn up by the Ex-Post Impact Assessment Unit of the Directorate for Impact Assessment and European Added Value, within the European Parliament's Directorate-General for Parliamentary Research Services. However, in this case, owing to the wider context of JURI's request and of its related work in the JURI Committee's CWG, this European Implementation Assessment developed into a broader exercise covering both Ex-Post and EU Added Value aspects.

## **Abstract**

This European Implementation Assessment aims to provide briefing for the Committee on Legal Affairs (JURI) ahead of the publication of the Commission's legislative proposals concerning the modernisation of the EU copyright framework, which are expected towards the end of 2015. The specific objective is to help JURI Members achieve a better understanding of the actual gaps and weaknesses in the existing EU copyright framework.

For this European Implementation Assessment, input was received from three independent external contractors: A consortium led by the Centre for European Policy Studies (CEPS) with Economisti Associati as consortium partner; Milieu Ltd; and, Valdani Vicari & Associati (VVA) with the involvement of KEA European Affairs as a subcontractor.

This European Implementation Assessment is divided into an Ex-Post Impact Assessment study and three EU Added Value briefing papers, which are included as annexes.

The Ex-Post Impact Assessment focuses on the implementation, application and effects of the information society Directive 2001/29/EC (InfoSoc), and of its related instruments.

The three additional briefing papers investigate the EU Added Value of modernising the InfoSoc Directive and its related instruments, each one focussing on a general theme in EU copyright policy, and suggesting possible options for reform, namely:

1. The legal aspects of copyright covering, amongst others, the expected effects of any further harmonisation of the existing copyright framework, effects on other EU policies, and of the choice in legal basis.
2. The internal market aspects of copyright relating to inter alia territorial licencing, geo-blocking, exceptions and limitations.
3. The industry and industrial relations aspects of copyright, looking in particular at the copyright value chain and fair remuneration or compensation of artists, authors, content owners, as well as tackling infringements and enforcement mechanisms.

The introduction presents an overall analysis and summary of findings. This aims to highlight key overall findings as well as making sure these findings are presented in an easy format for MEPs, and in particular, that the overall evaluation highlights the benefits and problems with the InfoSoc Directive and its related instruments and the main options for reform, which the briefing papers have identified.

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- Ex-Post Impact Assessment study on the implementation, application and effects of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (InfoSoc) and of its related instruments, written by **Andrea Renda, Felice Simonelli, and Giuseppe Mazziotti (Centre for European Policy Studies) and Alberto Bolognini and Giacomo Luchetta (Economisti Associati srl)**.
- Briefing paper on the legal aspects of copyright: Added value and options for further harmonisation and efficiency of the EU copyright regime, including the projected impact on other policy areas, written by **Agnieszka Markowska and Nathalie Meurens of Milieu Ltd, and Ana Ramalho of the University of Maastricht**.
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- -Briefing paper on the industry and industrial relations aspects of copyright: Added value and options for improving enforcement and fair remuneration/compensation in the EU copyright system, written by **Viviana Spaghetti and Pierre Hausemer of VVA with the involvement of KEA European affairs**.

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## Introduction

This European Implementation Assessment is presented three months after the European Parliament adopted a [non-legislative resolution](#) on the implementation of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights (InfoSoc), Rapporteur Julia Reda (Greens, DE), and ahead of the European Commission's related legislative modernisation proposals, expected during the 4th quarter of 2015.

The introduction presents a summary of findings and analysis based on:

- the input from the Ex-Post Impact Assessment study on the implementation, application and effects of the InfoSoc Directive and of its related instruments,
- on three briefing papers on discrete aspects of the added value of modernising the EU copyright framework,
- this introduction is also based on internal research.

The draft and final study and briefing papers were presented and discussed at two Copyright Working Group meetings and one JURI Committee meeting in 2015.



# 1. Mapping the EU Legislative framework on copyright

<b>World Intellectual Property Organisation (WIPO) Treaties</b> <i>The EU legal framework on copyright and future reform must conform to these treaties</i>				
<a href="#">Berne Convention for the Protection of Literary and Artistic Works (1886, last amended in 1979)</a>				
<a href="#">WIPO Copyright Treaty (WCT) (1996)</a>				
<a href="#">WIPO Performances and Phonograms Treaty (WPPT) (1996)</a>				
<a href="#">Beijing Treaty on the Protection of Audiovisual Performances (2012)</a>				
<a href="#">Marrakesh Treaty (2013)</a> <a href="#">to facilitate access to published works for the blind, visually impaired or otherwise print disabled</a>				
<b>Initial EU instruments regarding copyright on specific subjects</b> <i>These instruments have not been updated or replaced</i>				
<a href="#">Directive 87/54/EEC</a> amended by <a href="#">Council Decisions 94/824/EC</a> and <a href="#">96/644/EC</a> on the legal protection of topographies of semiconductor products.		<a href="#">Directive 93/83/EEC</a> on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission.		<a href="#">Directive 96/9/EC</a> on the legal protection of databases.
<b>Main EU instrument establishing an EU legal framework on copyright</b> <i>This instrument has not been updated or replaced</i> <a href="#">Directive 2001/29/EC</a> on the harmonisation of certain aspects of copyright and related rights in the information society (InfoSoc Directive)				
<b>Later EU instruments regarding copyright on specific subjects</b>				<b>Enforcement</b>
<a href="#">Directive 2001/84/EC</a> on the resale right for the benefit of the author of an original work of art.	<a href="#">Directive 2006/115/EC</a> on rental right and lending right and on certain rights related to copyright in the field of intellectual property.	<a href="#">Directive 2011/77/EU</a> amending <a href="#">Directive 2006/116/EC</a> on the term of protection of copyright and certain related rights.	<a href="#">Directive 2009/24/EC</a> on the legal protection of computer programs, which recasts the original <a href="#">Directive 91/250/EEC</a>	<a href="#">Directive 2004/48/EC</a> on the enforcement of intellectual property rights (IPRED).
<b>Recent EU instruments adapting the copyright framework to the digital environment</b>				
<a href="#">Directive 2012/28/EU</a> on certain permitted uses of orphan works.  >>Transposition deadline: 29 October 2014.		<a href="#">Directive 2014/26/EU</a> on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market.  >>Transposition deadline: 10 April 2016.		

## 2. Evaluations carried out by the Commission and next steps

Previous evaluations of the EU framework on copyright in view of new media and the digital transformation	
Subject area	Communications/Reports
Implementation of the main EU instrument; how exceptions and enforcement are working at national level.	<a href="#">Commission Report SEC(2007)/1556</a> on the application of the Directive on the harmonisation of certain aspects of copyright and related rights in the information society (2001/29/EC).
Efficiency of the system of private copyright levies.	<a href="#">Vitorino Recommendations</a> (2013) resulting from the mediation on Private Copying and Reprography.
Digitisation and dissemination of books and library collections; orphan works and user generated content.	<a href="#">COM(2009) 532 final</a> on Copyright in the Knowledge Economy.
Addressing EU market fragmentation; improving access to content online; efficiency of the rights clearance system; remuneration of authors; administration of the resale right; exceptions and limitations.	<a href="#">COM(2011) 287 final</a> on a Single Market for Intellectual Property Rights.
	<a href="#">COM(2012) 789 final</a> on content in the Digital Single Market.
	2011 <a href="#">Report on the Resale Right Directive 2001/84</a> .
	2014 <a href="#">Recommendations on the management of the Author Resale Right</a> .
	2013 Licenses for Europe <a href="#">Ten pledges to bring more content online</a> .
Recent overall evaluation and review of the EU framework on copyright in view of the digital transformation	
Subject area	Communications/Reports
Initial announcements concerning the review of the EU copyright framework.	Commission Work Programme 2014 <a href="#">COM(2013) 739 final</a> and <a href="#">COM(2013) 739 final Annexes</a> .
Rationale and content of the review of the EU copyright framework.	2013 <a href="#">Roadmap</a> on the Review of the EU Copyright Framework.
Consultations and studies in the context of the review.	2013 <a href="#">Public Consultation on the review of the EU copyright rules</a> .
	2013 Extensive <a href="#">Study on the application of Directive 2001/29/EC on copyright and related rights in the information society</a> .
	March 2014: <a href="#">Study on Text and Data Mining</a> .
	March 2014: <a href="#">Economic analysis</a> of the territoriality of the making available right.
	May 2014: Study on the <a href="#">economic impacts of adapting certain limitations and exceptions</a> .
	July 2014: <a href="#">Report on the responses to the 2013 consultation</a> on the Review of EU copyright rules.
	December 2014: <a href="#">Study on the relationship of the making available right with the reproduction right</a> in cross-border digital transmissions.
	<b>September 2014: White Paper and accompanying Impact Assessment on the review of the EU copyright framework (leaked but not published).</b>
<b>Related legislative proposal(s) expected during the 4th Quarter of 2015.</b>	

### 3. Problem definition

The copyright intensive industries, which are principally the cultural and creative industries such as the music business and the visual arts, play an important role in supporting EU economic growth and jobs, employing over 7.5 million people in the EU and contributing around €554.66 billion to the EU economy in 2012<sup>1</sup>, or 4.2% of EU GDP.

However, in the digital age, this contribution could be higher in view of the advanced development of the societies and economies of Europe, and especially given Europe's cultural diversity and wealth, as well as its international influence. A helpful comparison can be drawn with the United States, where the copyright intensive industries contribute approximately 6.5% to US GDP, employ 11 million people (for a smaller population than the EU's) and generate around 1 trillion dollars (€900 billion) in annual turnover<sup>2</sup>.

The past 5 to 10 years have seen a very rapid increase in content consumption through digital channels as a result of technological developments, in particular, the widespread roll out and use of new products such as the smart phone, the tablet and internet TV. Even within the digital environment, consumption itself is becoming even more 'virtual': a new trend can be observed moving away from the time-consuming and physical act of downloading content in favour of just immediately streaming content.

In contrast to this rapid evolution, a surprisingly low proportion of the revenue generated by these industries corresponds to digital sales. From the EU industry data published by Ernst & Young (see section 4), it may be deduced that total revenue roughly attributable to digital content sales in the EU was most likely below €45 billion in 2012 (the bulk of which was generated, in all likelihood, in the newspapers and magazines sector). Therefore, digital content revenues equated accordingly to, at most, 8% of the approximate €554 billion overall revenues generated by the EU's copyright industries.

There is a degree of uncertainty in these estimations because figures for the EU's newspaper and magazine sector do not distinguish online revenues from direct sales, and the digital content revenues of the EU book sector have not been isolated in the dataset either. However, these gaps are not thought to bear a significant impact on this analysis. In reality, the EU copyright intensive industries' total digital content revenues are probably closer to €30 billion (about 5% of total revenues).

A variety of factors can explain the discrepancy between the extent of digital content consumption in the EU and actual digital sales. Although not all factors relate to the EU legal framework's weaknesses, a modernisation exercise is likely to resolve many issues, but only if this reform is proportionate, structured, and carried out responsibly. This reform should start by focusing on the main EU instrument establishing an EU legal framework on copyright, which has not been updated or replaced since coming in to force, that is [Directive 2001/29/EC](#) on the harmonisation of certain aspects of copyright and related rights in the information society (InfoSoc Directive).

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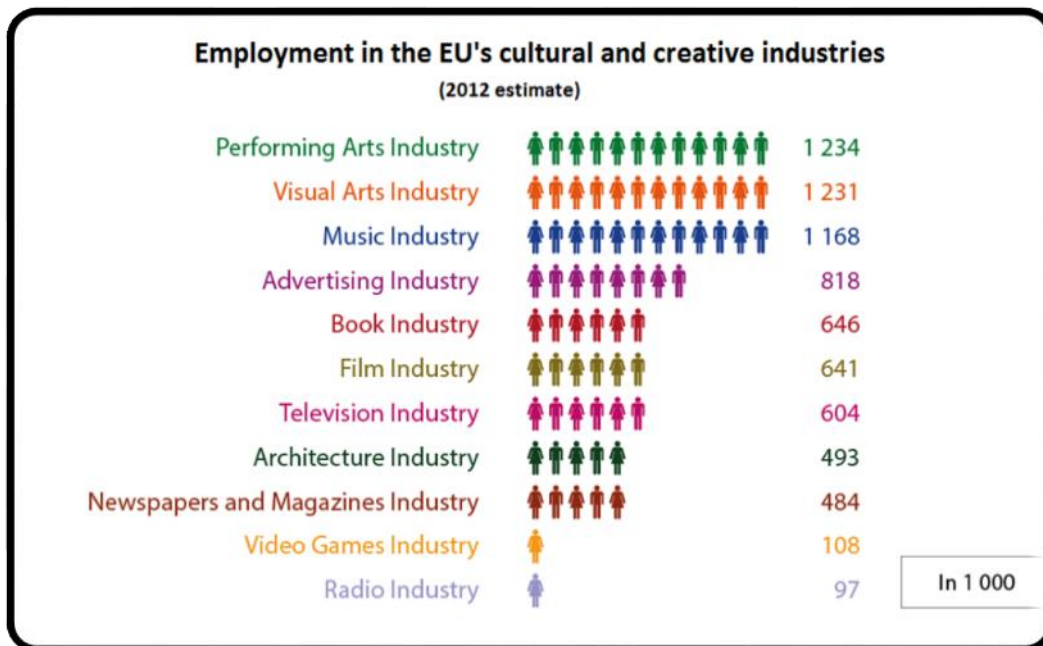
<sup>1</sup> [Figures from Ernst and Young's December 2014 study. See section 4 for further details.](#)

<sup>2</sup> [http://www.iipa.com/pdf/2013\\_Copyright\\_Industries\\_Full\\_Report.PDF](http://www.iipa.com/pdf/2013_Copyright_Industries_Full_Report.PDF)

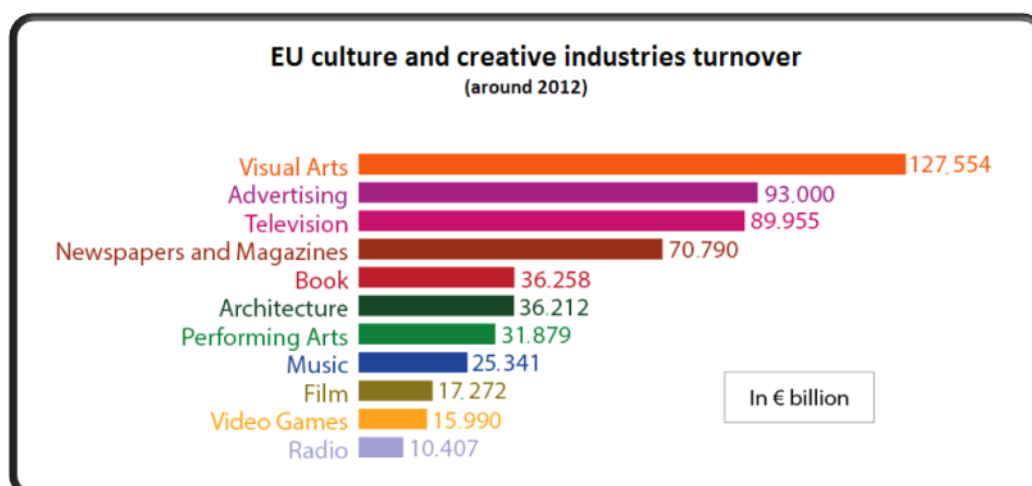
## 4. The EU copyright intensive industries in figures

A review of published information sources on the size and breakdown of the EU's copyright intensive industries concluded that [Ernst and Young's December 2014 study](#) on "creating growth: Measuring cultural and creative markets in the EU, carried out for [GESAC](#), is the most comprehensive, consolidated, and up to date source.

### 4.1. Overall figures



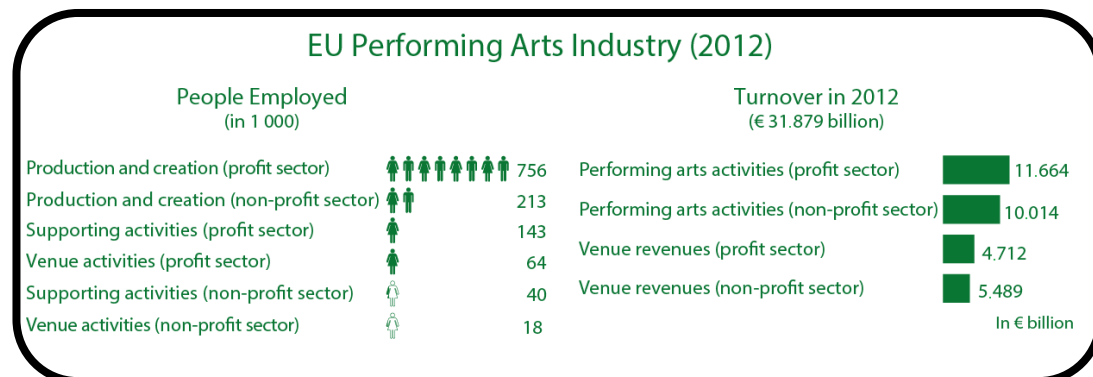
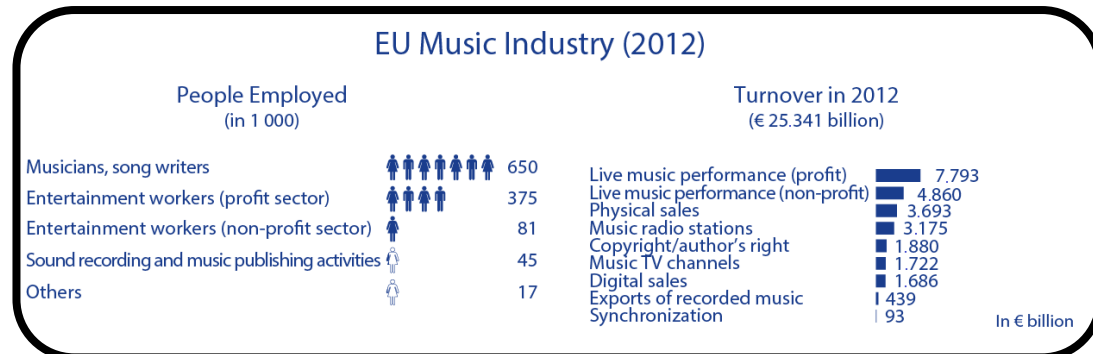
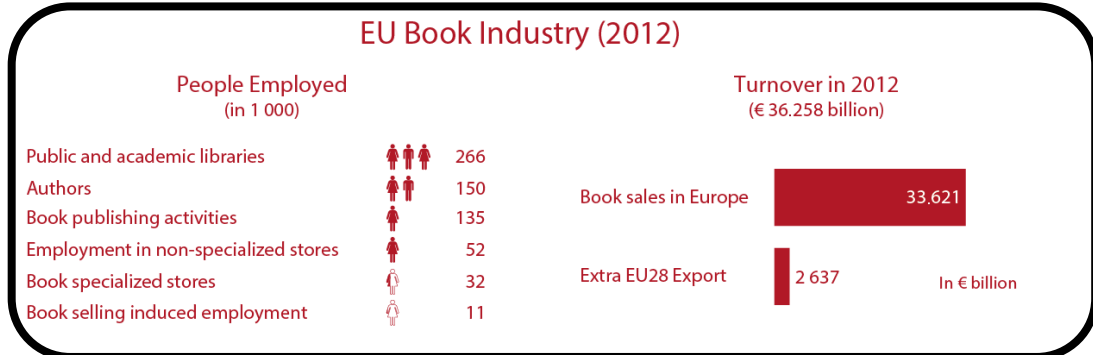
**Total: 7 524 000**

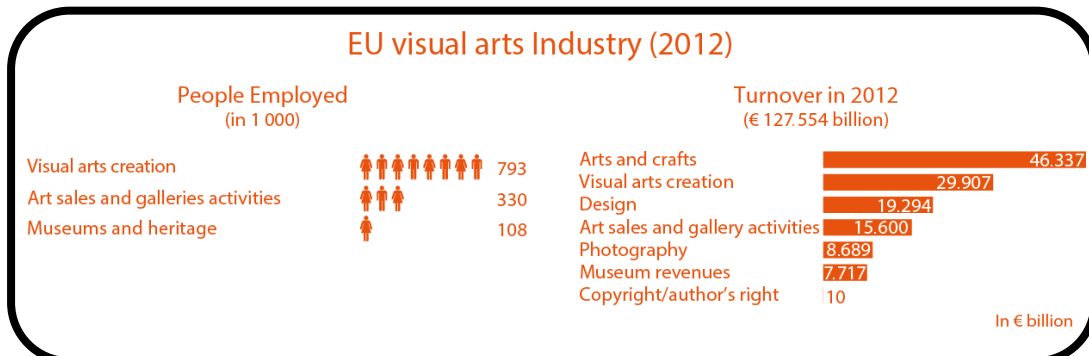
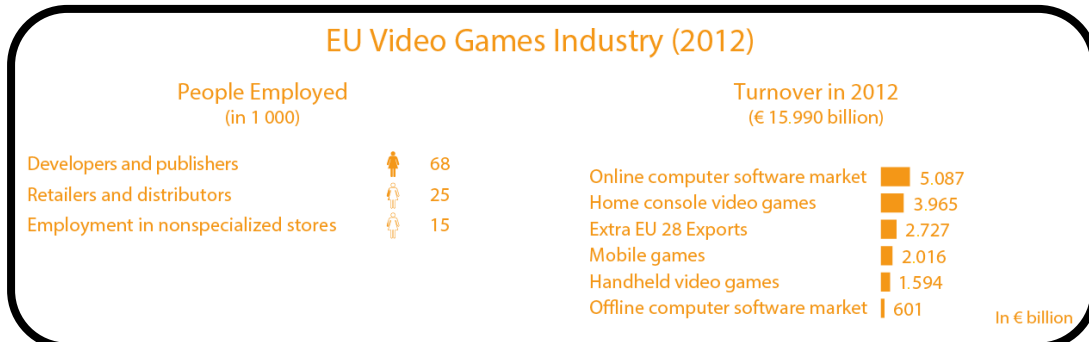
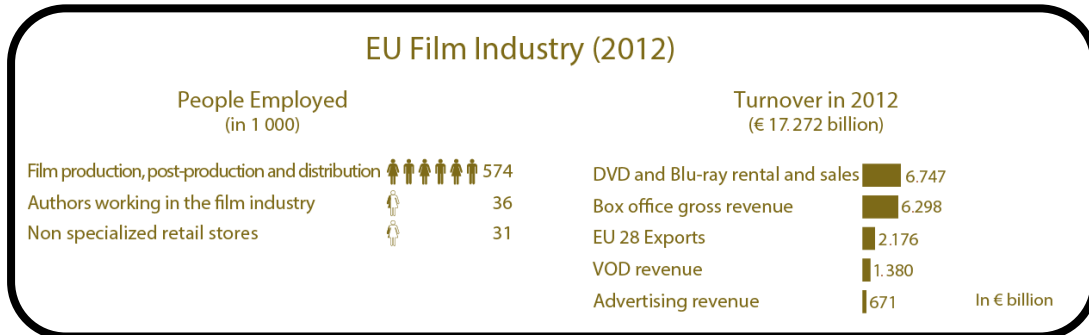


**Total: €554 658 000 000**

## 4.2. Breakdown by sector

(Detailed figures for the Advertising, Architecture and Radio Industries are not available)





*Source: Authors' own elaboration on Ernst and Young data.  
Graphics by Giulio Sabbati, EPRS – PMES.*

## **5. Key findings of the Ex-Post Impact Assessment on the implementation, application and enforcement of the InfoSoc Directive and of its related instruments**

This section relates to the work carried out by the Centre for European Policy Studies (CEPS), see [Annex I](#). The InfoSoc Directive is at the centre of the EU copyright system and this Ex-Post study aims to determine and describe the achievements and the level of application and implementation of this Directive, and of its related instruments, with regard to the originally intended objectives. It also aims to identify the remaining gaps, or implementation deficits, of the current EU legislative framework relating to copyright, particularly in view of the digital transformation.

### **5.1. Effectiveness**

The InfoSoc Directive had the following key objectives:

1. To align EU legislation with international law.
2. To strengthen intellectual property protection in light of technological developments.
3. To reduce the existing disparities between national EU legal systems.
4. To ensure an adequate remuneration and compensation of authors and performers.

The Ex-Post Impact Assessment essentially found that the InfoSoc Directive has not been effective or efficient overall for the industry or for users and needs modernising urgently in light of the digital transformation which has occurred since 2001.

#### **5.1.1. Successful alignment to international standards**

In terms of its positive impact, in conforming to international (WIPO) standards, the InfoSoc Directive managed to introduce the three-step test into the legal system of the EU Member States, and led to a very broad definition of intellectual property rights coupled with the effective endorsement of Technological Protection Measures (TPMs) as a viable way to enforce copyright. At the same time, this alignment enabled a system of copyright protection through the prosecution of actors that circumvent TPMs, which has enjoyed only a limited degree of success (e.g. the closing down of Napster and shift towards paid subscription services for music consumption).

### **5.1.2. Enforcement deficit**

With hindsight however, the weak part of the protection system envisaged in the InfoSoc Directive was, without doubt, enforcement, compounded by an excessive reliance on TPMs, which did not develop into the predominant approach for protecting online content, contrary to initial expectations.

This meant that the only remaining enforcement option in the InfoSoc Directive was Article 8(3), which provides for the possibility of filing injunctions against online intermediaries for the takedown of content infringing copyright. This channel however, was inconsistent, in particular, with the 'mere conduit' principle established in Articles 12-15 of the 2000 e-Commerce Directive, and was gradually marginalised owing to difficulties in access to justice and in identifying infringers. Member States have since relied on other methods, including regulations based on administrative remedies (e.g. HADOPI) and codes of conduct (e.g. BREIN). Therefore overall, the current level of protection for copyright-holders in the EU is still inadequate, and accordingly, the overall objective to strengthen copyright protection in the EU was not achieved by the InfoSoc Directive.

### **5.1.3. A fragmented EU copyright regime**

The InfoSoc Directive did not fully manage to reduce fragmentation in the copyright regimes of the Member States. Despite its 'Internal Market' harmonisation legal basis, the InfoSoc Directive is subordinated to the WIPO treaties, with the result that, in effect, 28 different copyright systems subsist in the EU.

Some progress was made in that exceptions and limitations were limited in number. However, most of them have remained optional, and fragmentation was only partly avoided by the decisions provided by the CJEU in recent years. The implementation and scope of exceptions and limitations in a selected number of Member States portrays a fragmented picture, which continues to harm commercial users of copyright works, online intermediaries and end users.

### **5.1.4. Limited impact on fair remuneration/compensation of creators**

The InfoSoc Directive was not successful in securing adequate remuneration for the majority of authors and performers. The Directive was largely silent about how to achieve this, and the 'reintermediation' observed in most content markets has aggravated the problem, namely the emergence of powerful online intermediaries which right-holders must engage with on a weaker negotiating footing owing to the access intermediaries enjoy to final users and to their data. As a result, the balance of power between authors and performers on the one hand, and distributors on the other, is such that reliance on market forces for the determination of a fair remuneration and compensation is likely to be satisfactory only for a limited number of very successful creators. The vast majority of authors feel under-remunerated.



### **Shortfall in effectiveness of the EU copyright framework.**

The InfoSoc Directive has not achieved its internal market integration objective in light of the many non-harmonised areas, from the basic definition of copyright to the adoption and interpretation of exceptions and limitations. In particular, Text and Data Mining and the overall framework for User Generated Content have delivered limited competitiveness-related benefits. Furthermore, while the CJEU has certainly tried to promote the consistent interpretation of rights and exceptions, this role has become controversial.

The relevant enforcement "IPRED" Directive has not significantly contributed to the effectiveness of copyright protection online. Article 3, in particular, has restricted more 'vigorous' injunctions and the imposition of filtering techniques onto ISPs and other online intermediaries.

Finally, although there are some minor exceptions, achieving fair remuneration and compensation for authors and performers was stated but not given practical effect through a workable provision in the InfoSoc Directive or in its related instruments. Market forces and freedom of contract still primarily determine the remuneration of authors and performers.

## **5.2. Efficiency**

The EU copyright framework generates costs which have a limiting effect on content production, distribution and creation, especially given the SME make-up of the EU copyright intensive industries.

### **5.2.1. Inefficient transaction costs**

Distributors in the EU currently negotiate licences under 28 different legal regimes. CEPS point to a recent study in which it was established that, in the music sector, cross border commercial service providers offering more than one million titles face transaction costs of up to €260,000 per year. This costly and bureaucratic process, in a business still dominated by micro-enterprises, may be considered as a serious shortfall on the objectives of EU copyright law. However, the Directives on Orphan Works and, in particular, on Collective Rights Management in the online music sector, are intended to address these problems, and expectations are that they will improve the efficiency of the EU copyright framework. It is important to note that these Directives were only recently adopted, and that therefore, their effect cannot yet be measured, although it is already clear that their impact will be essentially non-existent in the audio-visual sector.

### **5.2.2. Cost associated to legal fragmentation**

These include costs borne by consumers for the remuneration of artists (e.g. through levies) which diverge significantly across Europe. Furthermore, divergences in the scope of legislation and the failure to implement a consistent set of copyright exceptions and limitations, at least for those that have a significant impact on cross-border activities, create inefficiencies, in particular, in the fields of education and research, but also in relation to encouraging the commercial viability of new products and services such as *inter alia* social networks, streaming services, and online libraries.

### **5.2.3. Limited benefits for creators and users**

The current *acquis* on copyright seems to have secured very few benefits for authors, performers and end-users for a variety of reasons (ineffectiveness of enforcement, absence of provisions on fair remuneration and compensation, technological developments that deviated from the use of Technological Protection Measures (TPMs), availability of technical measures to circumvent copyright protection without incurring liability). Accordingly, as things stand, the InfoSoc Directive and its related instruments have overall only brought a limited measurable positive effect on industry and consumers, and lack general efficiency (see Section 2.5.2 of CEPS's study for more details).

\* \*

The negative impacts associated with the above sources of inefficiency are only likely to increase over time as the Internet permeates an ever growing number of activities and carries an even larger share of copyrighted creative content. This is because the growth of digital content markets has been consistently stronger than that of traditional media markets in recent years, and this trend is expected to continue. In particular, the advent of the Internet of Things and the growing deployment of ultra-fast broadband networks are expected to further boost this trend, consolidating the market dominance of Internet-based content dissemination, production and consumption in the coming years.

### **Inefficiency of the EU copyright framework.**

**Productive.** Current legislation increases costs for content producers and distributors, and limits availability of content for end-users. Inefficient enforcement limits incentives to produce and distribute new valuable content. Current rules do not incentivise users who would make use of such content to create user generated content or engage in text and data mining activities.

**Allocative.** The lost consumer and producer surplus owing to widespread copyright infringement and lack of availability of content is responsible for reductions of allocative efficiency that negatively impact the value of digital content available online.

**Dynamic.** Besides hampering production and consumption, the reduction in quantity and quality of content available to end-users reverberates on the competitiveness of Europe's Internet markets as a whole. For example, it can lead to lower demand for Internet connectivity, and could therefore end up stifling incentives to deploy broadband networks.

### **5.3. Coherence**

The InfoSoc Directive has achieved an initial level of coherence in the European Union's legislation on copyright, but while it has been complemented by additional instruments, in particular the Orphan Works and Collective Rights Management Directives, which address specific problems in the EU copyright system, and bring increased coherence to the copyright framework, several significant problems remain.

In terms of internal coherence, the remaining gaps and sources of fragmentation are numerous and range from the absence of common basic definitions to the wide variety of practices in the areas of exceptions and limitations, and enforcement. Problems have also emerged in terms of the external coherence of the copyright enforcement provisions with other equally important EU provisions, e.g. the protection of fundamental rights (privacy, freedom to run a business) and the 'mere conduit' principle in the e-Commerce Directive.

### 5.3.1. Implementation gaps

This study highlights certain major implementation gaps (see section 2.4.1 of CEPS' Ex-Post Impact Assessment), specifically the absence of clarity as regards the compatibility of the InfoSoc Directive and IPRED with legislation on fundamental rights, data protection, and e-commerce. In addition, there are gaps in relation to the absence of a clear legal framework for the remuneration and compensation of authors and performers, and uncertainty as regards the responsibility of online intermediaries which have become central in the distribution of digital content.

A subset of issues include the absence of regulation on accessibility, and to curtail the unjustified geo-blocking of service portability; uncertainty over the applicable law in the case of online copyright infringements; uncertainty as regards the applicability of the exhaustion principle to making content available on intangible media, in particular for 'download-to-own' content; lack of adaptability to new uses such as Text and Data Mining, e-lending, e-learning, and User Generated Content; lack of clarity on the implementation of specific exceptions such as for parody, caricature, and pastiche, and for libraries, and finally; the lack of clear rules on access to justice and collection of evidence in civil proceedings.

### 5.3.2. Sources of fragmentation

Diverging definitions at the Member State level for "derivative works/transformative uses", and "authorship" are at the root of fragmentation in the internal market. Furthermore, the differing interpretation of exceptions and limitations between Member States has also contributed to fragmentation, with in particular the introduction of new exceptions not originally envisaged by the InfoSoc Directive (namely the UK Text and Data Mining exception). Divergent enforcement practices in Member States are also singled out, with some Member States relying on administrative procedures and others on codes of conduct. Finally, the different approaches to the remuneration and compensation of authors through private copying levies have also created distortions in cross-border trade.

\* \*

The specific growth contribution associated to reform of the EU copyright system has not yet been estimated independently of the recent works covering reform of the Digital Single Market, where available data shows that full integration could add between €260 billion and €520 billion to European GDP and that the long term growth impact of digital reform is expected to generate an additional 2.1% of GDP growth, in addition to the 1% the reform is estimated to have already generated. While the increased revenue which could potentially be generated by the copyright intensive industries only amounts to a portion of this total, a number of costs have been identified.

### **The costs to growth connected to a coherence deficit.**

**Direct costs incurred by distributors.** These take the form of substantive compliance costs and transaction costs (licenses negotiated on a country-by-country basis). The absence of a one-stop shop for licensing in specific sectors can also discourage creation and circulation of content over time.

**Missed commercial opportunities.** These stem from limitations on content availability and on the portability of content and access across borders. Corollary costs take the form of higher retail prices (more limited price competition) and suboptimal sales. Restrictions on productive text and data mining and e-lending limit data-driven innovation, and the emergence of new business models and services.

**Insufficient incentives for creators.** From the suspected unequal bargaining power between authors and intermediaries and between 'traditional' distributors and online intermediaries (especially in the audio-visual sector).

**The absence of an integrated internal market for creative content.** This likely reduces the value end-users derive from Internet access, and the value generated by the EU copyright system.

## **5.4. Relevance**

Despite its overall importance and relevance in establishing the EU legal framework on copyright, the InfoSoc Directive and its related instruments are increasingly outdated in light of the rapid pace of technological change since the establishment of the framework. In particular, the exceptions and limitations listed in Article 5 of the InfoSoc Directive are increasingly misaligned with technological developments, and the lack of an update limits the development of new, potentially high value added "welfare-enhancing" uses of information.

### **5.4.1. Outdated exceptions**

Most notably, the lack of certainty over the application of a number of exceptions, including for Text and Data Mining, represents a potentially serious gap in the EU acquis. Notably, the current set of exceptions and limitations does not cover e-lending, hampers mass digitisation projects, also affects the development of User Generated Content applications, and hampers the development of social networks. The unevenly implemented exceptions for teaching and research across the EU furthermore potentially

impinge on the provision of pan-European e-learning services as well as on the creation of a truly integrated European Research Area. In this regard, [a recent report for the European Commission](#) highlights how Text and Data Mining lowers research costs and *de facto* removes barriers to market entry for innovative SMEs and micro-enterprises, which are the key entities driving EU growth and employment.

Furthermore, looking forward, this Commission report argues that the uncertain legal treatment of Text and Data Mining is even more serious in light of the emerging automation of service industries (automation of thinking), as well as the widespread use of data-driven analytics in the Internet of Things and its industrial applications (Industry 4.0). It is frequently upheld that, with the exception of the UK, European researchers may be falling behind, especially with regard to researchers in the United States in this field, and that such a lag results, at least in part, from the nature of Europe's laws with regard to copyright, database protection and, perhaps increasingly, data protection.

#### **5.4.2. Side-lined enforcement mechanisms**

The enforcement tools foreseen in the InfoSoc and the IPRED Directives have also been largely overtaken by technology and rendered ineffective. Accordingly, civil litigation to pursue infringers has been generally abandoned as a non-viable means of enforcement.

#### **The lack of relevance of the EU copyright framework.**

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

In particular, the absence of legal certainty to support the development of Text and Data Mining is a key gap in urgent need of addressing.

## 5.5. Summary

### 5.5.1. Gaps which could be addressed by non-legislative measures

Only a narrow subset of the gaps in the EU legal framework on copyright could be partly filled if the existing *acquis* were clarified and made more consistent, both in terms of interpretation and implementation.

- **The compatibility of the InfoSoc and IPRED Directives with other legislation**, most notably on fundamental rights, data protection and e-commerce. For these problems, non-legislative proposals and clarifications could probably address some outstanding problems without requiring legislative reform.
- Similarly, **the lack of flexibility and adaptability of exceptions and limitations to new uses** (mass digitisation, text and data mining, e-lending, e-learning, User Generated Content) could be partly remedied if, for example, Text and Data Mining were directly included in the scope of the mandatory exception for transient copies. Furthermore, the lack of clarity on the implementation of specific exceptions (e.g. the exception covering parody, caricature and pastiche) could be remedied, at least partly, through more coordinated and consistent implementation.

### 5.5.2. Gaps which would require legislative intervention

In order to be effectively addressed, many gaps would however require legislative intervention, as is apparent from the ongoing debate on copyright reform at the EU level. These include:

- **The absence of a clear legal framework for the remuneration and compensation of authors and performers**, due to the lack of clear provisions in the InfoSoc Directive.
- **The uncertainty as regards the responsibility of online intermediaries**, which have become key players in the distribution of copyright protected content online and conduits for the illegal dissemination of such content.
- **The lack of clear rules to curtail unjustified geo-blocking practices.**
- **The uncertainty regarding the application of private international law** such as which criteria to apply for the determination of the applicable law in case of copyright infringements occurring online.
- **The partial uncertainty as regards the applicability of the exhaustion principle**, in particular to the making available of 'download-to-own' content on intangible media.
- **The absence of clear rules on access to justice and on the collection of evidence** to be used in civil proceedings.

## 6. Options for reform of the EU copyright framework

### 6.1. The legal aspects of copyright

This section relates to Milieu's briefing paper, which focuses on analysing the degree of harmonisation and efficiency of the EU copyright regime, and its impact on other policy areas. It investigates the form and extent of harmonisation of the EU copyright system, including the implications of different choices in legal basis, and whether the degree of harmonisation is sufficient or insufficient, effective or ineffective. This research also covers the regulatory efficiency of the EU copyright system in relation to procedures, regulatory or administrative burdens, and if these constitute barriers, for example, to media innovation, as well as the extent and effects of consumer information on *inter alia* reimbursement and compensation procedures. Finally the analysis of the interplay between the EU copyright system and other EU policy streams is also covered.

Accordingly, with the objective of assessing the potential added value of modernising the InfoSoc Directive and its related instruments, a number of gaps and legislative options to address these gaps have been identified, and a view has been provided on the costs and benefits of the different legislative options.

#### 6.1.1. Categories of gaps

The fragmentation of the EU's copyright acquis stems from the existing partial harmonisation of EU copyright and the fact that the system's legal instruments are ill-suited to technological developments affecting the dissemination of digital content online. Four main categories of gaps were identified, specifically:

- gaps relating to the exclusive rights of copyright holders and other stakeholders (concerning harmonised and non-harmonised elements of the legislation);
- gaps associated with exceptions and limitations;
- gaps linked to the concepts of authorship and ownership; and
- gaps resulting from the relationship between the InfoSoc Directive and related Directives.

#### 6.1.2. Costs and benefits of different options for reform

Addressing these gaps by focusing on limiting legal uncertainty and clarity in the EU copyright framework would lower the need for court litigation as well as the associated costs. Addressing these gaps would also limit transaction costs and accordingly improve market efficiency. Compliance costs for users would also be reduced. The competitiveness of the EU's copyright-intensive industries would be increased as would access to diverse works of European culture. Fair remuneration for authors would also be better ensured.

The qualitative assessment carried out found that the options proposing greater harmonisation (such as further harmonisation of selected issues and creation of a single EU title) stand to deliver the most benefits, although they may also bring higher costs and be resisted at national level. Most stakeholders, including EU society as a whole, would



be expected to benefit from increased harmonisation of the EU copyright framework. The role of Collective Management Organisations and their regional hubs would likely grow although licensing intermediaries operating at Member State level would incur losses and a proportion of mainstream artists may lose part of their market share owing to the increased availability and international demand for works from different Member States, once obtaining multi-territorial licences has been facilitated in the music sector by the Directive on Collective Rights Management.

In particular, the analysis concludes that high value added benefits would clearly be derived from a reform addressing the high level of fragmentation of the EU copyright acquis, given that such reform would improve on the overall low efficiency, effectiveness and coherence of the EU copyright framework in the digital age, and would ultimately reduce the need for a substantial body of case-law to be settled before the CJEU.

### **Legal aspects: Options for reforming the EU framework.**

**Option 1:** Codification. This option would increase legal certainty by regrouping relevant legislation into one single instrument, addressing some inconsistency, deleting overlapping provisions, harmonising terms and definitions and correcting errors. Prior amendments would need to be made to the existing directives for this option to bring meaningful harmonisation, without which key gaps would not be addressed.

**Option 2:** Recasting. This has the advantage of incorporating substantive amendments in a single text together with the unchanged provisions of existing legislation. This option is an improvement on Option 1 but remains limited to addressing gaps in areas of already harmonised legislation.

**Option 3:** Further harmonisation of selected issues. This would enable the harmonisation of areas which have not been previously regulated at EU level. This option cannot, however, address gaps and inconsistencies in the existing legal framework and potentially could add further inconsistencies since it adds yet another layer to EU copyright regulation.

**Option 4:** The creation of a single EU title. This could achieve full harmonisation and address most existing gaps and inconsistencies but it would most likely encounter the resistance of Member States and stakeholders in addition to being subject to complex and protracted negotiations. While this option would potentially ensure full consistency, a strong commitment by the EU legislator is required.

### 6.1.3. Analysis of options

**One logical course of action at this stage would be to combine a recasting exercise (option 2) with the further harmonisation of selected issues (option 3).** The result would introduce new regulation of previously non-harmonised issues while clarifying the body of EU copyright law.

While the creation of a single EU title (option 4) would bring the highest level of harmonisation, removing national copyrights is very likely to meet with the resistance of a number of Member States and would most likely involve a long and difficult legislative process. This suggests that pursuing this option at this stage would be unrealistic, and would in any case require a strong political commitment.

To conclude, there are clearly alternative legal basis to be explored in advancing the EU system gradually towards a single EU copyright title, and this is perhaps the preferable overall objective. Accordingly, **the creation of a single EU copyright title should probably be envisaged, but only once EU copyright law has reached a higher level of legislative unification.**

## 6.2. The internal market aspects of copyright

This section is based on CEPS' research into options for reform focusing on EU copyright and the functioning of the internal market, with respect to the need to strengthen the internal market for creative content. The analysis explores how best to remedy existing policy problems covering the system of rights (in particular Articles 2-4 of the InfoSoc Directive), the territorial scope of the rights involved in digital transmissions and its impact on the segmentation of the market through licensing agreements and geo-blocking, the extent of portability in the online market and of consumer access to cross-border online services, and the overall impact on different stakeholders. This section also covers the extent and effect of the system of limitations and exceptions (in particular Article 5) as well as any implications on fair remuneration or compensation for rights holders, given the cross border effect of limitations and exceptions.

### 6.2.1. Categories of gaps

There are many gaps in the existing legal framework and, of these gaps, only a narrow subset could be partly filled if the existing *acquis* were clarified and made more consistent in terms of interpretation and implementation.

Potential candidate issues for an exercise to improve interpretation and implementation of the existing framework include ensuring the future compatibility of the InfoSoc and IPRED Directives with other EU legislation, most notably on fundamental rights, data protection and e-commerce, for which non-legislative documents and clarification efforts could probably address some outstanding problems without requiring legislative reform. The lack of flexibility and adaptability of exceptions and limitations to new uses such as Text and Data Mining could also be partly remedied if, for example, Text and Data

Mining were directly included within the scope of the mandatory exception for transient copies in a non-legislative clarification exercise. The lack of clarity on the implementation of specific exceptions (e.g. for the parody, caricature and pastiche exception) could also be remedied, at least partly, through more coordinated and consistent implementation.

However, the majority of key gaps in the existing framework would require legislative intervention, namely in order to address the absence of a clear legal framework for the remuneration and compensation of authors and performers; the existing uncertainty as regards the responsibility of online intermediaries; the lack of clear rules on geo-blocking practices with the aim of eliminating unjustified practices; the uncertainty as regards determining the laws applicable to online copyright infringements; uncertainty on the applicability of the exhaustion principle to the making available of 'download-to-own' content on intangible media; and the lack of clear rules on access to justice and the collection of evidence for civil proceedings.

### **6.2.2. Costs and benefits of different options for reform**

An efficient intervention would at once reduce costs generated because of the current framework, and create benefits for industry players and end-users. Such benefits largely overlap with the benefits of an integrated Digital Single Market, which are estimated as representing at least 1% of GDP.

Among the costs linked to the inadequacies of the existing framework, there are direct costs in the form of substantive compliance costs and transaction costs pursuant to the need to negotiate licenses on a country-by-country basis, furthermore often with several intermediaries operating at the Member State level. Limits on content availability generated by the territoriality of copyright offerings are also cited *inter alia*, as well as uncertainty over the rights and obligations of industry players, inefficiency costs generated by varying interpretations of certain exceptions and limitations, the lack of legal certainty on Text and Data Mining, the lack of a level playing field between 'traditional' distributors and online intermediaries, the likelihood of significant market power emerging on the side of specific players, and an overall reduction of the value end-users derive from internet access.

Conversely, the main costs which might be generated through introducing the infrastructure necessary to overcome the gaps in the existing framework are also identified as follows: the need to achieve further convergence in the interpretation and implementation of exceptions and limitations might entail the creation of a permanent platform for the exchange of practices between national authorities or specific cross-country groups, or of a dedicated agency in charge of producing implementation reports (such as in the field of telecoms with the creation of national regulatory authorities, the European Regulators Group (ERG) and later, the Body of European Regulators of electronic Communications (BEREC), which has greatly facilitated the comparison of implementation practices in Member States). However, this would perhaps carry significant implementation costs. Furthermore, any option requiring a pan-EU registration system would also entail additional administrative costs.

### Internal market aspects: Options for reforming the EU framework.

**Option 1:** Soft law approach. The overall effect may be limited, however guidance concerning exceptions and limitations would deliver benefits to the internal market as would guidance on the interplay between copyright law and competition law. Initiatives aiming at making information about copyright and related rights available to commercial and non-commercial users and right-holders would also convey benefits.

**Option 2a:** Light-handed regulation. The introduction of a limited new legal provision specifying the types of licensing agreements and territorial restrictions that should be regarded as incompatible with the free movement of goods and services would have a targeted but clear impact on the internal market, mainly on users.

**Option 2b:** Comprehensive legislative reform could bring broad benefits if it aimed at introducing a clearer definition of exclusive rights, the simplification of the right of online transmission, introducing a principle of 'country of origin' (or country of upload) for online transmissions of selected categories of copyrighted works, and if such reform covered the modernisation and further harmonisation of exceptions and limitations.

**Option 3a:** Complete unification. The introduction of an EU copyright code and title replacing national legislation and titles, would deliver significant internal market cost savings and efficiency benefits but would also likely entail significant implementation costs.

**Option 3b:** Optional EU copyright registration system. The introduction of a supplementary EU copyright code providing for an optional copyright title running on top of national legislation and titles and only applicable to registered works, and the introduction of an optional registration system for copyrighted works, may constitute a viable transitional system.

### 6.2.3. Analysis of options

Although the identification of the preferred policy option would fall outside the scope of this analysis, **"no action" is not a reasonable option, due to the existence of very important gaps and significant fragmentation** across Member States in the field of copyright, which damages EU citizens and businesses interests. Accordingly, the suggestion is that **'more Europe' would be needed in the field of copyright**, given the existing sources of productive, allocative and dynamic inefficiency associated with the current system. Addressing the internal market issue in copyright would, in this respect, also lead to addressing many of the shortcomings of the current framework in related domains such as general legal and industrial policy issues.

This broadly entails that **the Commission needs to propose measures to modernise the existing framework, looking, in due course, at the existing regime of exceptions and limitations** with a view to introducing new ones and harmonising their implementation across all EU member states, and by **improving cross border access to online content**, one solution being by removing unjustified geo-blocking practices.

Furthermore, **this analysis would tend not to favour the introduction of a single EU copyright code and title - despite its clear positive impact on the internal market - without first passing through a transitional phase, which would follow a comprehensive legislative reform introducing greater harmonisation or alternatively, after introducing an optional EU registration system and supplementary copyright code that would run on top of national copyright systems and titles and would apply specifically to registered works**, similarly to the system in place for patents and trademarks. This would be particularly useful for those copyright holders wishing to exploit and enforce their rights on a genuinely pan-European basis.

A recent [EPRS briefing](#)<sup>3</sup> also highlights that several approaches to reform deserve to be further considered by policy makers to address the restrictions on the functioning of the internal market caused by the territorial protection of copyrights, namely: by limiting territorial restrictions, adapting copyright rules to the online environment, further harmonising exceptions and limitations and introducing a single European copyright framework.

### **6.3. The industry and industrial relations aspects of copyright**

Finally, this section, based on VVA's findings, analyses the industry and industrial relations aspects of reforming the EU copyright framework with a particular emphasis on enforcement and fair remuneration or compensation. As such, this theme covers the functioning of Directive 2004/48/EC on the civil enforcement of IPR and the concerns that some of its provisions may not be fit for purpose for copyright in the digital age. Options, focusing on copyright contracts, are presented for improving fair remuneration or compensation of authors and performers in rewarding creativity and innovation and transparency in the copyright value chain in the digital environment, and also in safeguarding national cultural and linguistic specificities and stimulating related economic activity.

#### **6.3.1. Categories of gaps**

The main problem in relation to industry aspects of copyright follows on from the fact that provisions set out in the InfoSoc Directive, the IPRED Directive and the e-commerce Directive have not been implemented in a uniform manner throughout the EU. Specifically, Art. 8 (3) of the InfoSoc Directive and Art. 11 of the IPRED Directive have failed to provide a harmonised EU framework for IPR enforcement. The IPRED Directive is furthermore not adapted to the digital environment and has limited application in tackling infringements online, especially mass scale infringements. There is also a need to

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<sup>3</sup> Tambiana Madiega, EU copyright reform: Revisiting the principle of territoriality, EPRS, PE 568.348, 2015.

clarify the liability of online intermediaries in identifying and preventing online infringements as set out in the relevant EU Directives (InfoSoc, IPRED, and e-commerce).

In terms of industrial relations, the following gaps in the existing framework were identified: the remuneration of authors and performers being mainly left to contractual arrangements and market forces, and the lack of transparency in revenue allocation and contractual arrangements along the copyright value chain. These flaws in the framework stem from authors' and performers' weaker bargaining power vis-à-vis producers, publishers, and online intermediaries. Furthermore, significant differences exist in Member States' legal systems as regards the scope of transfer and the remuneration or compensation to be paid to authors and performers by the entities exploiting their works.

### **6.3.2. Costs and benefits of different options for reform**

In case of no new policy action, the existing gaps in the enforcement of copyright will ultimately have a negative impact on both those who invest in copyrighted works as well as on the creators. In particular, it is unlikely that the Member States will implement new effective provisions otherwise. As regards the remuneration of authors and performers, if the status quo is maintained, their position is also unlikely to improve and the constant increase in cross-border cultural exchange may exacerbate discrepancies in remuneration across the Member States.

Any modernisation of regulatory instruments by means of legislative action is likely to contribute to increased harmonisation and legal certainty across the EU. As a result, the EU Digital Single Market would function better and there would be an improvement in authors' and performers' remuneration. This could ultimately contribute to boost growth and content creation in the EU cultural and creative industries. Whereas many authors and performers would benefit from increased protection, those however who invested in the copyrighted works and who shared or fronted the bulk of the financial risk, including producers, publishers and distributors, may well see their profit margins reduced as a result, and accordingly, users may also have to pay a higher price for using copyrighted content. For consumers, increased legal certainty coupled with a wider legal offer is also likely to increase their trust in the Digital Single Market and drive commercial benefits. However, a legislative reform would be more lengthy and costly and would probably not remain relevant long to the fast-changing and dynamic internet environment. A rigid - even if modernised - legal instrument could indeed conceivably become obsolete even more quickly than did the InfoSoc Directive owing to the ever faster pace of technological change.

Varying policy options would impact the numerous stakeholders within each copyright industry sector differently and therefore it would be advisable to conduct detailed sector by sector research and impact assessments of the proposed options at EU level, coupled with a continuous dialogue with the stakeholders involved. It is interesting to note here that this proposal resembles the way in which the JURI committee's Working Group on Copyright and IPR already consults with external stakeholders.

**Industrial relations aspects: Options for reforming the EU framework.  
Regarding fair remuneration or compensation.**

**Non legislative options:**

- These include awareness raising actions on contractual practices among creators and performers and structured stakeholder engagement in order to assess possible ways to ensure fairer remuneration or compensation for authors and performers, leading to the development of model contract clauses dealing with the remuneration of the author for each mode of exploitation. A particular emphasis could be contracts dealing with the online exploitation of works. Discussions could also generate recommendations and guidelines to be implemented at national level.
- Alternatively, collective bargaining agreements could also be promoted, provided they are compatible with competition law.

**Legislative options:**

- A new instrument could recognise authors' and performers' rights to adequate remuneration according to the mode of exploitation. However, a potential increase in administrative costs for exploiters, which could have a negative impact on remuneration or compensation and potential costs linked to updating contracts following technological developments and emerging business models, would need to be addressed. A number of solutions could be envisaged to resolve this problem including the model prescribed in the Term of Protection Directive of a "revert back" clause; a supplementary royalty to be paid after a defined period of time; the inclusion of "use it or lose it" clauses which already exist in certain Member States; or "best-seller" clauses giving authors certain rights to renegotiate their contract.
- Tougher proposals on industry players could include transparency requirements on exploiters to report revenues and grant authors unwaivable rights to remuneration for digital exploitation, in particular for audio-visual works, possibly subject to collective management inspired by the Spanish system. As in consumer law, contract clauses deemed abusive could also be considered invalid or blacklisted as in the Unfair Terms Directive. Alternative dispute resolution or collective redress to enable authors or performers to denounce adhesion contracts, in which one side holds all the bargaining power, could also be promoted.

**Industry aspects: Options for reforming the EU framework.**

**Regarding the enforcement of copyright.**

**Non legislative options:**

- Self-regulation could take the form of an easily revisable voluntary code of conduct agreed by intermediaries, ideal in the constantly evolving internet environment, although such a code would lack accountability.
- Specialised and dedicated national copyright courts could also be encouraged.
- Awareness-raising actions and educational campaigns to fight piracy with a focus on making legal content accessible could also prove beneficial.
- Finally, new guidelines to foster harmonised practices would help address the number of existing discrepancies in national implementation.

**Legislative options:**

- These could include adapting the IPRED Directive to involve intermediaries by introducing a provision allowing for the blocking of payments to individuals involved in infringements on a commercial scale. Such a proposal should first clarify what types of intermediaries would be covered and introduce provisions on the conditions for justifying an injunction, and clarify the extent to which intermediaries can be affected in the enforcement process with due regard to their fundamental rights and those of end users.
- New provisions building on the general framework for "notice and take down" and which are designed to be compatible with the mere conduit principle of the e-commerce Directive, could also be worked up in order to provide more legal certainty to ISPs, rights holders and users. For this, inspiration could be taken from relevant national court rulings which deem certain monitoring and filtering possible under certain conditions. However, the CJEU has so far firmly based all of its rulings on the cornerstone of the prevailing right embodied in Article 15 of the e-commerce Directive, whereby national courts or legislators cannot impose general obligations on online intermediaries to monitor content they store or transmit. Alignment would also be needed on data protection law, so that it does not present an obstacle as regards the disclosure of infringers' identity in the context of civil enforcement proceedings. Measures to facilitate cross-border civil injunctions could also be considered in this context.



### 6.3.3. Analysis of options

The soft law options proposed would likely allow for a quick adaptation of the legal framework to the fast-changing digital environment. The main advantage is their flexibility and the support they are likely to enjoy, in particular from intermediaries. **Self-regulation also appears to represent a more cost-effective choice as compared to the law making process. However, the flexibility of the system may ultimately increase legal uncertainty**, especially as regards protection of personal data, freedom of expression and freedom to conduct a business. Furthermore, soft law measures addressing remuneration or compensation for authors and performers would likely not improve their bargaining position in relation to undertakings exploiting their works.

The increase of cross-border cultural exchange and the development of new business models and online forms of exploitation of copyrighted works call for action at EU level aimed at fostering harmonisation of existing provisions and at ensuring greater legal certainty, to facilitate the enforcement of copyright and related rights. But **better enforcement also has to be coupled with the establishment of a system that would ensure fair remuneration or compensation for authors and performers to encourage artistic creation**. However, EU legislative intervention would require more time to roll out, may end up restricting the development of future innovative technologies, and would likely encounter the opposition of key stakeholders along the value chain, who would need to adapt their business models. Nevertheless, this analysis tends to lead to the conclusion that more liability should somehow be required from online intermediaries (ISPs) in tackling piracy and illegal downloading. **Accordingly, the general findings of this section tend to support applying, wherever possible, a light touch approach, amending legislation only where other means have failed, in order to maintain flexibility in the EU framework, to ensure it remains relevant.**

## 7. A roadmap for reform: methodology and ordering priorities

This section examines the findings overall, building on the most striking conclusions of the external study and briefing papers, and on additional in-house research. It aims to set out a pragmatic approach for addressing the challenges of modernising the EU copyright framework, by correctly differentiating between 'fundamental' and 'resulting' problems.

### 7.1. Methodology

#### 7.1.1. Agreeing on an analytical framework

A prism or a framework for analysis through which to view EU copyright reform should ideally be agreed between the key stakeholder groups. In this framework, it is crucial to acknowledge that certain actions need to be carried out before others, or must at least be synchronised. **The order of priorities should reflect the actual importance of identified problems, as evidenced by analysing the value of lost benefits and the realistic modelling of the potential gains of specific initiatives.** A pragmatic approach would be to work by ranking into a matrix the options for reform, from the easiest option, which at the same time derives the most benefits, to the most complex option, which at the same time generates the least benefits. This would ensure that modernising the EU framework does not cause catastrophic damage to certain stakeholder interests in the process.

#### 7.1.2. Data collection

However, the very first step, as noted by all external experts involved in the production of this European Implementation Assessment, as well as the secretariat's project team, is that **a number of key data sets need to be generated or completed in the field of EU copyright.** As CEPS in particular points out, despite the breadth of the Commission's previous evaluation work, *"there is still a remarkable lack of data on a number of important aspects of the effectiveness and efficiency of the InfoSoc Directive, such as data on the allocation of revenues along the value chain in different sectors, on the relative diffusion of legally consumed versus infringing content, on the effectiveness and diffusion of TPMs, and on many other aspects relevant to the effectiveness of the copyright acquis"*.

Although recently launched "Fitness Checks" on the creative content sector and the sectoral inquiry into the e-commerce sector are expected to help expand the evidence base, maybe OHIM (which is to be renamed the European Union Intellectual Property Office)<sup>4</sup>, in particular its observatory, **could play a greater role in the consistent collection of relevant data on copyright. This would however constitute an entirely new mission for OHIM.** The first exercise would be to collect comprehensive and exact year on year figures on the EU copyright intensive industry's' revenue structure and on consumer trends, particularly because of the speed at which the digital environment changes. As some of this data may be commercially sensitive, it may need anonymising.

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<sup>4</sup> See [JURI newsletter Issue 4, July 2015](#), EU trademarks package briefing.

## 7.2. Analysis of recent Commission announcements

### 7.2.1. What's in the pipeline and why?

On 9th September 2015, Commission President Juncker and 1st Vice President Timmermans explained the Commission's progress on priorities in a [letter of intent](#) to the European Parliament and to the Council Presidency in office. This included, as a second priority, a connected Digital Single Market, where **a further europeanisation of copyright rules is envisaged, together with legislative proposals to tackle unjustified geo-blocking**. Although it is not clear what form the 'further europeanisation of copyright rules' will take, this wording does avoid direct reference to harmonisation. Furthermore, the fact that legislative proposals on geo-blocking are separated out tends to indicate the Commission's preference for a more targeted approach to reform, rather than the comprehensive modernisation exercise envisaged by the Barosso II Commission, which was ultimately stalled right before a White Paper and high-level Impact Assessment were published. This previous reform effort had been criticised for lacking in ambition, and this was cited as a reason for stalling the project, but it would nevertheless appear that the new Commission's plan is even less extensive.

**Improving access to content has emerged as a clear priority for the current Commission**, with European consumers driving change. The recent publication of Eurobarometer figures was a good opportunity to note this. *According to Eurobarometer figures (...), only 8 percent of Europeans have tried to access content across borders, and more than half were successful. According to the Commission's digital single market spokesperson, Nathalie Vandystadt, the thing to remember is that young people between the ages of 15 and 24 were the most likely ("almost one in five") to have attempted cross-border access. "This shows that a demand for cross-border access to legal content exists, and that, more importantly, it is expected to grow in line with the younger generations' consumer behavior and as the market flourishes," she said. Vandystadt added that (the latest) Eurobarometer's figures also showed two-fifths of people trying to access their online content subscription abroad faced problems, saying: "The failure rate is too high to ignore."*<sup>5</sup>

The latest Eurobarometer survey<sup>6</sup> reveals that there is growing although, in fact, still limited (8%) **user demand for cross EU border access to legal content and services** (by principally young users). This would mainly tend to indicate that the EU market is not especially integrated. The survey also highlights that **geo-blocking is a problem** for 40% of users abroad. But the Commission does not caveat this observation by stressing that users who travel to another EU Member State only represent a small percentage of the total. A significant reduction on that 40% figure is therefore required to determine the actual number of affected users. Nevertheless, **the Commission appears to consider that these observations cannot be ignored, whereas they do not indisputably constitute grave problems, and are moreover only the effects of more fundamental imbalances.**

<sup>5</sup> Reported by David Mayer (Politico), Morning Tech briefing, 1st September 2015.

<sup>6</sup> <http://ec.europa.eu/COMMFrontOffice/PublicOpinion/index.cfm/Survey/getSurveyDetail/instruments/FLASH/surveyKy/2059>

### 7.2.2. Competing interpretations

The shortfall in digital content and services revenues in the EU (see graphics of section 3, and section 4 of this introduction) may be an indication that the EU culture and creative industries are perhaps more traditionally organised than they could be, however if it is true that, in the EU, these industries are characterised by a relatively traditional set up:

-a) it may not be in the EU's copyright intensive industries' interest to propose a radical amendment to the EU legal framework seeking to eliminate 'unjustified' geo-blocking, as this may principally deliver a competitive advantage to non-EU industry players who are operating according to more modern business models in other large marketplaces, or alternatively,

-b) it may be that the inadequacies of the EU legal framework relating to copyright actively contributed to the comparatively slow adaptation of the EU's copyright intensive industries to the digital environment (as compared to the speed of innovation in the copyright intensive industries in other markets), in which case an ambitious legislative reform would seem more appropriate than a light touch approach.

If there is any truth in these two assumptions, which seems likely given the findings of CEPS' Ex-Post Impact assessment, **any change to the EU copyright framework should at least take into account the state of development of the EU copyright intensive industries** before proposing a modernisation of content distribution which would begin by focussing on eliminating geo-blocking which is unjustified from the consumer perspective. **Industry requires time to prepare, invest, develop and trial new business models, while continuing to operate effectively and sustainably. Furthermore geo-blocking shouldn't necessarily be given a prominent focus in first instance, because the widespread online dissemination of copyright infringing content is the underlying problem which explains why geo-blocking practices cannot simply be eliminated.**

### 7.3. Copyright infringement online and understanding consumer behaviour

In determining the right approach to copyright reform, it is important to recall that the shortfall in expected revenues from digital content is chiefly explained by online piracy, a far bigger problem for the industry than any other. Furthermore, the current level of attention given to the analysis of EU market integration and geo-blocking can be regarded as not taking into account the fundamental way in which EU consumers are actually driving change.

#### 7.3.1. The confines of tackling copyright infringement online

**Significant volumes of digital content consumption are in breach of copyright** and copyright infringement is perpetrated by a broad user base across the EU. **This is unquestionably the principal factor damaging the EU's copyright intensive industries,** which are very likely to uphold that online piracy must be addressed before further online market opening or EU market integration initiatives are even considered.

File-sharing services have significantly contributed to the online dissemination of content in breach of copyright. Effectively, content is downloaded by users across the socio-professional categories, and from a multitude of sources around the world. Furthermore, **a fast growing proportion of European users install Virtual Private Network (VPN) software to circumvent territorial restrictions** (see CEPS' briefing paper) or are perfectly familiar with a variety of other ways of doing so. It is expected that illegal downloading today is principally carried out for viewing audio-visual content. To a lesser extent, music and software including games are also affected, although affordable and more practical legal solutions are increasingly widespread for these types of content. Accordingly, a significant number of users have switched back to legal content consumption for software and games and especially with the growth of paid subscription online music services. A similar trend is starting to emerge for audio-visual content (e.g. Netflix).

**Unfortunately, illegal content downloads cannot be easily policed or curtailed.** The issue is that while ISPs can see the VPN provider's Internet Protocol (IP) which the subscriber is connected to (most ISPs and web-hosting companies use GEO IP Utility software to recognise user IP addresses), ISPs cannot see what sites the subscriber accesses via the VPN. Both ISPs and VPN provider companies can see where the client is located, but **ISPs cannot see the user's VPN-encrypted traffic. Accordingly, the mere conduit principle is likely to continue to be successfully upheld above copyright protection prerogatives.** Furthermore, the economic reality is that DPI solutions (Deep Packet Inspection) carry a significant cost for ISPs in equipment and services, and are very unlikely to be used to snoop on VPN customers as a result.

Because of this, as well as due to data protection requirements, **Hadopi-style laws to prevent users from downloading content in breach of copyright, and in particular to clamp down on hosts of illegal content, have had a limited effect. As a result, as regards mechanisms to ensure fair compensation or remuneration, there are increasing calls for an internet tax to be levied on online intermediaries. However, this approach is likely to be resisted as disproportionate** as it likens to fining all drivers to make up for the unclaimed fines of those drivers who were in fact speeding, but who weren't caught.

Court decisions can certainly block access to those hosting illegal content in a given territory, which is technically possible and already carried out. However, blocking is generally ineffective because the hosts of illegal content just move to a different location on the internet or use proxies. Additionally, VPN host providers can be located anywhere in the world. Although this illustrates how Technological Protection Measures (TPMs) are bound to ultimately fail, this does not mean that TPMs are not part of the solution. **The EU legal framework could perhaps move beyond the current requirement on Member States to uphold TPMs towards a system ensuring the rapid introduction of constantly updated TPMs** (like patches on an operating system), as technological needs change.

At the same time, **the resulting push in consumer behaviour towards legal content downloads would quickly need to be accompanied by industry, and possibly regulatory, efforts to enable greater and faster access to legal content at affordable rates** (and in any available language), **in order to create a virtuous circle.** However, a TPM for

VPNs, aimed at limiting the functionality of VPN design standards to prevent access to sites offering content in breach of copyright, is a necessary first step. Such a standard would have to be universally agreed and policed. A black-list would constantly need to be updated and automatically 'patched' over to VPN users, patches which if refused, would carry the penalty of expiry of the VPN software. This is clearly not an easy path, and would likely carry significant costs, but it may need to be considered.

### 7.3.2. Making sure applied behaviour analysis is properly informed

Numerous surveys have revealed that online infringement of copyright is very widespread. In one UK survey, **about half of consumers (not just half the users) admit to having illegally downloaded content**<sup>7</sup>. Taking furthermore two particularly poignant examples, *TorrentFreak* data has revealed that even employees in *Paramount Pictures*, *Warner Bros.*, *Disney*, *Sony Pictures* and *20th Century Fox* are openly downloading movies, games and other media while at work - illegally<sup>8</sup>. And in 2013, it was reported that even though the US Congress has found itself at the forefront of measures to stop piracy, its staff downloaded a host of shows in breach of copyright to congressional computers<sup>9</sup>. Legislators and industry players alike need to be fully aware that the internet literate generation regularly downloads illegal content, and that users between the ages of 15 and 24 are clearly not the only users who are sufficiently IT literate to develop the know how to consume desired content illegally, and who do so without paying much attention to where the content is coming from, or to copyright laws.

Consumers at large are simply reluctant to wait, for example, for content service providers to have set up shop in their Member State of residence in order to watch a popular TV series or for those series to be made available in their country of residence later than the original country release dates. Nor are they willing to subscribe to certain channels or services in the EU only to watch one television series or show, and nor are they willing to wait for the DVD/Blu-ray release date to enjoy a given movie on *iTunes*, where some users will also be frustrated by the limited set of available language options and subtitles. Neither are sports fans content with subscribing to a suite of service providers to be able to watch the selection of sporting events and matches from around the world that they likely want to follow.

A key problem which must be addressed, is that **for viewing sports or shows or series, or movies, there is generally no reasonable *ad hoc* fee which can be paid from abroad, just to watch one sporting tournament, one show, one series or one movie**, whereas users are increasingly eclectic in their tastes, and want immediate access to whatever is fashionable or popular at any one time.

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<sup>7</sup><http://www.screendaily.com/news/over-half-of-uk-consumers-admit-to-illegal-film-downloading/5041635.article>

<sup>8</sup><http://dottech.org/92994/guess-what-hollywood-studios-download-pirated-movies-too/#GzpEbrv2ziBUyoMY.99>

<sup>9</sup><http://www.theguardian.com/technology/2013/jan/16/sopa-congress-illegal-download>

In fact, it has already been clear for a long time that **the consumption of cultural content in the internet age is essentially immediate and pan global** and also that cultural trends typically only last a fleeting moment, which Andy Warhol captured in his famous quote: *"In the future, everyone will be world-famous for 15 minutes."*

**What all consumers (not just young people) actually expect in the digital age is immediate access to creative and cultural content situated anywhere in the world, and increasingly, to be able to re-use it.** Access from abroad to the domestic content offer(s) users have subscribed to is a minor issue by comparison. Furthermore, there is a case for arguing that if a business model aims to make money from fashionable but light and ephemeral entertainment appealing to the masses, one cannot honestly expect a strong degree of customer loyalty (the etymology of which is *legalis* i.e. legal in Latin). Conversely, those who propose a comprehensive offer quickly, focussing on consistent quality, are more likely to secure paying customers. To simplify, if a film is of poor quality, consumers will be prone to simply downloading it illegally then deleting it, or to streaming it once. However, if it is of good quality, consumers will go to the cinema, perhaps more than once, then stream it or download it illegally, and eventually either download it legally or, most likely, buy it on DVD or Blu-ray.

In surveys, as noted by CEPS, **a correlation between unlawful downloading and purchases of the same content downstream has indeed also been observed.** In this context, it may be appropriate to **task a group** made up of legislators, industrial players, IT experts, consumers, lawyers and in particular economists, **to estimate how much value may be attributed to the demonstration or advertising effect associated to the online dissemination or re-use of content in breach of copyright, including e.g. User Generated Content which infringes copyright.** Alternatively, a study could focus on **how the dissemination of content in breach of copyright actually contributes to the revenues of the original content, or to the down-stream revenues of the same legally acquired content.** Ideally, this value should be deducted from the lost revenue owing to piracy and included in Impact Assessments accompanying proposed changes to EU copyright regulation. Indeed, it is likely that at least some of this demonstration or advertising factor should be taken into account in a review of copyright exceptions.

## 7.4. Conclusions

New technologies and their societal impact have revolutionised the way content is created, distributed and accessed over the past 15 years and have facilitated the expansion of ever changing online business models. The sheer scale of the impact is such that it seems essential to **re-organise EU priorities for copyright in a process addressing firstly those problems which are truly significant.** Considering the magnitude of online piracy, creators are often victims of their own success, and a clear opportunity to generate significant growth and jobs, and more artistic creation, is simply being missed. However, it is also apparent that distribution exclusivity is being seriously challenged in the internet age, and perhaps even controlled content distribution in general is becoming redundant. Consumers are likely to just continue to acquire the content they desire, when they require it - immediately - which often translates to unlawfully, for as long as:

- content in breach of copyright is easily discoverable online,
- users remain able to circumvent any technological protection measures and search and manage content effortlessly by using a variety of dedicated, and most of the time free, software applications, namely VPN software,
- exploiters of digital content continue to tailor their offerings too restrictively, or to test mature markets before making services or content widely available.

For the EU copyright industry to maintain or improve on its global position, **the EU legal framework on copyright needs to strike the right balance between responding to the industries' needs, and responding to consumer demand, in order to continue to sustain and generate new growth streams and jobs.** Whatever mix of non-legislative and legislative measures is eventually chosen, there will also be a need to transcend contending approaches to EU action i.e. those approaches favouring implementation and enforcement, or alternatively those favouring market enabling and innovation. These are not incompatible for as long as the correct detailed framework for analysis is agreed first, as supported by comprehensive and accurate industry and consumer trends data. Given however the urgency of rolling out a reform of EU copyright, certain aspects of reform should be initiated as soon as possible, but without taking precedence over an informed and rational approach, especially for areas where more research is required. **A holistic approach** is likely to be the most effective way to put the EU copyright framework on the right track and **a precise sequence** for rolling out the modernisation exercise is recommended below.

#### Ordering EU action.

Stage 1) Crack down on the circulation of illegal digital content, which will have the *effects* of promoting fair remuneration or compensation throughout the copyright value chain and of supporting creation, particularly quality creation, which caters for more specific cultural interests and consequently promotes EU cultural and linguistic diversity.

Stage 2) Make legal digital content more widely accessible, and more affordable wherever this is still relevant, for example by stimulating multi-territorial licencing in the internal market beyond merely musical works for online use.

Stage 1) should be carried out before 2) or at least simultaneously, otherwise the EU copyright intensive industries may not be able to afford or risk Stage 2).

Only then would it be fitting to target any remaining unjustified geo-blocking practices, if such action is still relevant. This is also the optimal stage at which it would be fitting to review the scope of exceptions and limitations and the system of private copying levies. A final simplification exercise could then take place to increase the efficiency of the EU copyright framework.



## **Annex I**

### **Ex-Post Impact Assessment on the Implementation, application and effects of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (InfoSoc) and of its related instruments**

**Study by CEPS and Economisti Associati**

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## List of abbreviations

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

## Executive Summary

### Background

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

The InfoSoc Directive had the following major objectives:

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

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

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

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

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

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

### **How efficient is the present EU copyright framework structure?**

**Concerning the efficiency of the intervention, there are serious doubts about cost-effectiveness,** where the assessment is negative overall since most of the intended objectives were not reached, also in consideration of the significant technological changes that have emerged since the adoption of the Directives. Moreover, the Directive has also not been successful in eliminating the need to negotiate licences under 28 different legal regimes. A recent study (KEA & Vrije Universiteit Brussel, 2012) estimated that commercial users that provide services in more than one country and offer more than one million titles face transaction costs up to €260,000 per year and require about six employees to deal with licensing

issues; in particular, the identification of relevant right-holders may require up to six months and negotiations to clear rights may take up to two years. This costly and bureaucratic process, in an EU copyright intensive industry still dominated by micro-enterprises, might be considered as a serious shortfall in the legislative objectives of EU copyright law. Furthermore, the failure of Member States to implement a consistent set of copyright exceptions and limitations, at least for those that have a significant impact on cross-border activities, has also led to a system that is inefficient for specific categories of users, affecting in particular research and innovation and the viability of new products and services that could target the whole EU Internal Market (e.g. social networks).

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

### **‘Internal’ coherence: what are the remaining gaps and fragmentation in the application of the existing EU copyright framework?**

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

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



The main sources of fragmentation are summarised below:

- **Divergent definitions on key aspects of copyright law**, including the definition of derivative works/transformative uses and the authorship of copyrighted works;
- **Divergent implementation and interpretation of exceptions and limitations** across EU Member States, with some countries now even introducing new exceptions not originally envisaged by the InfoSoc Directive (e.g. in the UK on text and data mining);
- **Limited consideration of the cross-border effects of specific exceptions**, including *inter alia* the exceptions for private copying, but also the exceptions for teaching and scientific research, and in relation to certain cases concerning the freedom of panorama;
- **Divergent enforcement practices in Member States**, with some countries relying on administrative procedures to counter infringing behaviour, others relying on codes of conduct and other voluntary measures, and others relying on neither of the two; and
- **Different approaches to the remuneration and compensation of authors through private copying levies**. The disparate national treatment of exceptions, as well as the related levy systems, have so far raised significant national barriers and led to distortions of cross-border trade within the Internal Market.

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

There are several sources of cost that can be identified.

- While authors often manage to reduce their transaction costs by relying on collective rights organisations, distributors face **direct costs in the form of substantive compliance costs and transaction costs** due to the need to negotiate licenses on a country-by-country basis with one or more counter-parties.
- **The territoriality of copyright offerings limits content availability and portability and generates costs for end-users and businesses**. It harms competition and drives losses in terms of unrealised EU-wide consumer surplus. This type of market inefficiency reduces price competition and ultimately leads to **suboptimal quantities being sold on the market**.
- Another source of direct costs is the existing **uncertainty about the rights and obligations of different types of industry players**, as well as over-enforcement mechanisms.
- **Inefficiency is generated by a confusing and contradictory interpretation of certain exceptions and limitations, as well as by the interaction between the use of TPMs and available exceptions and limitations**. The current situation hinders the possibility for libraries to engage in e-lending, for example, and for researchers to engage in productive data processing for research and teaching purposes; this, in turn, leads to foregone benefits for society as a whole.
- In the era of big data and data-driven innovation and new business models, **the absence of legal certainty on text and data mining can also be hugely detrimental** to the development of new offers and services, which in turn limits benefits to society through a direct negative impact on so-called ‘dynamic efficiency’ (e.g. innovation and the development of new welfare-enhancing products and services).

- **Furthermore, the lack of a level playing field between ‘traditional’ distributors and online intermediaries** (especially in the audiovisual sector) can lead to insufficient incentives for the creation of content from the outset, which in turn would translate into a lack of dynamic efficiency. This problem can also account for a lack of adequate funding and exposure for ‘niche’ content.
- **The significantly superior bargaining strength of specific players (especially online intermediaries) could lead to unequal contractual conditions and consequently undesirable welfare losses** in the contracts concluded between authors and intermediaries.
- Finally, **the absence of a fully integrated Single Market for creative content dramatically reduces the value that end-users derive from Internet access**. The greater the amount of content that can be circulated among all users in the EU, the greater the value of the EU Digital Single Market as a whole.

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

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

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

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

## Is the EU legislative framework in line with technological developments?

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

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

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

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

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

- **Productive inefficiency.** Current legislation in the field of copyright increases costs for content producers and distributors, and also limits the availability of content for end-users. In particular, inefficient enforcement limits incentives to produce and distribute new valuable content for right-holders. In addition, current rules do not encourage those users who would make use of such content to create user-generated content or to engage in text and data-mining activities. This means that overall content production is hampered by an unnecessarily complex and restrictive *acquis*, and this might explain the differences in the relative performance of the EU *vis-à-vis* its global competitors in specific areas. There are good reasons to believe that both the production and the dissemination of knowledge would greatly benefit from the availability of more up-to-date rules, which would couple greater effectiveness in enforcement with more user-friendly provisions on content consumption, re-use and transformation.
- **Allocative inefficiency.** Legal fragmentation and limits to the availability of content in the Internal Market fundamentally reduce the value of the Internet for European end-users, because the end-to-end design of the internet (i.e., the ability of each user to communicate

and exchange files with every other user) cannot be fully exploited to share and access all types of content. The untapped consumer and producer surplus brought on by the lack of availability of content and by widespread copyright infringement account for reductions in allocative efficiency that reverberate on the value of digital content available online, and hence also on the value of Internet access for end-users. Nevertheless, this does not necessarily lead to the conclusion that all price discrimination in the Single Market should be prohibited: as noted throughout this Study, there are several instances of price-discrimination, even those based on geo-blocking practices, which can be considered as welfare-enhancing, not welfare-reducing. The difficulty in the reform exercise consists precisely in singling out welfare-reducing practices and curbing them while treating pro-competitive, welfare-enhancing forms of price discrimination as perfectly viable business solutions.

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

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

## Summary table

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

### Summary ex-post evaluation

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

## Introduction

### 1. Copyright in the digital era

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

A few years after the birth of the Web, it seemed fair to state that the prophets of the 'death of copyright' were right, and the advocates of the 'celestial jukebox' had simply gotten it wrong. The reason was simple, and related to the combination of three factors. First, content was flowing in digitised form over the Web, and for the first time the copy was identical to the original – some authors even started to state that on the Web, the 'license is the product', meaning that access rights are what count, and the product itself does not exist anymore (Gomulkiewicz, 1998). Second, the end-to-end architecture allowed end-users to exchange files (regardless of whether they were copyrighted or not) without having to pass any filter, as the pipe was 'dumb' and the 'code' of cyberspace allowed them to do it. Third, broadband connections were becoming more widespread, and increased connectivity made it easier for end-users to share content on the Web by shipping large files.

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

A first policy response came with the 1996 *World Intellectual Property Organization Copyright Treaty* (WIPO Copyright Treaty), which called for a broadening and strengthening of copyright, at the same time endorsing technological protection measures (TPMs) and condemning any form of circumvention thereof. The United States (US) implemented the Treaty already in 1998 with the *Digital Millennium Copyright Act* (DMCA). The DMCA did not criminalise copying; on the other hand, it allowed whatever form of anti-circumvention technique, including TPMs aimed at restoring control over digital content. In the same year, the *Sonny Bono Copyright Term*

*Extension Act* extended the validity of copyright to 70 years after the author's death. **In the European Union (EU), the WIPO Copyright Treaty was implemented by Decision 2000/278/EC of 16 March 2000, and copyright legislation for the digital environment was finally introduced with Directive 2001/29/EC (hereinafter, the InfoSoc Directive), which forms the starting point and main subject matter of our evaluation in this report.**

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

**The difficulty of limiting copyright infringement by relying exclusively on litigation in court has led to increased emphasis on ways to limit the possibility for end-users to share copyrighted files with their peers.** In particular, the entry into the market of Apple's iTunes-iPod system determined the rise of Digital Rights Management (DRM) systems, initially hailed as a panacea against the perils of enduring illegal file-sharing. Not only the InfoSoc Directive was largely based on the belief that DRM would become a major way of ensuring copyright protection in the online environment (as will be recalled and illustrated in more detail in the next Sections of this report): a few years later, in 2005, a report by an *ad hoc* High-Level Group on DRM appointed by the European Commission concluded: "EU Institutions and Member States [must] reflect in their policy positions that copyright abuse will not be tolerated, and that protection of content delivered via DRM is the way forward."<sup>10</sup>

But that, again, was only a chimera. **Even the most sophisticated protection mechanism ever conceived, such as DRM, combining both technological and legal protection measures, has not put an end to the quarrel on how to effectively protect copyright online.** For example, in an open letter dated 6 February 2007, Steve Jobs observed: "DRMs haven't worked, and may never work, to halt music piracy...Much of the concern over DRM systems has arisen in European countries. Perhaps those unhappy with the current situation should redirect their energies towards persuading the music companies to sell their music DRM-free...Convincing them to license their music to Apple and others DRM-free will create a truly interoperable music marketplace. Apple will embrace this wholeheartedly."<sup>11</sup>

The fact that DRM systems ended up becoming part of existing business models only in a limited subset of content markets (e.g. in e-books) led to a further reflection on how to strengthen copyright enforcement online. This reflection spurred a new wave of legislation that ended up **conflicting with one of the most fundamental tenets of Internet policy: the idea, largely based on the need to defend the neutral design of the Internet, that Internet Service Providers (ISPs) could not be held liable for the conduct of their subscribers, as they would not be expected to inspect the bits of traffic that end-users shipped or received through their 'pipes'.**

<sup>10</sup> See the *Final Report of the High Level Group on Digital Rights Management*, 2004

<sup>11</sup> Steve Jobs, *Thoughts on Music*, at <http://www.apple.com/hotnews/thoughtsonmusic/>.

These new pieces of legislation violated this principle by relying directly on ISPs to detect copyright infringement and even directly enforce the law. For example, in 2009 France passed a controversial ‘content and creation’ law that called for the creation of the *Haute Autorité pour la Diffusion des Oeuvres et la Protection des droits sur Internet* (HADOPI), a new agency with a mandate to sanction those accused of illegal file-sharing. The law introduced a ‘three-strikes’ rule according to which ISPs should monitor infringing conduct by their subscribers, and after two warnings put them on a black list and block their account for up to one year. The ‘three-strikers’ would, by the way, continue to pay while being disconnected. During the following years, ‘three-strikes’ or ‘graduated response’ legislation was considered and also heavily debated in many other jurisdictions. At the same time, some countries (in particular those, like the Netherlands, that had already legislated in favour of mandatory net neutrality) decided to rely more on self- or co-regulatory remedies such as codes of conduct in order to strike a balance between the need to protect copyright, end-users’ right to privacy and intermediaries’ right to conduct business.

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

## 2. Structure of the work

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

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



**remuneration and compensation of authors and performers**<sup>12</sup> by looking at the various approaches existing in EU legislation, as well as the existing data on market structure and revenue allocation in the creative content markets.

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

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<sup>12</sup> In this study the terms ‘remuneration’ and ‘compensation’ are often used together to broadly refer to the financial reward that EU copyright Directives require to be granted to authors and performers for certain uses of their works. These terms, which refer to the same concept and type of pecuniary obligation, are used interchangeably in the relevant legislation, also when the remuneration or compensation has to be paid to other categories of right-holders: for instance, reprography and private copying are allowed on condition that copyright holders receive ‘fair compensation’ (see InfoSoc Directive, Article 5(2)(a) and 5(2)(b)); music performers are given an unwaivable right to ‘equitable remuneration’ for the rental of phonograms (see Directive 2006/115/EC, Article 5); music performers are granted a right to an ‘annual supplementary remuneration’ for the 20-year period of additional protection of sound recordings provided by Directive 2011/77/EU (which amended Directive 2006/116, Article 3), and so on. In the Section concerning the legal aspects of copyright (see Section II.1) this Study gives priority to the specific terminology of the legislative acts taken into consideration.

## **Part I: The Intervention Logic of the InfoSoc Directive and Related Legislation**

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

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

#### **1.1. Needs and problems at the time of the InfoSoc Directive**

In a review of the EU legal framework on copyright undertaken in 2004, the European Commission defined the 2001 InfoSoc Directive as the most comprehensive piece of legislation ever adopted in this field.<sup>13</sup> Even though, as reflected by its title and apparent objective, its adoption was historically triggered by the advent of digitisation of information, **the InfoSoc Directive set out EU law provisions whose scope of application goes far beyond the realm of digital settings, and touches upon all dimensions of artistic and literary property.** Since the time of the submission of a Directive proposal by the Commission in 1997, commentators pointed out that, through this new piece of legislation, the European Community (EC) would have replaced “maybe two-thirds of national copyright laws” (Cohen Jehoram, 2001, p. 545). None of the former EU interventions in this field has been as wide as the legislative reform of 2001, which re-defined and harmonised, to a large extent, the most relevant categories of rights granted to copyright holders and took steps to make copyright exceptions as uniform as possible, in both digital and analogue environments (Cohen Jehoram, 2001).

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

There was no EU copyright law until the early 1990s. National rules on copyright were taken into consideration insofar as the European Court of Justice (ECJ) found that national provisions created obstacles to the EC principles of free movement of goods and services, and unrestricted competition. National courts started seeking clarification about the basic tension that existed between EU-wide constitutional principles and national copyright rules. **The exercise of intellectual property rights within national borders allowed companies to partition the Common Market in order to prevent the free**

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<sup>13</sup> See Commission of the European Communities, Commission Staff Working Paper on the review of the EC legal framework in the field of copyright and related rights, SEC(2004)995, Brussels, 19.7.2004, p. 3.

**movement of goods on a cross-border basis.** By reserving to the owner the exclusive right to exploit a protected process, product or work within Member States' territories, on the grounds of the principle of territoriality of intellectual property, national laws ended up conferring the right to oppose the importation of a good which enjoyed an identical or similar right into another Member State.

The first time the ECJ analysed such a conflict in the field of copyright was *Deutsche Grammophon v. Metro-SB-Grossmärkte*.<sup>14</sup> The Court found that, although Article 295 of the EC Treaty reserved the creation and definition of the subject matter of an intellectual property right (in the Court's lexicon: the *existence* of the right) to national law, the *exercise* of such a right nonetheless fell within the field of the application of the Treaty. Moreover, the Court clarified that Article 36 of the Treaty on the Functioning of the European Union (TFEU), formerly Article 30 of the Treaty establishing the European Communities (TEC), exempted the exercise of an intellectual property right from the scope of Article 34 TFEU (formerly Article 28 TEC), but only insofar as it was necessary for the specific subject matter of that right to be protected. Embracing this distinction, the ECJ pointed out that, **once a copyright holder exercises his or her exclusive right of distribution by putting a copyrighted work on the market for the first time, the rights should have been 'exhausted', in the sense that Community law should prevent the right-holder from using his or her intellectual property right to prevent parallel imports and restrict Community-wide trade.** The ECJ found that, this way, Community law ended up respecting the existence of copyright while narrowing its exercise for the pursuit of the objective of free movement of goods.

### 1.1.2. The principle of exhaustion and its scope of application

After having been coined and implemented by the ECJ, the principle of exhaustion progressively found legislative recognition in Article 4(c) of the 1991 Software Directive,<sup>15</sup> which concerns the right of distribution.<sup>16</sup> A similar provision was embodied in Article 5(c) of the 1996 Database Directive.<sup>17</sup> Meanwhile, the ECJ detailed its definition of the scope of application of this principle in several decisions on Article 30 TEC (now Article 36 TFEU), whose wording justified restrictions on imports and exports on the grounds of national copyright protection.

<sup>14</sup> See C-78/70, *Deutsche Grammophon v. Metro-SB-Grossmärkte*, 1971, ECR 487. In this case a German manufacturer of sound recordings sought to enforce its copyright in Germany in order to block the import by a third party of copies of the records manufactured and sold in France by its French subsidiary (i.e. with the manufacturer's consent).

<sup>15</sup> Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs, OJ L 111, 5.5.2009; which replaced Directive 91/250/EEC, hereinafter 'Software Directive'.

<sup>16</sup> Article 4(c) of the 1991 Software Directive read as follows: 'The first sale in the Community of a copy of a program by the right-holder or with his consent shall exhaust the distribution right within the Community of that copy, with the exception of the right to control further rental of the program or a copy thereof...' This provision is now included into Article 4(2) of Directive 2009/24/EC.

<sup>17</sup> Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ L 077, 27.03.1996, hereinafter 'Database Directive'.

In *Coditel and Others v. Ciné Vog Films and Others*,<sup>18</sup> the ECJ made it clear **that the principle of Community-wide exhaustion applied only to the physical dissemination of copyrighted goods, without extending it to intangible forms of commercial exploitation such as a cross-border re-transmission of a film.** In that case, the Court excluded that the principle of free movement of goods and services could allow a Belgian trans-border cable re-transmission of a film, broadcast in Germany, without the authorisation of the copyright owner of the film. In *Warner Brothers v. Erik Viuff Christiansen*,<sup>19</sup> the Court declined to apply the exhaustion rule to a case of unauthorised rental of a videocassette in Denmark that had been marketed in the United Kingdom, on the grounds that Danish law, unlike UK law, provided a rental right in favour of copyright owners. Even if the Court recognised that the protection of the Danish rental right had the effect of restricting the intra-Community market for videocassettes, it held that such protection was justified on the grounds of Article 30 TEC (now article 36 TFEU). In *EMI Electrola v. Patricia and others*,<sup>20</sup> the ECJ argued that the national protection of intellectual property based on Article 30 TEC (now article 36 TFEU) allowed a copyright owner of sound recordings to obtain an injunction in Germany against the unauthorised importation of records from Denmark, where copyright on such recordings had already expired.

### 1.1.3. The progressive development of an EU copyright policy and regulation

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

In the literature, commentators described the Directives proposed by the Commission as a direct consequence of the above-mentioned ECJ judgments (Cohen Jehoram, 2001). These institutional responses to the case law of the ECJ consisted of specific legislation that sought to put the conflict between free movement of goods and national copyright protection to an end. Looking at the legislative evolution of the early 1990s from this perspective, one can easily understand that the adoption of Directive 93/83/EEC on the coordination of certain rules concerning copyright in satellite broadcasting and cable

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<sup>18</sup> C-62/79, *Coditel and others v. Ciné Vog Films and others* (1980), ECR 881.

<sup>19</sup> C-158/86 *Warner Brothers Inc. and Metronome Video ApS v. Erik Viuff Christiansen* (1988) ECR 2605.

<sup>20</sup> C-341/87 *EMI Electrola GmbH v. Patricia Im- und Export and others* (1989), ECR 79.

retransmissions<sup>21</sup> is a (not so timely) reaction to *Coditel and Others v. Ciné Vog Films and Others*; Directive 92/100/EEC on rental and lending rights<sup>22</sup> is linked to the *Warner Brothers* decision; and Directive 93/98/EEC on the harmonisation of the term of copyright protection<sup>23</sup> was **an answer to a disparity in the national term of copyright protection** emphasised by *EMI Electrola GmbH v. Patricia Im- und Export and others*.

**At that time, the idea of the Commission was not that of creating an entire European copyright system.** The publication of the *Green Paper on Copyright and the Challenge of Technology*<sup>24</sup> shows that the Commission mainly intended to put an end to the undesirable outcome of the ECJ's judgments, "and only for very particular subjects, such as computer software, databases, terms of protection and resale rights..." This Commission document explicitly emphasised that EU law should not have enacted horizontal (i.e. general) provisions (Cohen Jehoram, 2001).

#### 1.1.4. EU copyright Directives and industrial policy objectives

This overview of the original Commission plan in the field of copyright would be incomplete without considering that the EU copyright legislation, while aiming to **avoid competitive distortions in internal trade, primarily sought to foster the industrial development and the international competitiveness of Europe especially in sectors, such the production of computer programs and databases, where the European industry needed a boost** (Ullrich, 2003). The Recitals of EU copyright Directives, including the InfoSoc Directive, always stress the need to ensure a high level of protection of copyright as an indispensable tool to achieve industrial policy goals. In the very first European copyright statute, i.e. the 1991 Software Directive, the need to ensure a broad and uniform protection of software triggered the definition at European level of one of the most horizontal aspects of copyright law, namely, the standard of originality of creative works, as a basic requirement for such works (i.e. computer programmes) to be protected as literary works.<sup>25</sup> At that time, while **opting for a standard of originality borrowed from the continental-European *droit d'auteur* (i.e. the author's right) systems, Article 1(3) of the Software Directive obliged Member States such as the UK and Ireland to change their copyright laws on a basic point** (Cohen Jehoram, 2001). Until then, British and Irish laws granted copyright protection to computer programs that entailed "skill, labour or investment". To the contrary, the originality test under German law required at least certain categories of work such as designs and computer

<sup>21</sup> See Council Directive 93/83/EEC of 27 September 1993 on the co-ordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJ L 248, 6.10.1993, p. 15.

<sup>22</sup> See Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ L 346, 27.11.1992, p. 61.

<sup>23</sup> See Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights, OJ L 372, 27.12.2006, p. 9, hereinafter 'Term Directive'.

<sup>24</sup> See Commission of the European Communities, *Green Paper on Copyright and the Challenge of Technology*, COM(88)172 final.

<sup>25</sup> See Article 1(3) of the Software Directive: 'A computer program shall be protected if it is original in the sense that it is the *author's own intellectual creation*. No other criteria shall be applied to determine its eligibility for protection' (emphasis added).

programmes to meet further qualitative or aesthetic requirements for copyright protection to be granted.

Even in the case of the 1996 Database Directive the Commission continued to act as a copyright legislator pursuing internal and external industrial policy goals. The end was that of removing the existing disparities in the standard of originality required for a database to enjoy copyright protection.<sup>26</sup> On that occasion, the reasoning of European copyright policymakers was that the difference between the lower copyright standard applied in common law Member States (often referred to as ‘sweat of the brow’ standard, involving the aforementioned “skill, labour and investment” and the higher standard of intellectual creation applying in *droit d’auteur* Member States triggered market distortions in database products. Hence, the enactment of horizontal rules aimed at granting a high level of copyright protection to two distinct types of databases: (i) ‘original’ databases, which would presumably obtain protection under *droit d’auteur* jurisdictions, as they were the fruit of the *author’s own intellectual creation* and (ii) ‘non-original’ databases (i.e. mere aggregation of data), which resulted from substantial investment in either the obtaining, verification or presentation of their contents, and would meet just the common law copyright standard. That was the reason why the Database Directive introduced at the EU level a new form of *sui generis* protection for these products.<sup>27</sup>

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

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

A change in the European Commission’s copyright policy, following the publication of the 1995 *Green Paper on Copyright and the Challenge of Technology*, which still advocated a piecemeal approach to copyright harmonisation, and the subsequent proliferation of horizontal measures in this field were mainly the consequence of an institutional change

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<sup>26</sup> See Commission of the European Communities, *First evaluation of Directive 96/9/EC on the legal protection of databases*, DG Internal Market and Services Working Paper, 12.12.2005, available at: [http://ec.europa.eu/internal\\_market/copyright](http://ec.europa.eu/internal_market/copyright) (hereinafter *Commission’s Evaluation of the Database Directive*).

<sup>27</sup> See Commission’s Evaluation of the Database Directive, p. 3.

in the EU decision-making process. The constitutional amendments that followed the entry into force of the 1986 Single European Act (SEA) allowed the Community's Internal Market legislation, including copyright measures, to be adopted by the European Council (i.e., by the Member States) on the grounds of *qualified-majority voting* instead of unanimity (De Witte, 2006).<sup>28</sup> As stressed in the literature, the absence of any national veto under Article 100a (now Article 114 TFEU) ensured the vitality of this provision as a basis for the adoption of a large number of measures associated with the process of completion of the Internal Market (Weatherill, 1997). **This change of legal basis for Internal Market legislation, together with the re-orientation of the Commission's Internal Market Directorate objectives around 1990, contributed to a smoother implementation of harmonisation measures that ensured free movement of copyright goods within the Community.**<sup>29</sup>

### 1.1.6. The 1995 Green Paper on Copyright in the Information Society

The preparatory work for the adoption of such a comprehensive measure as Directive 2001/29/EC started with the publication of the above-mentioned 1995 *Green Paper on Copyright in the Information Society*.<sup>30</sup> In this document, the European Commission identified several legislative adjustments that the EC would have needed to make in order to pave the way for a harmonised protection of copyright in the newly emerged digital environment. Interestingly, the *Green Paper* argued that, for such a framework to have been created, Community law should have enacted a number of measures that, eventually, were not incorporated in the InfoSoc Directive such as: **i) international private law criteria to identify the law applicable to the contracts and copyright infringements taking place on the Internet; ii) the redefinition at European level of the subject matter and the extension of moral rights on creative works; and iii) an effective harmonisation of provisions regarding collective rights management of copyright.**

<sup>28</sup> De Witte stresses even that, following the enactment of the 1992 Maastricht Treaty and the 1997 Amsterdam Treaty, the scope of 'pure' Internal Market legislation, originally encompassed by the legal basis provided by Articles 94 (*ex* 100: unanimity) and 95 (*ex* 100a: qualified majority) was reduced by the creation of sector-specific policies such as environmental protection, health and safety of workers, social policy, migration, and civil law and procedure.

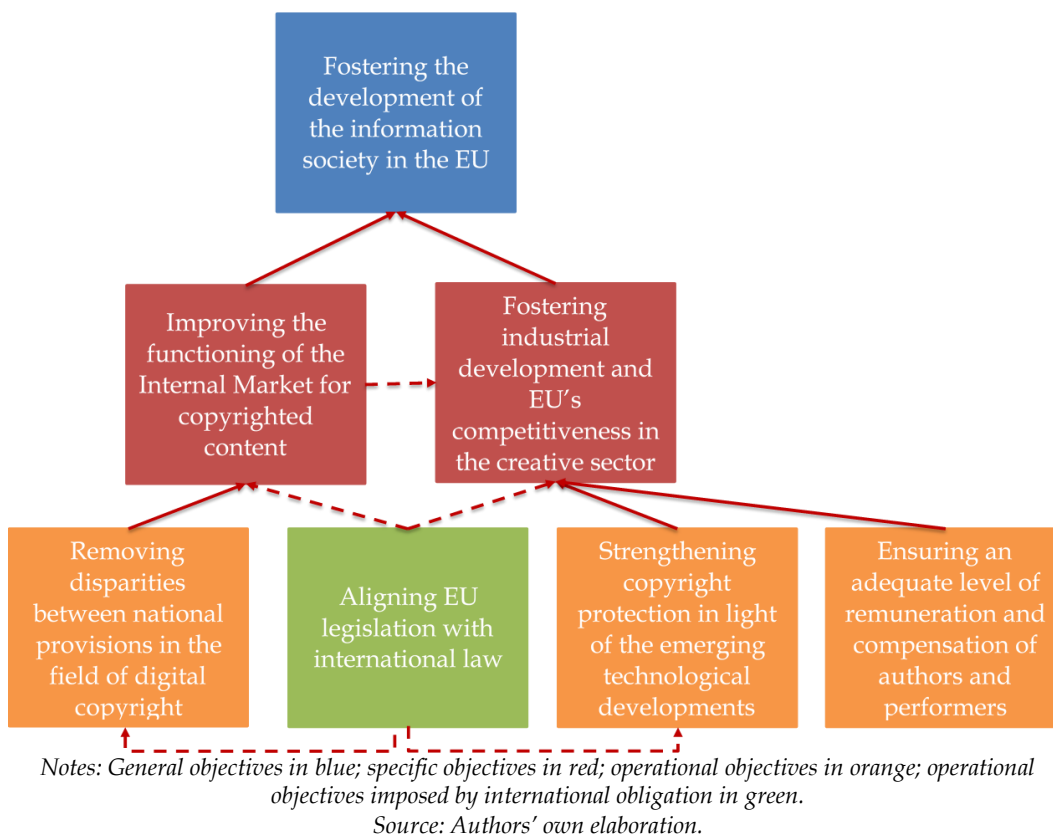
<sup>29</sup> See Cohen Jehoram who emphasised that, around 1990, the atmosphere in the copyright unit of what was, until recently, the Internal Market Directorate began to change. As the author stressed, 'New personnel was appointed with other ambitions and orientation than those that went before...' (Cohen Jehoram, 2001, p. 536).

<sup>30</sup> See Commission of the European Communities, *Green Paper. Copyright and Related Rights in the Information Society*, Brussels, 19.07.1995, COM (95) 382 final, 49.

## 1.2. Objectives of the InfoSoc Directive

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

Figure 1. General, specific and operational objectives



### 1.1.7. General and specific objectives

As mentioned above, the InfoSoc Directive was adopted by the European Parliament and the Council with the intent to “create a general and flexible legal framework at Community level in order to **foster the development of the information society in Europe**” (Recital 2 of the InfoSoc Directive). To achieve this general objective, the EU legislator acknowledged **the need to both improve the functioning of the Internal Market for new copyrighted products and services** (cf. Recital 2 of the InfoSoc Directive) as well as **foster substantial investment in creativity and innovation and thereby improve the EU competitiveness in the creative sector.** More specifically, the Directive conceived copyright harmonisation and Internal Market integration as a means to an end,



which was that of **aiming at “growth and increased competitiveness of European industry”** (Recital 4 of the InfoSoc Directive). To this end, copyright and related rights should have been adapted and supplemented in order to respond adequately to new economic realities by promoting investment in new forms of exploitation of creative works and in the development of network infrastructure.

### 1.1.8. Operational objectives

The creation of a truly integrated Internal Market for copyrighted works was to be achieved by **removing disparities between national provisions in the domain of copyright**, especially for digital uses. Harmonisation of national copyright laws was in fact deemed necessary in order to **avoid inconsistent national responses to technological developments**. The new Directive should have prevented Member States from responding to technological challenges in this field with isolated initiatives that might have resulted “in significant differences in protection and thereby in restrictions on the free movement of services and products incorporating, or based on, intellectual property” (Recital 6 of the InfoSoc Directive). **In particular, the existing copyright exceptions and limitations, as set out under national laws, had to be reassessed in the light of the new electronic environment (cf. Recital 31 of the InfoSoc Directive).**

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

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

In addition, when the Commission made its proposal for the text of a copyright Directive for the information society, another operational objective, external to the EC Treaty, prevailed over the accomplishment of intra-Community purposes. As explicitly mentioned in Recital 15 of the Directive, this objective consisted of the implementation, by the EU, of a number of international obligations set out in the 1996 WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, which were negotiated directly by the Commission with third countries.<sup>31</sup> The two major reforms embodied in these treaties concerned, on the one hand, the explicit recognition in favour of both copyright and the related holders of the exclusive right of authorising any communication to the public, including the making available of copyrighted material to the public in such a way that members of the public may access these works from a place and at a time chosen by them.<sup>32</sup> On the other hand, the WIPO Treaties introduced into international copyright law the duty for contracting parties to provide **adequate legal protection and effective legal remedies against the circumvention of effective technological measures** that are used by right-holders in connection with the exercise of their rights.<sup>33</sup>

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<sup>31</sup> See WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty, adopted in Geneva on 20 December 1996, available at: <http://www.wipo.int/treaties>.

<sup>32</sup> See Article 8 of the WIPO Copyright Treaty; Articles 10 and 14 of the WIPO Performances and Phonograms Treaty. A more in-depth commentary on the enactment of these measures is provided in Mazziotti (2008).

<sup>33</sup> See Article 11 of the WIPO Copyright Treaty and Article 18 of the WIPO Performances and Phonograms Treaty.

## Part II: Evaluation of Selected Issues

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

#### 1.1. Legal basis of EU copyright legislation

Until the entry into force of the Treaty of Lisbon, the EU did not have a direct competence to legislate in the field of intellectual property. The EU acquired such a prerogative with the introduction of Article 118 under the TFEU. Even though this constitutional provision addresses mostly the creation of intellectual property rights whose protection requires “the setting up of centralized Union-wide authorization, coordination and supervision arrangements” (i.e. trademarks, industrial designs, and patents), **this new legal basis would matter if, in the future, the EU decided to establish a genuinely pan-European copyright system.**<sup>34</sup>

For now, the EU legislative measures in the field of copyright have been legally based on the grounds of Article 114 TFEU (formerly Article 95 TEC). This provision enables EU lawmakers to enact measures that are designed to pursue the approximation of laws for the creation of a Single Market. **Under Article 114 TFEU, therefore, the EU is allowed to take harmonisation measures insofar as they help to remove disparities between national provisions that hinder the free movement of goods, or distort competition.** The only copyright directives that were adopted, more recently, with a different or broader justification under the TFEU were Directive 2012/28 on certain permitted uses of orphan works<sup>35</sup> and Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the Internal Market.<sup>36</sup> These directives were adopted to pursue additional or more specific policy objectives that were, respectively, those of allowing the mutual recognition of the status of orphan works on a cross-border basis (on the grounds of Article 53(1)

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<sup>34</sup> In the domains of trademark law and industrial design law such pan-European entitlements already exist, as a result of EU regulations that, in the absence of a specific legal basis at the time of their adoption, had to be based on the so-called implied powers conferred by Article 308 TEC to EU lawmakers, acting on the grounds of unanimity (see Council Regulation (EC) 207/2009 of 26 February 2009 on the Community trade mark (replacing Council Regulation 40/94 of 20 December 1993), OJ L 78, 24.3.2009; and Council Regulation (EC) 6/2002 of 12 December 2001 on Community designs, OJ L 3, 5.1.2002).

<sup>35</sup> Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, OJ L 299, 27.10.2012.

<sup>36</sup> Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, OJ L 84, 20.3.2014, hereinafter ‘Directive on collective management of copyright’.

TFEU) and facilitating the supply of services of collective rights management in the Internal Market (on the grounds of Articles 50, 53 and 62 TFEU).

As things stand, the unification of legislation in the field of copyright at EU level could be achieved through a regulation based on Article 118 TFEU. Such a process, however, would be more complex than that which occurred in areas such as EU trademark law since the EU layer of legislation would entirely replace national copyright laws. This is due to the fact that, contrary to what happens for industrial property, copyright protection is acquired by the act of creation, i.e. without any requirements of registration, but simply by operation of the law. As pointed out in the relevant literature, due to the automatic operation of a unified copyright system, a hypothetical EU copyright would simply supersede national copyright, in a way that the two titles could never coexist (as national and Community trademarks and designs, for instance, do) (Ullrich, 2004). This means that, in a context where harmonisation of national laws is still incomplete (see Section II.1.2), the enactment of a uniform and EU-wide copyright system can legitimately be regarded as a very difficult achievement, at least in the near future.

**The InfoSoc Directive is the most comprehensive piece of legislation the EU has adopted in the field of copyright.** On the grounds of former Article 95 TEC, the Directive sought to remove disparities between national provisions mainly through the redefinition at European level of the subject matter and the extension of economic rights on creative works. The assumption the whole InfoSoc Directive relies on is that copyright and related rights should have been adapted and supplemented in order to respond adequately to new economic realities by promoting investment in new forms of exploitation of creative works and in the development of network infrastructure (cf. Recital 5 of the InfoSoc Directive). In the view of EU lawmakers, **intervening at EU level with a set of harmonisation measures in the field of copyright would have prevented uncoordinated and isolated initiatives at national level that might have resulted “in significant differences in protection and thereby in restrictions on the free movement of services and products incorporating, or based on, intellectual property...”** (cf. **Recital 6**). These potential differences at national level would have caused distortions of competition in internal trade, weakening the industrial development of the information society.<sup>37</sup>

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

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<sup>37</sup> See Ullrich, who emphasised that all EU intellectual property measures, while seeking to avoid distortions of competition in internal trade, end up pursuing the goal of promoting Europe’s industrial development (Ullrich, 2003, p. 471).

investment in creativity and innovation with the aim of “growth and increased competitiveness of European industry” (cf. Recital 4 of the InfoSoc Directive).

The choice of EU lawmakers to give priority to the objective of redefining the scope of copyright protection over the accomplishment of purposes of Internal Market integration was due mostly to the obligations set out in the 1996 WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. **The goal of ensuring compliance with those international treaties forced the EU to effectively recognise broader rights that the treaties intended to grant to authors, performers and record producers with regard to their works.** These broader rights consisted of an adaptation and expansion of copyright’s logic and rationale to new forms of content dissemination and use that digital technologies and electronic networks had started enabling from the mid-1990s onwards. In particular, the 1996 WIPO Internet treaties required an extension of the traditional right of communication to the public with the purpose of including interactive transmissions of copyright content into the copyright scope.<sup>38</sup> With the advent of digital networks, the public may access creative works on demand (i.e. from a place and at a time chosen by each Internet user). The WIPO contracting parties sought to ensure that this new form of ‘point-to-point’ content transmission enabled by digital networks was explicitly included in the legal concept of ‘communication to the public’, to the benefit of authors, performers and the creative industries. Moreover, the WIPO Internet treaties influenced the drafters of the InfoSoc Directive by introducing into international copyright law the duty for the contracting parties to provide effective legal sanctions against the circumvention of technological measures (e.g. anti-copy devices, watermarks, DRM systems, etc.) that are used by copyright holders in connection with the exercise of their rights.<sup>39</sup>

## 1.2. Form and extent of harmonisation of the EU copyright system

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

<sup>38</sup> See Article 8 of the WIPO Copyright Treaty; Articles 10 and 14 of the WIPO Performances and Phonograms Treaty.

<sup>39</sup> See Article 11 of the WIPO Copyright Treaty and Article 18 of the WIPO Performances and Phonograms Treaty.

The fact that the Directive was shaped more as an instrument of industrial policy rather than as a pro-Single Market initiative is also evidenced by the absence of provisions that would have been necessary to foster cross-border exploitations of digital works. For reasons that have never been clarified, issues that were identified as necessary for the purpose of removing barriers to market integration in digital markets in the Commission's 1995 *Green Paper on Copyright in the Information Society*<sup>40</sup> were either taken into consideration at a much later stage (e.g. the harmonisation of collective rights management law through the aforementioned Directive on collective management of copyright) or remain unclear at present. For instance, in its case law the Court of Justice of the European Union (CJEU) still relies on distinct international private law criteria to identify the law applicable to online copyright infringements. This issue was regarded in the 1995 *Green Paper* as an important step towards the harmonisation of copyright laws in the information society. Yet, in the absence of a specific provision, the CJEU has relied so far on Article 7 of Regulation 1215/2012 (which replaced the so-called 'Brussels I Regulation'), which provides that "in matters related to tort, delict, or quasi-delict" one can alternatively be sued before the courts of the place "where the harmful event occurred or may occur".<sup>41</sup> In recent judgments the CJEU has followed different criteria to define the place of infringement of copyright and personality rights, locating such a place in the country where the claimant has her centre of interests<sup>42</sup> or in the country where the persons targeted by a given exploitation of copyright works are located.<sup>43</sup> More recently, the CJEU opted for the so-called 'accessibility' criterion, according to which an infringement action can be validly brought before the courts of the place where the damage occurs or where the act causing such damage takes place.<sup>44</sup> It is evident that the criterion of accessibility, whose validity was recently confirmed by the CJEU, paves the way for a multiplication of courts, on the assumption that a copyright enforcement action can be brought in each Member State where the infringed work can be accessed, in accordance with the applicable national rules and in relation to the damages occurred in each single jurisdiction.<sup>45</sup>

### 1.2.1. Standard of originality

The sector specific Directives that were adopted before the InfoSoc Directive explicitly identified the standard of originality as a basic requirement for copyright protection. The main reason for that was that EU lawmakers sought to ensure that Member States granted a uniform legal protection to types of works that either did not fall, at that time,

<sup>40</sup> See Commission of the European Communities, *Green Paper. Copyright and Related Rights in the Information Society*, Brussels, 19.07.1995, COM (95) 382 final, 49.

<sup>41</sup> Regulation (EU) 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351/1, 20.12.2012.

<sup>42</sup> Joined cases C-509/09 and C-161/10, *eDate Advertising GmbH v. X and Oliver Martinez*, Judgment of 25 October 2011, par. 48-52.

<sup>43</sup> C-173/11, *Football Dataco Ltd v. Sportradar GmbH*, Judgment of 18 October 2012, par. 38-39.

<sup>44</sup> C-170/12, *Peter Pinckney v. KDG Mediatech AG*, Judgment of 3 October 2013, par. 42-43.

<sup>45</sup> C-387/12, *Hi Hotel v. Uwe Spoering*, Judgment of 3 April 2014, par. 35 and 38-39 (where the CJEU held that the courts of the Member States where the damage occurs are 'best placed, first, to ascertain whether the rights of copyright guaranteed by the Member State concerned have in fact been infringed and, secondly, to determine the nature of the damage caused').

within the traditional categories of copyrighted works or were protected in accordance with diverging criteria under national laws.<sup>46</sup> If this legislation had not defined at EU level the subject matter of copyright, a different understanding of the basic requirements for protection at national level would have caused distortions of competition in the Internal Market for these works. To avoid that scenario, sector-specific Directives provided a definition of ‘computer programme’, ‘photograph’ and ‘database’, embracing the continental-European criterion of originality. Articles 1(3) of the Software Directive, 3(1) of the Database Directive and 6 of the Term Directive clarify that the above-mentioned works are protected by copyright if they are original in the sense that they are their author’s own intellectual creation.<sup>47</sup> Moreover, in order to reflect the respective standards of originality of common law and civil law countries, the Database Directive identified two distinct types of works that should have been protected under national laws: i) ‘original’ databases, which would presumably obtain protection under *droit d’auteur* jurisdictions (as they were the fruit of the author’s own intellectual creation); ii) ‘non-original’ databases, which result from substantial investment in either the obtaining, verification or presentation of their contents, and would easily meet the common law copyright (i.e. ‘sweat of the brow’) standard.<sup>48</sup>

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

<sup>46</sup> For instance, when it comes to the protection of photographic works, Directive 93/98/EEC (Term Directive) provides that a photograph that fulfils the originality requirement set out under Article 6 (i.e. ‘the author’s own intellectual creation reflecting his personality’) should be protected by copyright under national law. As pointed out in the literature, as a result of this provision Member States are free to protect other types of photographs that do not meet the originality requirement through copyright-related rights with their own terms of protection; however, such protection should be based on requirements other than the (harmonised) originality requirement defined in the Directive: Minero, who recalled that countries like Italy and Spain protect non-original photographs by a related right for 20 and 25 years, respectively, after the date of creation (Minero, 2014) – cf. Article 92 of the Italian Copyright Act and Article 128 of the Spanish Copyright Act).

<sup>47</sup> See, in particular, Article 1(3) of the Software Directive: ‘A computer program shall be protected if it is original in the sense that it is the *author’s own intellectual creation*. No other criteria shall be applied to determine its eligibility for protection’; similarly, Article 3(1) of the Database Directive provides that ‘databases which, by reason of the selection or arrangement of their contents, constitute the *author’s own intellectual creation* shall be protected as such by copyright. No other criteria shall be applied to determine their eligibility for that protection.’

<sup>48</sup> See, respectively, Article 1(2) of the 1996 Database Directive: ‘For the purpose of this Directive, “database” shall mean a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means’; and Article 7, par. 1 and 4, of the same Directive, according to which Member States shall provide a *sui generis* right for the maker of a database to prevent extraction and/or reutilisation of the whole or of a substantial part of a database which shows that there has been qualitative and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents, irrespectively of the eligibility of that database for copyright protection.

The CJEU sought to strike a fair balance between the relatively low standard of originality adopted in the UK and the higher standards applied in continental-European countries such as Germany and France. In the first and most important among such cases, i.e. *Infopaq International A/S v. Danske Dagblades Forening* (2009),<sup>49</sup> the CJEU found that the notion of copyright 'work' under the Directive should have been the same as the one adopted under sector specific provisions that define originality with regard to works such as computer programmes, databases, and photographs. The CJEU held that, for a matter of consistency with other EU law measures (cf. Recitals 4, 9 to 11 and 20) the rights harmonised under the InfoSoc Directive should have applied only in relation to a work (or parts of a work) which is original in the sense that it is its 'author's own intellectual creation'. Considering the purpose of harmonisation of the InfoSoc Directive, the CJEU developed the process of interpretation that started with *Infopaq International A/S v. Danske Dagblades Forening* (2009) in later judgments that clarified the notion of "author's own intellectual creation". According to the Court, for originality (and copyright protection) to subsist in the case of a graphic user interface, the features of such interface should not be differentiated only by their technical function, in a way that the author cannot express his creativity in an original manner.<sup>50</sup> In the case of a portrait photograph, the Court held that originality subsists insofar as the photographer makes creative choices and gives the work her personal touch.<sup>51</sup> As for sport events, it was held that this type of 'work' does not satisfy the Court's standard of originality insofar as the event is "subject to rules of the game, leaving no room for creative freedom for the purposes of copyright".<sup>52</sup>

### 1.2.2. The scope of the exclusive rights of reproduction

For the definition of the right of reproduction, the InfoSoc Directive adopted a notion taken from the specific Directives on information goods, i.e. computer programmes and databases.<sup>53</sup> This right is defined very broadly, as "...the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part..." of copyrighted works and of performances, phonograms, films and broadcasts protected by so-called neighbouring rights. As pointed out in the relevant literature, because of the inclusion of temporary copying in the copyright scope, the technical concept of reproduction gives rise to an unprecedented condition of simultaneity among the different modes of commercial exploitation of a work (cf. Ginsburg, 1995; Ricolfi, 2002; Hugenholtz, 1996; Hugenholtz, 2000a). This condition of simultaneity is easy to understand if one considers that, in the digital environment, reproductions constitute a technical necessity for digital content to be browsed, cached, used and transmitted over networks.

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<sup>49</sup> See C-5/08 *Infopaq International A/S v. Danske Dagblades Forening* (2009), hereinafter '*Infopaq*'.

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

<sup>51</sup> See C-145 *Eva-Maria Painer v. Standard Verlags GmbH* (2012), par. 88-92.

<sup>52</sup> See C-403/08 and 429/08 *Premier League v. QC Leisure* (2012), par. 98.

<sup>53</sup> See Article 4(a) of the Software Directive and Articles 5(a) and 7(2)(a) of the 1996 Database Directive.



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

Article 5(1) enacted two distinct provisions. On the one hand, Article 5(1)(a) exempts certain temporary acts, for example, caching,<sup>54</sup> and routing,<sup>55</sup> which enable intermediaries such as ISPs temporarily to store and reproduce digital packets of copyright works through their cables and network infrastructure.<sup>56</sup> On the other hand, Article 5(1)(b) allows end-users to engage in temporary acts (e.g. browsing and caching) that have “no independent economic significance”. The case law of the CJEU is of help to better understand the factual requirements that should be met for the exemption from the reproduction right to apply.<sup>57</sup> The Court found that a reproduction of copyright materials should be regarded as transient or incidental under certain conditions, each of which should be satisfied for the copyright exception to apply (*Infopaq*, par. 55). Firstly, the duration of the act must be limited to what is necessary for the proper completion of the technological process at issue (*Infopaq*, par. 64). Secondly, for temporary acts to be exempted, a reproduction should be an integral and essential part for the correct and efficient functioning of the technological process (*Infopaq II*, par. 30). Thirdly, the reproduction should aim at enabling either a transmission in a network between third parties by an intermediary or a lawful use, such as the ephemeral acts of reproductions that enable a satellite decoder and a television screen to function correctly.<sup>58</sup> Last but not least, the reproduction must not have an independent economic significance, in the sense that it is not be able to generate an economic advantage additional to the one generated by the intended use and it should not modify contents.<sup>59</sup>

<sup>54</sup> ‘Caching’ (from the French ‘cacher’, i.e. ‘to hide’) is the automatic creation of temporary copies of data in order to make the data immediately available for subsequent uses.

<sup>55</sup> The term ‘routing’, instead, describes a modality of transmission by which each whole of digital data is fragmented into many packets, each of which is sent electronically to the required destination through the shortest way.

<sup>56</sup> See: ‘Did we really need a European lawmaker to tell us that caching and browsing are allowed without authorisation? A common sense right would have done the job as well, if not much better...’ (Hugenholtz, 2000b).

<sup>57</sup> See C-5/08 *Infopaq International A/S v. Danske Dagblades Forening* (2009); C-302/10 *Infopaq International A/S v. Danske Dagblades Forening* (2012), hereinafter *Infopaq II*; C-403/08 *Football Association Premier League Ltd and Others v. QC Leisure and Others* (2012), hereinafter *Premier League*.

<sup>58</sup> See *Premier League*, par. 165-172. By ‘lawful use’ one should mean a use either authorised by the right-holder or not restricted by law, as made it clear in the InfoSoc Directive, Recital 33. See also *Infopaq II*, par. 43-44.

<sup>59</sup> See *Premier League*, par. 176, and *Infopaq II*, par. 54.

With particular regard to the transient reproductions made by information carriers and exempted under Article 5(1)(a), this exemption serves the purpose of excluding carriers from indirect liability for copyright infringements carried out by their customers (see also above, in the introductory Section to this report). The technical functioning of the Internet – like that of a gigantic ‘copy machine’ – requires intermediaries to engage in temporary reproductions of small digital packets for digital content to be communicated over networks. The above-mentioned provision of the InfoSoc Directive makes it clear that acts of transient reproduction do not fall within the legal notion of ‘copies’ that are subject to the control of copyright holders. The complementary provisions of Article 5(1)(a) of the InfoSoc Directive and Articles 12 to 15 of the 2000 Electronic Commerce Directive restrict, under certain clear conditions, the liability of ISPs acting as mere conduits, caching and hosting service providers for the communication of infringing material.<sup>60</sup> It is worth recalling that, at the time of the negotiations for the 1996 WIPO Copyright Treaties, the issue of transient reproductions was far from being taken for granted. This question was highly debated in Geneva, where the US delegation proposed the adoption of a notion of copyright reproduction that would have intentionally invoked the liability of information carriers for their acts of communication through networks. The intention was that of requiring such intermediaries to police unauthorised flows of copyrighted works through their infrastructure.<sup>61</sup>

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

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<sup>60</sup> See Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178, 17.7.2000, hereinafter ‘e-Commerce Directive’, Articles 12 to 15. On the connection between the InfoSoc Directive and the e-Commerce Directive see Hart (2002) and IVIR (2007).

<sup>61</sup> The US proposal, which was eventually rejected, had previously been elaborated in the so-called 1995 White Paper: see U.S. Department of Commerce, Patent and Trademark Office, Information Infrastructure Task Force, Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights, available at: [www.uspto.gov/web/offices/com/doc/ipnii/front.pdf](http://www.uspto.gov/web/offices/com/doc/ipnii/front.pdf).

approach merely suggests that very short extracts of protected works *might* constitute a reproduction legally reserved to the copyright holder, within the meaning of Article 2.

### 1.2.3. The exclusive rights of communication to the public

The InfoSoc Directive provided an EU-wide adaptation of the traditional right of communication to the public to the realm of electronic networks (cf. InfoSoc Directive Articles 3 and 4). Taking as a model the broad definition embodied in Article 8 of the 1996 WIPO Copyright Treaty,<sup>62</sup> Article 3 of the Directive grants authors, performers and the producers of copyrighted works with the exclusive right “...to prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time chosen by them.”<sup>63</sup>

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

In its interpretation of Article 3 of the InfoSoc Directive, the Court relied on the explicit objective of the Directive to ensure the extension of this right to all communications “to the public not present at the place where the communication originates” (cf. Recital 23). In interpreting this concept the CJEU made it clear that the harmonisation of the right of public performance fell outside the scope of Article 3, since ‘public performance’ requires actors and performers to be in direct contact with the public.<sup>64</sup> In other cases where the communication of copyright works occurred as a result of an intervention (i.e. the installation of TV screens and/or speakers) by a commercial user or operator (i.e. a hotel, a spa establishment or a pub owner) in the transmission of copyright works, the Court found that such a deliberate intervention gave rise to a distinct act of communication and required a separate authorisation of the copyright owner for the activity to be lawful.<sup>65</sup> The CJEU reached such a conclusion on the assumption that a company that had given its customers access to broadcast works via television sets installed in its clients’ bedrooms

<sup>62</sup> Article 8 of the 1996 WIPO Copyright Treaty provides as follows: ‘Right of Communication to the public: ...Authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at the time chosen by them.’

<sup>63</sup> The preamble of the Directive (cf. Recital 23) clarifies that this right ‘should be understood in a broad sense, covering all communication to the public not present at the place where the communication originates...’ and it should include ‘any such transmission or re-transmission of a work to the public by wire or wireless means, including broadcasting...’ This means that the right covers, in particular, the interactive on-demand transmission of copyright works over digital networks (see Recital 25).

<sup>64</sup> See C-283/10 *Circus Globus Bucuresti v. UCMR-ADA* (2011).

<sup>65</sup> C-306/05 *SGAE v. Rafael Hoteles SA* (2006), par. 37-39 and 42; C-351/12 *OSA v. Lecebne lazne Marianske Lazne* (2014), par. 29-32; *Premier League*, par. 194-197.

or in a public house intended to target a new public, by distributing in those places, with full knowledge of the position, the signal received carrying the protected works.<sup>66</sup> According to the Court, even though the ‘public’ refers to an indeterminate number of potential listeners or viewers, such a notion does not necessarily entail a large number of persons. Rather, this notion establishes a certain *de minimis* threshold and requires that, for the author’s exclusive right to come into play, a work is made available to persons in general, and not to specific individuals belonging to a private group.<sup>67</sup> In the above-mentioned cases, a ‘new public’ is a public that was not taken into account by the authors of the protected works when they authorised their use by the communication to the original public.<sup>68</sup>

The implementation of the ‘new public’ criterion raised criticism and strong objections when the Court applied it in a landmark case where the question was whether the supply, on a given website, of a hyperlink to protected works freely accessible on another website constituted an act of communication to the public.<sup>69</sup> A second question was whether acts of hyperlinking required the permission of the copyright holders. The CJEU gave a positive answer to the first question, holding that a hyperlink is a form of making content available to the public (*Svensson v. Retriever Sverige AB*, par. 20-23). The answer to the second question, instead, was negative since, according to the Court, the fact that the linked works were freely available on another site, without being subject to any restrictive measures, did not lead to a communication of such works to a new public: “since there is no new public” – the CJEU concluded – “the authorisation of the copyright holders is not required”.<sup>70</sup> This conclusion was upheld at a later stage by the CJEU in a case which concerned the lawfulness of embedding a copyright audiovisual work freely accessible on YouTube onto a given website without the right-holder’s authorisation.<sup>71</sup> In the same way as in *Svensson*, the Court found that the embedded video was neither communicated to a ‘new public’ nor transmitted through ‘new specific means’ that would make the act of embedding content distinct from the original act of communication (*Bestwater International*, par. 19). **In both *Svensson* and *Bestwater International*, then, the ‘new public’ criterion ended up narrowing the scope of the right of communication to the public.**

As emphasised by copyright experts, this approach by the CJEU is unfortunate from the perspective of right-holders since it enables third parties to capture the value created by

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<sup>66</sup> See C-306/05 *SGAE v. Rafael Hoteles SA* (2006), par. 42; *Premier League*, par. 194.

<sup>67</sup> C-162/10 *Phonographic Performance (Ireland) Limited v Ireland* (2012), par. 34-35; C-135/10 *Società Consortile Fonografici (SCF) v Marco Del Corso* (2012), par. 85-86.

<sup>68</sup> See *Premier League*, par. 197. In another relevant case concerning the retransmission of TV broadcasts by a company enabling its customers to watch streams of a third party’s TV broadcasts, the CJEU held that the circumstance that the online service provider used a specific technical means to ensure or improve reception of the terrestrial television broadcast should have been regarded as a new communication to the public ex Article 3 of the InfoSoc Directive by itself, i.e. without the necessity of examining whether the user intended to target or reach a new public: see C-607/11 *ITV Broadcasting Ltd v. CatchupTV Ltd* (2013), par. 26-27 and 38-39.

<sup>69</sup> C-466/12 *Svensson v. Retriever Sverige AB* (2014), hereinafter *Svensson*.

<sup>70</sup> See *Svensson*, par. 26-28.

<sup>71</sup> C-348/13 *Bestwater International GmbH v. Michael Mebes* (2014), hereinafter ‘*Bestwater International*’.

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

#### 1.2.4. The exclusive right of distribution and the exhaustion principle

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

As anticipated above, the Directive defines the right of making content available through digital networks by strictly delimiting the right of distribution of copyrighted works. The Directive refers to ‘distribution’ with exclusive regard to the circulation of physical (i.e. tangible) media that incorporate a protected work. The preamble of the Directive (cf. Recital 28) clarifies that copyright protection covers “the exclusive right to control distribution of the work incorporated in a tangible article”, in such a way that the principle of EU-wide exhaustion cannot apply to the dissemination of intangible copies over networks.<sup>72</sup> The distribution right has been interpreted by the CJEU in a few judgments that acknowledged the application of such right only to the sale of physical copies of copyright works. **In particular, the CJEU’s case law made it clear that Article 4 of the InfoSoc Directive does not leave Member States with the freedom to provide for a rule of exhaustion having effects outside of the EU (i.e. international exhaustion).**<sup>73</sup> **Moreover, the Court found that the distribution right is not exhausted if a physical medium incorporating a copyright work has been altered after the sale of the medium in its original format without the copyright owner’s consent.**<sup>74</sup>

<sup>72</sup> According to Article 4(2), which draws from the *acquis communautaire* on exhaustion, the distribution right ‘should not be exhausted within the Community in respect of the original or copies of the work, except where the first sale or other transfer of ownership in the Community of that object is made by the right-holder or with his consent.’

<sup>73</sup> C-479/04 *Laserdisken ApS v. Kulturministeriet* (2006), par. 23-26.

<sup>74</sup> C-419/13 *Art & Allposters BV v. Stichting Pictoright* (2015), par. 37 to 40, and par. 46. This case concerned a business (*Art & Allposters*) which markets through its websites posters and other kinds of reproductions of copyright works of art by famous painters. The claimant (*Pictoright*) was a Dutch collecting society having the mandate to exploit copyright on behalf of the copyright holders. Among other products, *Art & Allposters* sells images on canvases, which are obtained through a chemical process by which images incorporated in posters are transferred from paper to

**Despite the clarity of the principle that links exhaustion (just) to physical media, in a landmark decision the CJEU caught the European Commission and copyright experts by surprise, holding that this principle can be applied also in the online environment.** The Court held that the exclusive right of distribution of the owner of a computer programme should be regarded as being exhausted in relation to the sale of a copy of the programme that customers downloaded from the copyright holder's site after having purchased it under a license granted for an unlimited period of time.<sup>75</sup> According to the CJEU, when this type of sale occurs, the copyright owner is no longer entitled to block a second-hand market for such copies. This means that third parties who acquire the software licenses from the original users and sell them, while transferring also the related right to download updated copies of the computer programme, to their own customers do not infringe the right of distribution of the copyright owner. The CJEU reached this conclusion with specific regard to the Software Directive that – unlike the InfoSoc Directive – does not incorporate a right of making computer programmes available as a species of the right of communication to the public. The *UsedSoft* judgment clarified that, for the distribution right to be exhausted with regard to computer programmes, the first acquirer should delete or make the original copy of the programme downloaded onto his/her computer unusable at the time of resale.<sup>76</sup>

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

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canvas and then stretched over a wooden frame. *Pictoright* successfully claimed that this process and the related business was unlawful without the copyright owner's consent and the exercise of the distribution right concerning the posters was not exhausted when it comes to canvases.

<sup>75</sup> C-128/11 *UsedSoft GmbH v. Oracle International Corp.* (2012), hereinafter *UsedSoft*.

<sup>76</sup> See *UsedSoft*, par. 78-79. As acknowledged by the CJEU, ascertaining whether such a copy has been made unusable may prove to be difficult. Still – as the Court emphasised – copyright owners distributing computer programmes through physical media (e.g. CD-ROM or DVD) have to face the same problem, since it is only with great difficulty that they can make sure the original acquirer has not made copies of the programme that she continues to use after having sold her material medium. To solve that problem, the CJEU concluded, the software owner is allowed to use TPM (like product keys) in the distribution of both physical and digital (i.e. intangible) formats.

### 1.2.5. The ‘Europeanisation’ of copyright exceptions and limitations

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

#### 1.2.5.1. Optional character

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

The final text of Article 5 makes mandatory only the technical exception regarding temporary reproductions, which served the purpose of transitory communication in a network between third parties (Article 5(1)). All the other exceptions, including the ones that the Directive seems to regard as most relevant from a public policy perspective, were conceived as *optional*, having been inserted into a list from which Member States are free to choose (Cohen Jehoram, 2001; Hart, 2002). The list of exceptions grew significantly from the original seven to more than 20 items.<sup>77</sup>

<sup>77</sup> Whereas the exceptions provided under Article 5(2) concern just the right of reproduction, Article 5(3) provides a list of optional exceptions to the rights of reproduction and communication to the

### 1.2.5.2. Exhaustive character

It is worth recalling that the EU Commission targeted the complex issue of exceptions and limitations in the information society, initially, in its Follow-up to the 1995 *Green Paper on Copyright and Related Rights*. In that context, the Commission disclosed its intention of setting out specifically defined exceptions to the exclusive right of reproduction, with the purpose of accommodating the interests of users or the public at large.<sup>78</sup> In commenting on the Follow-up, the European Commission Legal Advisory Board expressed its scepticism on the possibility of enacting an exhaustive list of copyright exceptions, such as the one embodied in Article 5 of the InfoSoc Directive.<sup>79</sup> The Advisory Board argued that harmonisation of national exceptions did not necessarily mean that national systems were to be made uniform in this regard. As briefly recalled above, exceptions could have been maintained in national systems as long as they did not hinder the pursuit of market integration for copyrighted works. Member States such as Italy, Spain and France took the view that an exhaustive list of exceptions and limitations would have been more appropriate than an open-ended list since exhaustiveness would have ensured a higher degree of harmonisation and legal certainty (Cohen Jehoram, 2001). Scandinavian countries and the Netherlands, instead, unsuccessfully sought to oppose this approach while advocating the desirability of a more flexible system, **where the concept of 'fair use' (modelled on the homonymous US doctrine) could have allowed legislation to more easily keep pace with technological advancements**. As recalled above, the final text of the Directive did not follow the recommendations of the Legal Advisory Board and adopted an exhaustive list of (optional) exceptions.

### 1.2.5.3. The three-step test

A legislative measure that, instead, was transposed in the 2001 Directive directly from the follow-up to 1995 *Green Paper* is the so-called three-step test (cf. Article 5.5 InfoSoc Directive) that EU lawmakers borrowed from international copyright law (cf. 9.2 Berne Convention; Article 13 Agreement on Trade-Related Aspects of Intellectual Property Rights). This provision is regarded as essential by copyright holders and, more in general, by the creative industries insofar as it confines the implementation of exceptions and limitations to special cases which do not conflict with a normal exploitation of the protected work and do not cause an unreasonable prejudice for the legitimate interests of the copyright holder.<sup>80</sup> In short, the test makes sure that exceptions and limitations do not end up affecting unreasonably (i.e. excessively) the market for the copyrighted work.

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public. Article 5(4) provides that, where the Member States may create or maintain an exception or limitation to the right of reproduction in accordance with Articles 5(2) and 5(3), they are entitled to enact an exception or limitation to the exclusive right of distribution 'to the extent justified by the purpose of the authorised act of reproduction'.

<sup>78</sup> See Communication from the Commission of 20.11.1996, *Follow-up to the Green Paper on Copyright and Related Rights in the Information Society*, COM(96) 586 final (under the paragraph to 'Reproduction - Proposed Action').

<sup>79</sup> See *Commentaires du Legal Advisory Board sur la Communication de la Commission du 20 Novembre 1996*, available (in French) at: <http://europa.eu.int/ISPO/legal/fr/proprint/labcomment.htm>.

<sup>80</sup> As shown below (see §4.2.1.), the aforementioned restrictive requirements pointed out by the Commission in the Follow-up for the enactment of harmonised copyright exceptions are drawn from the so-called 'three-step test' embodied in Article 9(2) of the Berne Convention.



**What is still unclear, is whether the test should be regarded just as a set of (mandatory) requirements for national parliaments that codify their own national exceptions under their laws** (i.e. requirements that all Member States were already compelled to comply with as a result of their adherence to the Berne Convention and the Agreement on Trade-Related Aspects of Intellectual Property Rights) **or also (and most important) as a binding test for national courts when they evaluate and apply the exceptions stemming from Article 5 of the InfoSoc Directive** (Mazziotti, 2008).

#### 1.2.5.4. Copyright exceptions and contract law

Unlike the Software and the Database Directives, the InfoSoc Directive does not provide that contractual provisions aimed at restricting the exercise of copyright exceptions should be deemed null or void.<sup>81</sup> To the contrary, the Directive (cf. Recital 45) seems to encourage the contractual overriding of copyright exceptions insofar as it provides that exceptions “should not, however, prevent the definition of contractual relations designed to ensure fair compensation for the right-holders insofar as permitted by national law”. **The absence of an explicit provision clarifying the legal status of copyright exceptions at the level of EU law, and in particular whether or not exceptions (or at least a few of them) should be regarded as non-waivable through contract, creates a situation of high uncertainty.**

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

Even though the harmonisation of exceptions and limitations was deliberately shaped as minimal at the EU level, the CJEU recently interpreted several exceptions in a way that reflected their autonomous concepts under EU law and recognised their potential to protect the public interest. At the same time, in several judgments the CJEU had the opportunity to clarify that Article 5(5) of the Directive (i.e. the three-step test) should not be interpreted broadly, i.e. as a provision justifying an extension of the scope of the different exceptions and limitations.<sup>82</sup>

Considering the low degree of harmonisation that EU lawmakers – deliberately – sought to achieve in this area of copyright, Member States maintained or transposed exceptions and limitations in their legal orders in a highly discretionary manner (see Section II.2.3

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<sup>81</sup> For instance, the Software Directive states, “The making of a back-up copy by a person having a right to use the computer program may not be prevented by contract insofar as it is necessary for that use” (Article 5(2)); and: ‘Any contractual provisions contrary to Article 6 or to the exceptions provided for in Article 5 (2) and (3) shall be null or void’ (Article 9(1)). In addition, Article 15 of the Database Directive (‘Binding nature of certain provisions’) reads, ‘Any contractual provision contrary to Article 6(1) and 8 shall be null and void’ (Article 6 of the Database Directive provides exceptions to restricted acts with regard to databases protected by copyright; Article 8, instead, sets out rights and obligations of lawful users in relation to databases protected by the so-called *sui generis* right).

<sup>82</sup> See *Infopaq*, par. 58; C-145/10 *Eva-Maria Painer v. Standard Verlags and Others* (2011), par. 109; C-435/12 *ACI Adam and Others v. Stichting de ThuisKopie* (2014), par. 26; C-117/13 *Technische Universität Darmstadt v. Eugen Ulmer* (2014), par. 47; hereinafter *Technische Universität Darmstadt*.

and Annex A). However, despite the flexibilities embodied in the wording of Article 5, the case law of the CJEU progressively acknowledged the necessity to preserve the harmonisation goal of the InfoSoc Directive and to restate, also in the area of copyright exceptions and limitations, the principle of unity and consistency of the EU *acquis*. This means that, for an increasingly relevant number of exceptions, the CJEU has restricted the room for manoeuvre that, under the text of the Directive, the Member States could take advantage of.

The pro-harmonisation approach of the CJEU materialised in relation to classes of uses that Member States are not (or 'no longer') entitled to modify or make more restrictive in scope, after having decided whether or not to maintain or implement a given exception or limitation. Examples of unintended harmonisation concern provisions of Article 5 such as those on fair remuneration and private copying,<sup>83</sup> quotations for purposes such as criticism and review (*Eva-Maria Painer*, par. 129-137), parody<sup>84</sup> and on-site consultation for purposes of research or private study of copyright works held by publicly accessible libraries, educational establishments, museums and archives (*Technische Universität Darmstadt*):

- The fair remuneration that should be paid to copyright holders in order to compensate the economic harm they suffer from private copying of sound recordings and audiovisual works (cf. Article 5(2)(b)) was regarded in *Padawan* as an autonomous concept of EU law since the purpose of the InfoSoc Directive was that of ensuring a coherent application of the exceptions to the reproduction right at the EU level (*Padawan*, par. 33-35). The case concerned the indiscriminate application of copyright levies on all copying devices and blank media in Spain, irrespective of whether the purchaser was a private individual or a professional user.
- In *Eva-Maria Painer* the CJEU interpreted the quotation exception as *not* precluding the Member States from applying this exception when the quotation of a copyright work is not made in a subsequent literary work (i.e. a 'quoting work') but in a mere press report. The case concerned the unauthorised publication of a portrait photograph by newspapers and magazines for a search of a kidnapped girl by the Austrian police in 1998. The judgment is relevant since the InfoSoc Directive remains silent on this issue and the interpretation of the CJEU clarifies that the requirements set out under Article 5(3)(d) do not also include the incorporation of the quoted work into another literary work, as the copyright law of Member States, such as France, requires in order to confine the exception to cases where an editorial intervention shows the intent of criticism and/or review by the user of the work (see Section II.2.3.6).<sup>85</sup>
- In a case concerning the publication in Belgium of a calendar incorporating a political cartoon, which represented one of the main characters of a well-known comic book without the copyright holder's consent, the CJEU did more than acknowledge that the

<sup>83</sup> See C-467/08 *Padawan v. SGAE* (2010), par. 33-35, hereinafter '*Padawan*'.

<sup>84</sup> C-201/13 *Johan Deckmyn v. Helena Vandersteen and Others* (2014), hereinafter '*Deckmyn*'.

<sup>85</sup> According to Article 5(3)(d) of the InfoSoc Directive, quotations should refer to works that have already been lawfully made available to the public and must indicate the source and name of the author of the work, in accordance with fair practice and to the extent required by the specific purpose of the use.

parody exception (cf. Article 5(3)(k)) should be regarded as a unitary notion of EU law, as a result of the harmonisation goals of the Directive. In the absence of a definition under EU law of what a parody is, the CJEU filled the gap while holding that this notion should be determined in consideration of its meaning in everyday language, that is, a work whose essential elements are the evocation of an existing work in a noticeably different manner and the expression of humour or mockery (*Deckmyn*, par. 19-20). According to the Court, no additional requirement, apart from the above-mentioned elements, should be met for the unauthorised use to be lawful, on condition that the competent national court, after having considered all the circumstances of each case, finds that the implementation of the parody exception strikes a fair balance between the interests of the copyright holders and the freedom of expression of the user (par. 33-34).

- Last but not least, the CJEU found that the exception allowing the consultation of copyright items by dedicated terminals on the premises of a library, educational establishment, museum or archive (cf. Article 5(3)(n)) should be interpreted as incorporating the permission for one of these institutions to digitise some of the works from its collections. The CJEU acknowledged that the strict character of the exception to the reproduction right embodied into Article 5(2)(c) (which refers to “specific acts of reproduction”) would make digitisation of the entire collections of copyright works held by these institutions unlawful. Nonetheless, the Court found that, for the on-site consultation exception to pursue its public interest mission, the provision should be regarded as incorporating an “ancillary right of dissemination” into its scope (*Technische Universität Darmstadt*, par. 27 and 43-49). In the *Technische Universität Darmstadt v. Ulmer* case, a German university library had digitised and made available a textbook contained in its collections to the benefit of students and researchers, who could then print out the book on paper or store a copy on a USB stick. The CJEU seized the opportunity to clarify that the exception at issue does not extend to the printing of a copyright work on paper or to its electronic storage (par. 50-57).<sup>86</sup>

### 1.3. Legal protection of technological protection measures

Measures of technological protection and so-called DRM systems have developed at an impressive pace and become even more sophisticated in recent years. In spite of such technological advancement, the complex set of measures enacted by the InfoSoc Directive in order to afford legal protection of the technologies used by copyright holders to restrict unauthorised uses of their works has not proven to be successful in *all* markets for copyright works. Whereas these technologies have been progressively abandoned in the digital music sector, they are still widely relied upon by the book and newspaper publishing industries.

Articles 6 and 7 of the InfoSoc Directive sought to implement the international obligation embodied in Article 11 of the 1996 WIPO Copyright Treaty. These provisions oblige

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<sup>86</sup> It is worth recalling that, on the grounds of the on-site consultation exception, the German Copyright Act (Article 52b) does not allow a library to make available a number of copies of a work that exceeds the number of copies the library has acquired in analogue format (see Annex A).

Member States to outlaw: i) acts of circumvention of any technological measure and the removal or alteration of any rights management information carried out knowingly by any person (cf. Articles 6(1) and 7(1)(a)); ii) any act of manufacture and distribution of technologies which enable or facilitate circumvention of effective technological measures and the making available of copyrighted work whose electronic rights management information has been removed or altered without authority (cf. Articles 6(2) and 7(1)(b)).<sup>87</sup>

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

In the same way as equivalent provisions under US law, the EU anti- circumvention rules were widely debated in both industry sectors and society.<sup>88</sup> It was argued that the legal protection ensured by technological protection ended up granting copyright holders an unprecedented ‘access right’ over their works.<sup>89</sup> Considering the way they were shaped, these provisions seemed to establish a wholly separate tort of unauthorised access to copyright works, having the effect of restricting users from bypassing technological measures irrespective of whether their intent is to infringe copyright or not. **In short, the main objection that was raised with regard to these far-reaching provisions was that circumvention-related activities were outlawed with no link to copyright infringement, in a way that technological protection and a newly created access right could progressively replace copyright law and, even more important, prevail and restrict copyright exceptions and limitations.**<sup>90</sup> However, this was not the intent of the

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<sup>87</sup> This type of regulation found a precedent in the EU in the law of the so-called ‘Conditional Access Directive’: see Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access, OJ, L 320, 28.11.1998, 54. In a way fairly similar to that of prohibitions laid down in Articles 6(2) and 7(1)(b) of the InfoSoc Directive, Article 4 of the Conditional Access Directive required Member States to prohibit on their territories all activities regarding the manufacture, marketing, use, possession and communication of any equipment or software designed or adapted to give access to a protected service (e.g. television and radio broadcasting) without the authorisation of the service provider.

<sup>88</sup> Anti-circumvention provisions were enacted in the U.S. DMCA, which entered into force on 28 October 1998 by adding Sections 1201 to 1205 to the U.S. Copyright Act (U.S. Code, Title 17). Section 1201 (‘Circumvention of copyright protection systems’) contains two types of prohibitions very similar to the ones laid down in Article 6 of the InfoSoc Directive.

<sup>89</sup> In the US literature, for instance, see Ginsburg, J., who argued that the so-called ‘access right’, as codified now under Section 1201 of the U.S. Copyright Act, was implicitly pre-supposed by the existence, under copyright law, of the exclusive rights of reproduction and distribution (Ginsburg, 2000).

<sup>90</sup> See: ‘The anti-circumvention provisions are the most interesting battlefield between the traditional vision of the copyright law and the dictates of technology...The scope of copyright is no longer decided according to what the proper scope should be, but according to what technology can do’ (Vinje, 2000, p. 556; Dusollier, 2005, p. 202).

international copyright law provision the Directive intended to implement. Article 11 of the 1996 WIPO Copyright Treaty made it clear that circumvention torts should have been linked to an objective violation of copyright or of the rights related to copyright. As a negotiator of the 1996 WIPO Copyright Treaty on behalf of Member States, the Commission was fully aware of the fact that Article 11 of the Treaty immunised copyright exceptions from the operation of technological measures. Unsurprisingly, in the initial proposal of the Commission, anti-circumvention law was designed to protect technological measures as long as they restricted or prevented copyright infringements.<sup>91</sup> This link between anti-circumvention protection and copyright infringements was removed from the text of the Directive at a later stage, when the Commission and the European Council reached a Common Position in September 2000.<sup>92</sup>

The possibility of obtaining legal protection for technological measures implemented in order to protect more than just access to (and use of) copyright works was recently questioned by a judgment of the CJEU in a case concerning the circumvention of technical restrictions of videogame consoles.<sup>93</sup> In this judgment the Court showed the intent to ensure the application of a principle of proportionality for the protection of technological measures. Drawing on Recital 48, the Court held that Article 6(2) of the InfoSoc Directive should not have the effect of outlawing the manufacture and distribution of technologies that have a commercially significant purpose or use other than that of circumventing a technological protection (*Nintendo v. PC Box* par. 30). The CJEU stressed that the legal protection granted under Article 6 should not go beyond the purpose of restricting – with regard to copyright works – acts not authorised by the copyright holder (par. 31). A corollary of this conclusion is that equipment (such as the ‘mod-chips’ produced by PC Box) which allows deactivation of a technical measure installed by a videogame producer (like Nintendo) on its consoles to restrict the use of illegal copies of its works might be lawfully marketed if it is evidenced that the technology at issue is also used for legitimate purposes. It is still unclear, however, whether EU anti-circumvention law should leave users free to circumvent technical measures through the above-mentioned dual-use technologies insofar as the purpose of the use is not to infringe copyright but to enable non-infringing uses of the protected works or devices.<sup>94</sup>

As shown by Article 6(4), the Directive shaped the protection of TPM in a way that these measures can legitimately restrict the exercise of copyright exceptions. Only beneficiaries of a closed number of heterogeneous exceptions are expected to take advantage of a

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<sup>91</sup> See Article 6(2) of the Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society, COM (97) of 10 December 1997, OJ, C 108, 7.04.1998, p. 6.

<sup>92</sup> Whereas the position initially expressed by the Commission sought to preserve the vitality of copyright exceptions, several amendments coming from the Parliament extended the restrictive position adopted with regard to digital private copying to all other exceptions: see Common Position (EC) 48/2000 of 28 September 2000, OJ C 344, 1.12.2000, 1.

<sup>93</sup> See C-355/12 *Nintendo v. PC Box* (2014).

<sup>94</sup> *PC Box* argued that the actual purpose pursued by Nintendo through its technical measures was to prevent use of independent software which enables consoles to read MP3 files, movies and videos, giving users the possibility of using such consoles to a full extent: see *Nintendo v. PC Box*, par. 14-15.

mechanism aimed at shielding copyright exceptions from the operation of TPM.<sup>95</sup> For the exercise of these exceptions to be effectively guaranteed, the Directive obliges Member States to monitor and evaluate whether right-holders take voluntary measures (including agreements between right-holders and other parties concerned) in order to place the beneficiary of those exceptions in a position to benefit from each of them. A subsidiary obligation for Member States to intervene with ‘appropriate measures’ subsists when right-holders fail to provide effective means that enable beneficiaries to take advantage of one of those privileged exceptions.<sup>96</sup>

**In spite of its detailed character, the system of safety nets adopted by the Directive under Article 6(4) was not designed to have a broad application.** Firstly, the Directive provides that only users *who have already accessed* copyrighted works (i.e. lawful users) must be given the technical means to benefit from the mentioned exceptions. This means that the Directive enables just the lawful buyers of copyrighted works, who have already accessed the work – and not the general public – to exercise the few exceptions they are entitled to benefit from. Secondly, the Member States are not obliged to monitor and ensure the availability of technical means to exercise certain exceptions when copyrighted works are made available to the public through interactive on-demand services.<sup>97</sup>

The very narrow scope of application of this mechanism evidences a clear intent of the InfoSoc Directive to restrict considerably the enforcement of copyright exceptions in light of their increased economic impact in the new electronic environment (cf. Recital 44). This is a solution that, as explicitly provided under Recital 50 of the Directive, does not apply to computer programmes, whose technological measures should be protected without prejudice to the exercise of the (mandatory) exceptions under Articles 5 and 6 of the EU Software Directive.<sup>98</sup>

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<sup>95</sup> This list of exceptions includes acts of copying by libraries, educational establishments or museums, ephemeral recordings made by broadcasters, copying of broadcasts made by non-commercial social institutions, photocopying, quotations for teaching or scientific purposes, and uses for the benefit of people with a disability (cf. Article 6.4).

<sup>96</sup> Whereas Member States are obliged to take safeguard measures in order to ensure the availability of these exceptions, they are given the mere option to take such measures for the sake of the private copying exception, where this exception proves to be entrenched by the operation of a technical measure (cf. Article 6(4), §2).

<sup>97</sup> See Article 6(4), §4 (‘...shall not apply to works or other subject-matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them’).

<sup>98</sup> Article 7 of the Software Directive, which provides that the legal protection granted under national law to technological measures applied to computer programmes should be *without prejudice* to the exceptions aimed at permitting back-up copies, uses aimed at observing, studying and testing the functioning of a programme, and so-called reverse engineering of a programme code for the creation of interoperable programs (cf. Articles 5 and 6).

## 1.4. Sanctions and remedies

The InfoSoc Directive obliges the EU Member States to provide appropriate sanctions and remedies in respect of infringements of the rights and obligations set out in the Directive.<sup>99</sup> In particular, Article 8(3) obliges Member States to make sure that right-holders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right. This is by far one of the most controversial provisions in the whole Directive. Recital 59 seeks to clarify the exact meaning of the provision by pointing out that, in the digital environment, third parties may increasingly use the services of intermediaries for infringing activities. This Recital specifies that copyright holders should have the possibility of applying for an injunction against an intermediary who carries a third party's infringement of a protected work. The Directive left the Member States with the freedom to set out the conditions and modalities related to such injunctions, making it clear that an injunction against intermediaries should become available also where the acts carried out by the intermediary are exempted from liability under Article 5 of the Directive.

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

The CJEU has made it clear that injunctions aimed at blocking access to infringing materials should pass a *proportionality test* in order to ensure a fair balance with the online intermediary's freedom to conduct a business and other fundamental rights. The recognition of such a freedom for an online intermediary was a key part of the reasoning of the CJEU in judgments such as *Scarlet Extended v. SABAM* and *SABAM v. Netlog*.<sup>100</sup> In these cases the Court was asked to review the compatibility with EU law of injunctions that would have obliged, respectively, an ISP (Scarlet) and the deviser of a social network (Netlog) to install, at their own expense, filtering technologies that the Court viewed as excessively costly and complicated enforcement measures. Such technologies should have aimed at disabling access by users of the intermediary's services to the Belgian collecting society's musical repertoire. To acknowledge the existence of such a limit to injunctions *ex Article 8(3)*, the CJEU did not rely on the provision of Article 8(1) of the InfoSoc Directive, according to which sanctions should be "effective, proportionate and

<sup>99</sup> Article 8(2) provides that each Member State shall take the measures necessary to ensure that copyright holders whose interests are affected by infringing activities carried out on its territory can bring an action for damages and/or apply for an injunction and, where appropriate, for the seizure of infringing material as well as of devices, products or components enabling acts of circumvention of TPM.

<sup>100</sup> See C-70/10 *Scarlet Extended v. SABAM* (2011); C-360/10 *SABAM v. Netlog* (2012).

dissuasive". Rather, the CJEU developed a principle of proportionality on the grounds of Article 15 of the e-Commerce Directive (which does not allow Member States to impose duties of online monitoring on ISPs) and, even more important, in consideration of the requirements laid down in Article 3 of IPRED.<sup>101</sup> This reference is somehow surprising if one considers that Article 3 of the IPRED makes no mention of online intermediaries. This provision was introduced into EU law in order to re-state the principle laid down under Article 41(2) of The Agreement on Trade-Related Aspects of Intellectual Property Rights<sup>102</sup>, which clarifies that enforcement measures should not be "unnecessarily complicated or costly", to the benefit of intellectual property rights holders. In a subsequent judgment, *UPC Telekabel v. Constantin Film and Wega Filmproduktionsgesellschaft*, the CJEU took a step further holding that, for a blocking measure to be fair and proportionate, an ISP (*UPC Telekabel*) should remain free to decide what the best means to be used against online infringements are.<sup>103</sup> If specific measures (e.g. targeted at an infringing site's domain name and at its current Internet Protocol address) had to be ordered by a court, the online intermediary would be deprived of the freedom to opt for the means that are best suited to its resources and abilities and which do not end up restricting, in a disproportionate way (i.e. over-blocking), the user's freedom to access unprotected information (par. 51-56).

### 1.5. On the current efficiency of the EU copyright system

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

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

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<sup>101</sup> See *Scarlet v. SABAM*, par. 36, and *SABAM v. Netlog*, par. 34, where the CJEU emphasised that the requested injunctions would have required the online intermediary to actively monitor all the data of each of its subscribers in order to prevent future infringements (in violation of Article 15 of the e-Commerce Directive). To that end, the ISP should have implemented measures that would have conflicted with Article 3 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (hereinafter 'IPRED'), while not being fair and proportionate and raising excessive costs.

<sup>102</sup> See The Agreement on Trade-Related Aspects of Intellectual Property Rights: [https://www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_05\\_e.htm](https://www.wto.org/english/docs_e/legal_e/27-trips_05_e.htm)

<sup>103</sup> See C-314/12 *UPC Telekabel v. Constantin Film and Wega Filmproduktionsgesellschaft* (2014).



### 1.5.1. Principle of territoriality and collective rights management

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

One of the very first attempts to target what today is known as ‘geo-blocking’ was an antitrust investigation launched by the EU Commission against Apple Inc. and the major record companies operating in Europe. The Commission took the view that the territorial sales restrictions embodied in the licensing agreements between Apple and each record company violated Article 81 TEC.<sup>104</sup> According to the Commission’s statement of objections, the outcome of these agreements was the restriction of the consumer choice of where to buy digital music, what music to buy and at what price.<sup>105</sup>

At an earlier stage the Commission had already started targeting a cause of territorial restrictions that the EU eventually sought to remove (or at least to reduce) through the adoption of Directive on collective management of copyright. The origin of this Directive lies in a 2004 Communication on “The Management of Copyright and Related Rights in the Internal Market” through which the Commission questioned whether, in this context, “it should be left for the market to develop Community-wide licensing further, while respecting the basic rules of intellectual property protection, including its territorial nature, or whether the Community legislator should seek to facilitate greater Community wide licensing”.<sup>106</sup> A year later, the Commission accelerated the pursuit of this objective with specific regard to the recently emerged market for online music services through the adoption of a Recommendation of 18 October 2005 on collective cross-border management of copyright and related rights for legitimate online music services.<sup>107</sup> The 2005 Recommendation sought to trigger a radical change of the existing licensing structures in the online music sector. The Commission argued that the territorial restrictions stemming from reciprocal representation agreements concluded by national

<sup>104</sup> See Commission of the European Communities, Competition: European Commission confirms sending a Statement of Objections against alleged territorial restrictions in online music sales to major record companies and Apple, Press releases, Brussels, 3 of April 2007.

<sup>105</sup> Apple Inc. (iTunes) could easily verify the condition of the country of residence thanks to the compulsory requirement that consumers’ payments took place through either debit or credit cards linked to bank accounts based in their country of residence.

<sup>106</sup> See Commission of the European Communities, Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, *The Management of Copyright and Related Rights in the Internal Market*, COM/2004/0261 final (see in particular Sect. 1.2.4: ‘The Call for Community-wide Licensing’).

<sup>107</sup> See Commission Recommendation on collective cross-border management of copyright and related rights for legitimate online music services of 18 October 2005, OJ L 276, 21.10.2005, pp. 54-57.

collecting societies were contrary to the logic of the EU common market.<sup>108</sup> Under those agreements, collecting societies have traditionally administered, along with their own national repertoires, the repertoire of the affiliated, foreign collecting societies in their countries of establishment and operation.<sup>109</sup> The main assumption in the 2005 Recommendation was that, in the European Economic Area (EEA), the territorial restrictions embodied in those contracts prohibited collective rights managers from licensing their repertoires outside their (national) territory of activity. The Commission, instead, intended to promote the adoption of a multi-territorial licensing policy that corresponded to the ubiquity of the online environment. In particular, the Commission sought to soften the burden of commercial users of digital music, who had to negotiate in every Member State with each of the respective collective rights managers for each right that must be cleared for online exploitations (i.e. the rights of reproduction and communication to the public) in order to be entitled to provide their services in the whole EU.

The plan the Commission started developing in 2004 for the purpose of removing (or at least reducing) barriers stemming from strictly national collective rights management became effective, one decade later, with the adoption of Directive on collective management of copyright.<sup>110</sup> This Directive grants now individual right-holders the right

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<sup>108</sup> See Commission Staff Working Document, Impact Assessment reforming cross-border collective management of copyright and related rights for legitimate online music services, Brussels 11.10.2005.

<sup>109</sup> The function of mutual representation agreements is addressed by the October 2005 Commission Working Document, op. cit., p. 6: '[I]n the traditional system of managing copyright and related rights, if copyright works are accessible in another territory, the society active in that territory (the "affiliated society") normally enters into reciprocal representation agreement with the collective rights Managers that holds the repertoire on behalf of the right-holder...' The same document, at p. 9, ft. 16, recalls that the Santiago and Barcelona agreements, referring respectively to the collective management of the right of communication to the public and of the reproduction rights, were not renewed by collecting societies of the EEA on the assumption that the European Commission was highly critical of the so-called 'economic residence' clause in them.

<sup>110</sup> It is worth recalling that, before the adoption of Directive 2014/26 on collective management of copyright, through an antitrust decision of 2008 (known as the 'CISAC' decision, from the name of the international umbrella association of collecting societies) the EU Commission had found the clauses of territorial exclusivity and the membership requirement of economic residence embodied in the reciprocal representation agreements illegal because of their nature of cartels restricting competition in the EU market for services of collective management: see Commission Decision Relating to a Proceeding Under Article 81 of the EC Treaty and Article 53 of the EEA Agreement, C(2008) 3435 final, 16 July 2008. The Commission decision did not call into question the very existence of reciprocal representation agreements: the decision solely concerned the exploitation of copyright via the Internet, satellite and cable retransmission. Moreover, the decision prohibited clauses restricting authors' ability to freely join the collecting society of their choice and clauses having the effect of providing all collecting societies, in their territory of establishment, with absolute territorial protection against other collecting societies as far as the grant of licences to commercial users was concerned. Interestingly, a much later judgment of the General Court of the European Union (see T-442/08 *CISAC v. Commission*, and all related/joined cases, 12 April 2013) in the action brought by the addressees of the CISAC decision (i.e. most of the EEA collecting societies and CISAC itself), while upholding the legal interpretation of the Commission with regard to the membership and exclusivity clauses, annulled the Commission's decision in respect of the finding of the concerted practice. In that respect, the General Court considered that the Commission had not provided sufficient evidence with regard to the existence of a cartel regarding the territorial scope of the mandates that collecting societies grant each other. In addition, the reasoning of the

to entrust the management of any of the rights, categories of rights or types of works of their choice, for the territories of their choice, to a collective rights management organisation, irrespective of nationality, residence or establishment of either the organisation or the right-holder (Article 5(2)). In addition to that, the Directive seeks to establish a common level playing field for collective rights management organisations in order to enhance the degree of their efficiency and transparency. Moreover, in the specific domain of online music services, the Directive seeks to combine the goal of fostering competition on the market for rights management services with the objective to preserve EU-wide access to diverse musical repertoires and to facilitate aggregation of different repertoires on online content platforms. To do so, the Directive creates a mechanism (so-called ‘tag-on’ regime) under which each society which has an EU online licensing ‘passport’ for the issuance of multi-territorial licences has an obligation, in the absence of a voluntary representation agreement, to represent the repertoire and the rights of a society without such a passport.<sup>111</sup> The tag-on regime is expected to give societies a strong incentive to create voluntary rights management ‘hubs’ since it requires the requested society, in the absence of an agreement between them, to license the repertoires of the requesting society under the same conditions as those that it applies to its own repertoire and to include such a repertoire in all of its offerings to online service providers.

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

**The provisions of the InfoSoc Directive concerning the exceptions of reprography and private copying are certainly the biggest source of regulatory and administrative burdens in the domain of EU copyright law.** The Directive provides that these exceptions should confer a recompense to copyright holders in the form of a remuneration right. The Directive provides that the level of this compensation should take account of the presence and operation of technological measures.<sup>112</sup>

Articles 5(2)(a) and 5(2)(b) of the Directive have actually enabled Member States to maintain or introduce national levy systems under which national law is free to determine the form, detailed arrangement and possible level of fair compensation, on the

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Commission did not render implausible the explanation that the parallel conduct of collecting societies was not the result of a cartel, but rather of the need to fight effectively against the unauthorised use of musical works.

<sup>111</sup> As laid down under Article 30 (cf. also Article 23), in order to be permitted to issue licences for pan-European or cross-border digital uses, collecting societies should meet a number of requirements (known as ‘European Licensing Passport’). These requirements are all of a technical nature and impose high standards of service when it comes to processing the data needed for the exploitation of the licences, identifying the licensed repertoires through time-sensitive and authoritative databases, processing usage reports and invoicing, and so on (cf. Articles 24-28).

<sup>112</sup> The InfoSoc Directive defines private copying as copying made by “...a natural person and for ends that are neither directly nor indirectly commercial, on condition that the right-holders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned...”: see Article 5(2)(b) of the InfoSoc Directive. See also Recital 35, *in fine*.

condition that Member States carefully evaluate, among other circumstances, whether private copying causes harm to right-holders or not (Recital 35). The fact that national levies on digital copying equipment and digital media were proliferating without any control and to the detriment of the Internal Market has been evident since 2005.<sup>113</sup> The idea of a copyright levy reform in the EU was already enshrined in a Roadmap document in 2006 in which the Commission evidenced that levies were unequally applied in terms of equipment, media and amounts across EU Member States and that there was a lack of transparency in relation to their collection and distribution. From 2006 a number of initiatives and stakeholder consultations have been undertaken, the last of which was a mediation process launched in April 2012 that drew upon a draft Memorandum of Understanding (2009) achieved under the shield of the Commission and was brought to an end with the release of recommendations by the European Mediator, Antonio Vitorino, in January 2013.<sup>114</sup>

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

**Significant barriers and distortions to cross-border trade within the Internal Market have emerged from the disparate national versions of levy systems.**<sup>115</sup> One of the most evident problems is raised by the fact that the existing levy systems have not been conceived in a way that levies are collected just once in cross-border transactions. The fact that, in most Member States that have a levy system in force, levies are paid to collecting societies by manufacturers and importers in both the country of origin (or import) and in the country of destination of the products has inevitably resulted in double payments. Moreover, the fact that levies are paid at the manufacturer's or importer's level means also that it is practically impossible to distinguish between categories of final buyers of levied products and to effectively avoid undue payments by users other than natural persons (*i.e.* professional or business users), who are not obliged to pay levies. Last but not least, the fact that a significant portion of products subject to levies are sold to professional users raises the complex issue of either *ex ante* exemptions or reimbursements aimed at preventing undue payments.

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<sup>113</sup> See the speech given by Charles McCreevy (European Commissioner for Internal Market and Services), *Address to the European-American Business Council/Business Software Alliance Conference on Digital Rights' Management*, High level Industry Seminar/Global Industry Roundtable on Levies and DRMs, Brussels, 12 October 2005.

<sup>114</sup> See European Commission, Private copying levies, at: [http://ec.europa.eu/internal\\_market/copyright/levy\\_reform/index\\_en.htm](http://ec.europa.eu/internal_market/copyright/levy_reform/index_en.htm).

<sup>115</sup> It seems worth recalling that, from the perspective of the TFEU, these barriers could be regarded as compatible with Article 36 TFEU insofar as fair compensation for private copying were deemed to form part of the specific subject matter of copyright and, as a result, constituted a justified restriction to free movement of goods (cf. Article 34 TFEU).

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

#### **1.5.2.1. Unitary notion of ‘fair compensation’**

First of all, the Court held that, although it is open to the Member States to determine whether or not a private copying exception should be transposed into their national laws, ‘fair compensation’ is an autonomous concept of EU law and should be interpreted *uniformly* in all Member States where this exception exists (*Padawan*, par. 33-34). This means that, irrespective of the levy system or State fund each Member State opts for, national lawmakers are obliged to ensure consistency and uniformity in the way they compensate right-holders on the grounds of the harm they suffer from private copying. If that were not the case – as the CJEU held in the *Padawan* judgment (par. 35-36) – levy systems would prove to be incompatible with EU law insofar as they stifled the achievement of the main goal of Directive 2001/29/EC (i.e. harmonisation of certain aspects of copyright law and creation of undistorted conditions of competition that arise from different national provisions).

#### **1.5.2.2. Liability to pay levies**

The CJEU clarified also that the liability to pay fair compensation rests on the private end-users and the system of levies funded by the manufacturers or importers has been adopted for mere practical reasons (“where it is impossible to ensure recovery of the fair compensation from the purchasers”).<sup>116</sup> As the CJEU stressed, **a system of levies to be paid by those who make the devices available to consumers is legitimate insofar as it is possible for manufacturers and importers to pass the levy to the private end-users as part of the price of the product** (*Padawan*, par. 45-50, and *Stichting de ThuisKopie*, par. 29). The *Padawan* judgment held that there must be a necessary link between the application of copyright levies to digital devices and their use for private copying and that the indiscriminate application of private copying levies to all devices – including products sold to persons other than natural persons (e.g. professional users) – does not comply with Article 5(2) of the InfoSoc Directive (*Padawan*, par. 53).

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

To solve the problem of undue or double payments, the CJEU found that in cross-border sales the levy should be paid just in the country where the final user resides, as this is the country where the harm caused by private copying occurs.<sup>117</sup> Moreover, the CJEU indicated its preference for the implementation of ex ante exemptions of business users from the payment of private copying levies rather than reimbursement systems. The CJEU also held that reimbursements can replace such ex ante exoneration only if: i)

<sup>116</sup> See *C-462/09 Stichting de ThuisKopie v. Opus Supplies Deutschland* (2011), par. 41.

<sup>117</sup> See *C-462/09 Stichting de ThuisKopie v. Opus Supplies Deutschland* (2011), par. 36-41; *C-521/11, Amazon v. Austro Mechana* (2013), par. 57-61, hereinafter ‘*Amazon*’.

reimbursements are not made excessively difficult; and ii) practical difficulties exist for the exoneration (*Amazon*, par. 34-37).

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

Another relevant source of uncertainty concerns the applicability of levies and the related obligations and procedures when the copyright holders authorise (and control, through technological measures) private copying. By foreseeing the repeal of levies as a result of the progressive development of licensing systems, Article 5(2)(b) of the InfoSoc Directive clearly expresses a preference for the adoption of contractual arrangements *vis-à-vis* copyright exceptions in the online world. This policy choice is upheld by the fact that Article 6(4) also ensures that Member States do not render exceptions applicable in the context of on-demand content deliveries, where a license concluded by the service provider with the end-user authorises and covers private copying, leaving no room for levies and, as a result, for double payments.

The main principle the Directive relies on is that, whenever the copyright holder authorises the copying of his works, copying cannot be subject to any additional form of compensation. If levies were applied in the context of online services that have already been licensed by copyright holders, consumers would end up paying twice, i.e. they would bear the cost of a levy after having paid a subscription fee in order to access the service. From a legal point of view, the private copying exception only applies in circumstances where right-holders cannot practically authorise the relevant acts in exercising their exclusive rights. The fact that licensing opportunities should be deemed to prevent the application of the private copying exception when content is delivered on-demand is explicitly mentioned in the InfoSoc Directive.<sup>118</sup> This means that, wherever a right-holder authorises an activity in exercising his/her reproduction rights, no claim for fair compensation can arise since the person performing that activity (i.e. the subscriber of an online content service) is a licensee, and not a person making private copies under an exception.

Despite the clarity of the above-mentioned provisions, the case law of the CJEU has raised uncertainties on this issue, unfortunately. Initially, in the *Padawan* judgment the CJEU held that fair compensation occurs only when private copies are made without the authorisation of the right-holders, as the InfoSoc Directive seems to suggest (par. 39, 40 and 45). A similar statement can be found in the subsequent *Stichting de ThuisKopie v. Opus Supplies Deutschland* judgment (par. 24, 26 and 35). Subsequently, the Court took a different view while delivering two judgments in *VG Wort v. Kyocera and Others*<sup>119</sup> and *Copydan v. Nokia Danmark*,<sup>120</sup> where it held that the right-holders' authorisation (i.e.

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<sup>118</sup> See Article 6(4) and Recitals 35 and 45, where the InfoSoc Directive provides that statutory exceptions should not endanger the conclusion of licensing contracts and that no additional compensation payment should exist in case of licensing – either because a separate payment has occurred or since authorisation implies that there is no or minimal harm.

<sup>119</sup> See joined Cases C-457/11 to C-460/11 *VG Wort v. Kyocera and Others* (2013), par. 37-40.

<sup>120</sup> See C-435/12 *Copydan v. Nokia Danmark* (2015), par. 65-67.

licence) of private copying has no effect on the obligation to pay fair compensation. **According to the CJEU, Member States retain the freedom, under the Directive, to introduce an exception to the right of reproduction, for which they are requested to provide a system of fair compensation to right-holders. Once such an exception has been introduced under national law, the exception deprives copyright holders of the right to authorise private copying, in a way that any authorising act has no impact on the harm that copyright levies are expected to compensate.**<sup>121</sup>

#### **1.5.2.5. Proliferation and an unequal application of levies**

It seems evident that the uncertainties that neither the InfoSoc Directive nor the case law of the CJEU has been able to bring to an end have facilitated a rapid proliferation and an unequal application of levies on digital copying equipment and media. Uncertainties and disparities concern also the amounts collected across Member States, with a subsequent fragmentation of markets at national level for all products subject to a levy (see Section II.2.3.9). In this respect, it is worth recalling that the CJEU clarified that the obligation to pay fair compensation arises just in relation to private copies of lawfully acquired works, and not with regard to copies made using unlawful sources (e.g. file-sharing content).<sup>122</sup> This means that Member States are not entitled to provide fair compensation with regard to such copies, nor to make them fall within the scope of the private copying exception.

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

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

<sup>121</sup> See also *VG Wort v. Kyocera and Others*, par. 37.

<sup>122</sup> *C-435/12 ACI Adam v. Stichting de Thuis kopie* (2014), par. 54-58; *Copydan v Nokia*, par. 74-79.

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

A good example of digital uses whose exemption from copyright is difficult to assess is the automatic processing of newspaper articles and the online display of portions of such works performed by search engines and online news aggregators. Under the laws of the Member States that have preserved the technology-neutral wording of the InfoSoc Directive on exceptions, the above-mentioned reproductions could be regarded as quotations of copyright works (Hugenholtz & Senftleben, 2011). This may happen in the Netherlands and in the Nordic countries, where quotations and uses for purposes of news reporting are, in their statutory definitions, not linked to purposes of criticism and review.<sup>123</sup>

In other Member States where national laws set out such additional requirements for the quotation exception, online news aggregation services can easily be found to infringe copyright. For instance, in 2011 the Brussels Court of Appeal found that the news extracts displayed by Google News, in the absence of human intervention in the creation of its daily press review, could not be regarded as 'quotations' for purposes of criticism, review, education and research under Belgian law.<sup>124</sup>

More recently, considering that the aggregation of online copyright content available online without the authorisation of the copyright holder would give rise to an infringement, Germany and Spain introduced new ancillary rights in favour of press publishers.<sup>125</sup> Even though these national provisions and the related rights are shaped in a different way, both end up obliging online commercial users of news products to pay compensation to their respective publishers. The Spanish ancillary right is conceived as a statutory limitation that authorises the aggregation of news and other online contents subject to a non-waivable equitable compensation. The German ancillary right is shaped as an exclusive right to make 'press products' (or parts thereof) available to the public for commercial purposes (Xalabarder, 2014).

### **1.5.3.2. Text and data mining**

Automated processing of copyright works occur also for purposes of text and data mining, computational analysis on texts and automated extraction of data. These uses are undertaken by machines to the benefit of machines and for reasons that are not (directly) associated with enjoyment and consumption of works by humans. These activities – in the context of which copyright materials are treated not as 'works' but as (mere) data – might be beneficial for the extraction, collection and reuse of vast amounts of useful information. So-called 'non-display' uses of literary works in the context of large-scale

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<sup>123</sup> Ibid.

<sup>124</sup> Cf. Article 21, Sect 1, Belgian Copyright Act; see Court of Appeal of Brussels (9th Chamber), C-2007/AR/1730, *Google Inc v. Copiepresse*, Judgment of 5 May 2011.

<sup>125</sup> See, respectively, Article 87f of the 1965 German Copyright Act (as amended in 2013) and Article 32 (Quotation illustration for educational purposes) of the Spanish Intellectual Property Act 1/1996 (as amended in 2014).



book digitisation projects provide a very good example of such uses.<sup>126</sup> **It is still uncertain, for instance, whether the unauthorised scanning and digitisation of literary works which are not displayed to users but are merely used for purposes of data<sup>127</sup> and text mining<sup>128</sup> infringe copyright or not.**<sup>129</sup>

Considering that text and data mining entails a temporary reproduction of copyright works, as a technical necessity, the issue is whether or not such a reproduction should be regarded as transient or incidental under the mandatory exception of Article 5(1) of the InfoSoc Directive. Recently, in *Public Relations Consultants Association v. Newspaper Licensing Agency and Others*, the CJEU had the opportunity to clarify the scope of application of this exception in a case concerning the unauthorised on-screen copies and cached copies made in the context of an online media monitoring service.<sup>130</sup> The CJEU considered that the copies made in order to send emails containing the headlines of online articles, hyperlinks to the publishers' websites and short extracts of the articles themselves to the service subscribers were temporary, *transient* and an integral part of the technological process (i.e. the online receipt of the press reports), as prescribed by Article 5(1).<sup>131</sup> This means that the mere copying and viewing of the copyright works did not infringe the publisher's copyright, since these acts were a technical necessity for the service providers to deliver its online reports after having obtained a web database license from the newspaper publishers' association. Despite the relevance of this judgment, it has to be seen whether and how courts, in the absence of *ad hoc* legislative provisions, will extend such a conclusion to the realm of text and data mining, where the volatility of the copies of protected works has a different technological dimension.

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<sup>126</sup> In computer sciences 'data mining' is defined as the extraction of implicit, previously unknown, and potentially useful information from data (Borghi & Karapapa, 2011). 'Text mining' is the process of text analysis in order to extract information that is useful for particular purposes (Witten & Frank, 2005).

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

<sup>128</sup> 'Text mining' indicates finding structural patterns in texts, extracting information out of these patterns and combining them with data on the use of works such as data on searching and accessing works.

<sup>129</sup> On automated text processing and data mining Borghi & Karapapa point out that automated data processing can pursue commercially valuable objectives such as data analysis, sophisticated text analysis (e.g. the content of a book or the whole production of a specific author), analysis of metadata on patterns of use of digital copies (e.g. to create databases of user profiles) and computational analysis (which includes image analysis and text extraction, linguistic analysis and automatic translation and indexing and search) (Borghi & Karapapa, 2013).

<sup>130</sup> C-360/13 *Public Relations Consultants Association v. Newspaper Licensing Agency and Others* (2014).

<sup>131</sup> See *Public Relations Consultants Association v. Newspaper Licensing Agency*, par. 29-33 (arguing that the copies at issue were temporary since they were created and then deleted by the process used to view websites); par. 34-38 (arguing that without making temporary copies browsing would not function properly on the Internet) and par. 40 (where the CJEU recalled that a reproduction is transient if its duration is limited to what is necessary for the an automated process to be put to an end).

At a time when the European Commission had not even started taking into consideration a possible reform of copyright exceptions under the InfoSoc Directive, Member States such as the UK started developing a comprehensive reform plan that resulted, in 2014, in the enactment of new copyright exceptions that included an exception covering text and data mining for non-commercial research.<sup>132</sup> This reform was developed in response to a public consultation launched by the UK government<sup>133</sup> and to the policy recommendations embodied into the Hargreaves Review of May 2011 (Hargreaves, 2011). UK law allows researchers to make copies of any copyright works for the purpose of computational analysis if they already have lawful access to the copyright work, without having to obtain additional permission from the copyright holder to make the necessary copies.

While the UK was developing its reform plan on new copyright exceptions, the European Commission developed a multi-stakeholder dialogue in Brussels ('Licences for Europe') with the intent to explore standard licensing models that could have facilitated access to, and use of, data. The premise of this dialogue seemed to be that data mining requires an additional copyright licence on top of the licence to access the copyright works. For technology companies, if additional licenses were required, copyright would inevitably extend to facts and data embodied in the works (e.g. scientific journal articles) that technologies used by researchers have to copy in large quantities in order to be able to analyse patterns, trends and other useful information. The publishing industry, instead, can ultimately rely on the protection of non-original databases through a *sui generis* exclusive right granted under Article 7 of the 1996 Database Directive. This right ends up protecting mere aggregation of data on condition that a database has required a substantial investment. This prerogative might easily come into play and legitimately restrict text and data mining since publishers can be easily regarded as makers of databases who are entitled to prevent extraction and reuse of the whole (or of a substantial part of) the database. This legal barrier might be easily raised since, unlike the EU Software Directive, the Database Directive does *not* grant lawful users of protected works a number of non-waivable exceptions pursuing the goals of freedom of research and study and competition in downstream markets.<sup>134</sup>

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

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

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<sup>132</sup> See UK Intellectual Property Office (2012), *Modernising Copyright: A modern, robust and flexible framework*, 20 December, p. 16. Other areas in which the document announced legislative intervention are educational uses, quotation, parody, research and private study, disabilities, preservation, public administration and reporting.

<sup>133</sup> See *Ibid.*

<sup>134</sup> See Articles 5(3) and 6(1) of the Software Directive.

### 1.6.1. Copyright and liability exemptions under the e-Commerce Directive

As anticipated above, in a fast-changing technological context the CJEU has taken steps to coordinate and make the provisions of distinct EU Directives compatible and, to a large extent, complementary. When it comes to the copyright liability of online service providers, the CJEU has firmly relied on the so-called safe harbour provisions of the e-Commerce Directive (Articles 12 to 15). In particular, the Court has enforced the principle according to which Member States (and national courts) cannot impose on online intermediaries general obligations to monitor the content they store or transmit (Article 15). As mentioned above, this principle was applied in cases where national courts had to deal with requests for injunctions against ISPs and social network operators that, to prevent future infringements, would have required the installation of permanent filtering systems or technologies.<sup>135</sup> These judgments held that injunctions aimed at imposing *unlimited* filtering measures would inevitably affect the freedom to receive and impart free information as well as the protection of personal data of Internet users and the freedom of online intermediaries to conduct their businesses.

**The interpretation of the liability exemptions created by the e-Commerce Directive has evolved over time also with regard to the role of online content platforms (i.e. ‘hosting providers’).** Under Article 14 of the e-Commerce Directive hosting providers are shielded from liability insofar as they remove illegal or infringing content (or disable access to it) as soon as they gain knowledge of the infringement (normally in response to a notice sent by a copyright holder, in the context of so-called ‘notice-and-takedown’ procedures). As clarified by the CJEU in two landmark judgments, online intermediaries whose services are used by third parties to infringe intellectual property rights (i.e. trademarks) cannot be exempted from liability if the service provider plays an *active role* that presupposes knowledge of (or control over) such infringing content.<sup>136</sup> In *L’Oréal v. eBay*, the CJEU held that an online marketplace operator could benefit from the safe harbour provision if it confines itself to providing a service of merely technical, automatic and passive nature to its customers. In this case the Court found that eBay helped customers (who were caught to infringe trademarks) optimise the presentation of their offers for sale offers or promote those offers, in a way that eBay’s activity evidenced knowledge of the infringing nature of the materials it hosted.<sup>137</sup> In *Google v. Louis Vuitton*, instead, the CJEU found that the sale of keywords corresponding to a third party’s registered trademark to advertisers, in the context of a referencing service enabled by Google’s search engine operation (i.e. ‘AdWords’), was not sufficient by itself to justify the conclusion that Google had knowledge of, or control over, the data entered into its system by advertisers and stored on its servers.<sup>138</sup>

<sup>135</sup> See C-275/06 *Promusicae v. Telefonica* (2008); C-70/10 *Scarlet Extended v. SABAM* (2011); C-360/10 *SABAM v. Netlog* (2012).

<sup>136</sup> Joined Cases C-236/08 and C-238-08 *Google France & Google v. Louis Vuitton and Others*, par. 114-120; C-324/09 *L’Oréal v. eBay International* (2011), par. 113.

<sup>137</sup> See *L’Oréal v. eBay International*, par. 114-116.

<sup>138</sup> See *Google France & Google v. Louis Vuitton*, par. 117.

## 1.6.2. Copyright and data protection

Anti-piracy activities run by copyright holders or specialised bodies established by right-holders aim at gathering evidence of alleged infringements and obtaining disclosure of the identity of supposedly infringing users. These activities entail the monitoring of electronic communications (which might extend to inspection of the contents of such communications by means of 'deep packet inspection' technologies) and enable the collection and storage of Internet Protocol (IP) addresses of alleged infringers. Collecting such addresses, processing them and identifying the individuals acting behind each IP address gives rise to a form of personal data processing.<sup>139</sup> **EU data protection law makes these activities subject to restrictions such as the obligation to collect personal data only for specified, explicit and legitimate purposes and to processing such data in a way that is proportionate to the objective pursued.**<sup>140</sup>

In *Promusicae v. Telefonica* the CJEU acknowledged that copyright enforcement is a legitimate purpose to justify the treatment of personal data. However, such treatment must be proportionate in order to ensure a balance in the enforcement of conflicting fundamental rights.<sup>141</sup> Privacy-related problems also emerge under so-called 'three-strikes' laws, where ISPs have to process IP addresses, identify infringing users, and store and monitor infringers' data. As a consequence of the necessity to strike a balance between copyright and privacy protection, a systematic collection and identification of users' IP addresses and analysis of all content they exchanged is likely to be found disproportionate, whereas a request by right-holders to obtain a specific set of data through judicial proceedings would comply with the above-mentioned principle.

Additional problems might arise when ISPs are requested to disclose the identity of supposedly infringing users of their networks. The fact that ISPs can technically identify users does not allow them to give copyright owners *direct* access to user personal data. The e-Privacy Directive regulates access to users' confidential information in the context of electronic communications and their retention and processing.<sup>142</sup> This Directive allows disclosure of personal data only under the exceptional circumstances spelt out under

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<sup>139</sup> As acknowledged by the CJEU in *Scarlet Extended v. SABAM*, par. 51, user IP addresses should be treated as personal data under EU law since these data allow users to be identified precisely.

<sup>140</sup> See Article 6 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L281/31.

<sup>141</sup> See C-275/06 *Productores de Música de España (Promusicae) v. Telefónica de España SAU* (2008), par. 70.

<sup>142</sup> See Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector, OJ L201/37 (referred to as 'e-Privacy Directive') which ensures confidentiality of communications and the related traffic data by means of a public communications network and publicly available electronic communications services, through national legislation. In particular, Article 5 provides that Member States shall prohibit listening, tapping, storage or other kinds of interception or surveillance of communications and the related traffic data by persons other than users, without the consent of the users concerned, except when legally authorised to do so in accordance with Article 15(1) of the same Directive.

Article 15(1).<sup>143</sup> The CJEU in *Promusicae v. Telefonica* clarified that the only obligation created under EU law for the Member States and national courts is that of interpreting and transposing the relevant EU Directives in order to ensure a fair balance between the various fundamental rights and a principle of proportionality in the enforcement of these rights. The CJEU interpreted this provision as *not* obliging Member States to force under their laws ISPs to disclose user personal data in order to enable an effective protection of copyright through civil proceedings.<sup>144</sup>

*Promusicae v. Telefonica* clearly evidenced the need for better coordination at EU level between data protection and online copyright enforcement. **The absence of a uniform interface between these two bodies of law has inevitably made it possible that, in certain EU countries, the protection of user privacy systematically prevails over requests for injunctions aimed at disclosing the identity of large-scale infringers of copyright.** Here a lack of coordination between intellectual property law and data protection law is apparent, if one considers that the right to information *ex* Article 8 of the IPRED would allow the disclosure of the identity of Internet users found in possession of infringing goods on a commercial scale or providing services used in infringing activities.<sup>145</sup> However, IPRED requires that such right should apply without prejudice to other EU law provisions which “...govern the protection of confidentiality of information sources or the processing of personal data”, which includes IPRED and the harmonisation-related problem this Directive creates in the context of civil proceedings (Article 8(3)(e)).

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<sup>143</sup> The e-Privacy Directive (Article 15) allows Member States to adopt legislative measures to restrict user privacy rights when such restrictions constitute a necessary, appropriate and proportionate measure within a democratic society to safeguard national security, defence, public security, and the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communication system.

<sup>144</sup> In the decision, the CJEU interpreted the exceptions to user privacy rights broadly, emphasising a reference that the e-Privacy Directive makes to the 1995 Data Protection Directive. According to such reference, Member States are given the option to restrict user privacy rights also in situations that may give rise to civil proceedings, in particular when the processing of personal data is necessary, *inter alia*, ‘...for the protection of rights and freedoms of others...’ See *Promusicae v. Telefonica*, par. 52. Article 13(1)(g) of the 1995 Data Protection Directive provides that Member States are allowed to restrict the right to privacy in relation to the processing of personal data where the restriction is necessary for ‘...the protection of the data subject and of the rights and freedoms of others...’ The CJEU concluded that, due to this reference, the two Directives should be interpreted as expressing the intention of EU lawmakers not to exclude from their scope the protection of the right to intellectual property or situations in which copyright holders seek to obtain protection through civil proceedings. See *Promusicae v. Telefonica*, par. 53.

<sup>145</sup> See IPRED, Article 8(1). In particular, it seems to enable judicial authorities, upon request of copyright owners, to identify and prosecute users who are caught to have knowingly allowed their computers to be used as high-volume uploaders of infringing materials in fully decentralised peer-to-peer architectures: see IPRED, Article 8(2), which makes it clear that information on the origin and distribution networks of infringing goods comprises the names and addresses of distributors and suppliers of infringing goods as well as information on the quantities delivered or received.

### 1.6.3. Copyright and fundamental rights

Copyright enforcement on digital networks can easily have an impact on fundamental rights of citizens, Internet users and companies. The CJEU has recently evaluated the compatibility with EU law of several types of copyright enforcement measures that would end up imposing systematic and permanent filters or blocking access to sites through the cooperation of online intermediaries.<sup>146</sup> By placing emphasis on the fact that all measures based on content filtering, removal or disabling access to websites can easily lead to restriction of lawful content communications (running the risk of over-blocking), the Court held that such measures are bound by the principle of proportionality. Serious concerns regarding freedom to access the Internet insofar as an administrative body (and not a court) could issue the sanction of disconnection of repeat infringers from the Internet were raised by 'graduated responses' (or 'three-strikes') schemes, such as the one introduced in France by the 'Création et Internet' legislation, which established the HADOPI.<sup>147</sup>

**Another source of tension between copyright enforcement measures and free access to online information is the system of graduated response put in place on a voluntary basis by ISPs on the grounds of agreements concluded with copyright owners.** This issue was widely debated in 2009, during the lengthy and complex negotiations that led to the amendment of the 2003 'Telecoms Package'.<sup>148</sup> This amendment introduced into the 'Framework Directive' a new provision (cf. Article 1(3)(a)) on restrictive measures in communications networks – such as user disconnection from the Internet in the context of graduated response regimes. The Directive obliges Member States to guarantee a prior, fair and impartial procedure and an effective and timely judicial review to the affected parties. It was emphasised in the literature that, even though the new Framework Directive does not restrict Member States from introducing graduated response laws without judicial supervision, it guarantees at least a court hearing on an appeal from an initial ruling to disconnect.<sup>149</sup>

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<sup>146</sup> See C-70/10 *Scarlet Extended v. SABAM*, 24 November 2011, and C-360/10, *SABAM v. Netlog*, 16 February 2012, which dealt with, respectively, lawfulness of enforcement measures imposing permanent filtering technologies to an ISP and the owner of a social network platform.

<sup>147</sup> See Law 2009/669 of 12 June 2009, amended on 15 September 2009, *Journal officiel de la République française*. Through a well-known decision, in 2009 the French Constitutional Council held that the protection of freedom of expression and communication under the French constitution includes the freedom to access the Internet and censored the new law insofar as it allowed the sanction of disconnection to be taken by an administrative body. The Council held that this provision was inconsistent with the presumption of innocence and the right to a fair trial: see French Constitutional Council, Decision n. 2009-580DC, 10 June 2009, *Journal officiel de la République française*.

<sup>148</sup> See Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2008 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services (referred to as Framework Directive), 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities (referred to as Access Directive), and 2002/20/EC on the authorisation of electronic communications networks and services (referred to as Authorisation Directive), OJ L 337/37 (December 18, 2009).

<sup>149</sup> The amendments referred to in the main text constitute a dilution of an earlier proposal that was known throughout the blogosphere as 'Amendment 138/Article 8(4)(g)' to the Framework Directive. Amendment 138 aimed at requiring that disconnection from the Internet should have

#### 1.6.4. Copyright and support to cultural diversity

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

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

Even though the InfoSoc Directive does not explicitly give compensation rights stemming from private copying and reprography levies a non-waivable character, a principle of inalienability of this compensation seems to have become binding for all the Member States as a result of a recent judgment of the CJEU in *Martin Luksan v. Petrus van der Let* (par. 90-109). In this case the Court had to assess whether the sharing of fair compensation between the director of a cinematographic work and the film producer under Austrian law was in line with EU law and whether such compensation right should vest by operation of law, directly and originally, in the principal director, in his capacity as author or co-author of the cinematographic work. The CJEU concluded that the holders of the reproduction right (i.e. those listed under Article 2 of the InfoSoc Directive) are the only ones entitled to the fair compensation directly and originally. According to the CJEU, the InfoSoc Directive restricts national law from allowing the principal director of a cinematographic work to waive his right to fair compensation.<sup>150</sup> This means that the author and original holder of the reproduction right must necessarily receive compensation.

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been permissible (only) through a court decision except when public security was threatened (Barron, 2011).

<sup>150</sup> See C-277/10 *Martin Luksan v. Petrus van der Let* (2012), par 107-108.

#### 1.6.4.2. Resale right (*droit de suite*)

A non-waivable resale right is granted to authors of original works of graphic and plastic art, and to their heirs under Directive 2001/84/EC.<sup>151</sup> This right, known also as *droit de suite*, as it was first introduced in France in 1920, reserves a percentage of the resale price of artistic works when they are resold. The right covers any sales involving an art market professional as seller, buyer or intermediary, with the exception of private sales to non-profit museums. Despite the restrictions of its scope and the burdens it might raise for business actors in the European art market, the resale right matters in terms of support to cultural creation and, as a result, cultural diversity insofar as it provides extra financial resources to artists. **This additional source of remuneration creates a system of incentives for the artist to maintain a high artistic value for subsequent works and to gain abroad a reputation and exposure, which increases the value of earlier creations and generates higher resale royalties over time.**

#### 1.6.4.3. Remuneration and termination rights for music performers

To avoid that music performers do not benefit effectively from the 20-year extension of the term of protection for sound recordings enacted under Directive 2011/77/EU<sup>152</sup> (which amended the Term Directive) the Directive grants performers two types of non-waivable rights: i) a termination right that places music performers in a position to regain their rights if the record producer does not effectively market the sound recording within a year from the notification by the performer of her intention to terminate the transfer or assignment; and ii) a right to remuneration calculated on the grounds of net revenues that the record producer has derived from the marketing of the sound recording during its extended period of protection (i.e. following the 50th year after it was lawfully published or communicated to the public). Interestingly, the termination right introduces a mandatory 'use it or lose it' clause in the contractual relationship between performers and their record companies.<sup>153</sup> As a result of the termination of the original contractual transfer or assignment, the rights of the producers should expire whereas the rights in the fixation of the music performance should revert to the performer. **This provision enables the performer to either find another record producer wishing to exploit his/her performance or to do it himself/herself, for instance via the Internet under open content licensing schemes.**

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<sup>151</sup> See Directive 2001/84/EC of 27 November 2001 on the resale right for the benefit of the author of an original work of art, OJ L 272, 13/10/2001, 32.

<sup>152</sup> See Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights, OJ L 265, 11/10/2011, 1.

<sup>153</sup> See Directive 2011/77, Article 1(2)(c).



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

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

#### 2.1.1. The territorial application of copyright rules

As already recalled in the previous Sections of this Study, the territoriality of copyright and related (or ‘neighbouring’) rights is a core principle enshrined in Article 5 of the Berne Convention<sup>154</sup> and in other international treaties and confirmed by the CJEU.<sup>155</sup> Copyright and related rights are acquired and enforced at national level on the basis of the applicable law, which is determined on the grounds of the place where protection is claimed (*lex loci protectionis*).<sup>156</sup> **The geographical scope of these rights is limited to the territory of the State where they are granted and protected.** Any aspect of copyright that is not harmonised at the EU level remains therefore regulated by Member States’ law.<sup>157</sup>

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

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

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

<sup>154</sup> See Berne Convention for the Protection of Literary and Artistic Works, last amended on 28 September 1979 available at: [http://www.wipo.int/treaties/en/text.jsp?file\\_id=283698](http://www.wipo.int/treaties/en/text.jsp?file_id=283698).

<sup>155</sup> See for instance Case C-192/2004 *Lagarrière Active Broadcast v. Société pour la Perception de la Remunération Equitable (SPRE) and Others*.

<sup>156</sup> See Regulation 864/2007 on the law applicable to non-contractual obligations (Rome II), L 199/40, 31.7.2007, Article 8 (Infringement of intellectual property rights).

<sup>157</sup> See JURI Committee (2010), *Copyright Territoriality, Collective Management and Remuneration*, Working Document, European Parliament 15 September 2010.

seek legal advice to ascertain the rights they are entitled to in different Member States as well as to effectively enforce these rights.<sup>158</sup>

### 2.1.2. Definitions that fall outside the scope of the EU copyright *acquis*

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

Some notions that originally fell outside the scope of the InfoSoc Directive have been further elaborated by the CJEU in its case law, in order to preserve the original function of the Directive and to remove barriers to intra-EU trade that diverging standards might otherwise have caused. This is the case for the standard of originality. As emphasised above, EU law deliberately intervened by introducing a unitary concept of originality in those fields where this notion would have potentially generated the highest Internal Market obstacles, namely computer programmes and databases and, to some extent photographs. This definition is based, for all creative works protected by copyright, on the ‘author’s intellectual creation’ standard.<sup>159</sup> While the InfoSoc Directive fell short of defining a standard of originality for other types of creative works, the CJEU intervened by extending the ‘author’s intellectual creation’ standard to all the works to which the rights harmonised under InfoSoc Directive apply (see Section II.1.2.1). **Lack of harmonisation persists when it comes to the definition of derivative works/transformative uses and the attribution of authorship.**

#### 2.1.2.1. Transformative uses and derivative works

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

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<sup>158</sup> See JURI Committee (2010), *Copyright Territoriality, Collective Management and Remuneration*, Working Document, European Parliament, 15 September.

<sup>159</sup> This notion of originality has been to a large extent taken from the continental-European *droit d’auteur* (i.e. the author’s right) rather than from the prevalent common law approach that is deemed to cover also less ‘creative’ content. In common law countries, originality requires that the work must not be copied and must be the result of ‘skill, judgement and/or labour’ (the so-called ‘sweat of the brow’), i.e. the author needs to be diligent during the creation of a certain work. In practice, the two approaches do not lead to a different extension of the copyright subject matter for the majority of works (Margoni, 2014).

The InfoSoc Directive does not harmonise the scope of the exclusive right of authorising transformative uses of copyrighted works. This issue has been addressed only by Article 4(1)(b) of the Software Directive<sup>160</sup> and Article 5(b) of the Database Directive<sup>161</sup> granting to the author the exclusive right of translating, adapting and transforming computer programmes and databases.<sup>162</sup> As a result, the definition of derivative works and transformative uses for other copyright subject matter is left to Member States' discretion.<sup>163</sup> While this is not surprising as significant linkages exist between lawful transformative uses and moral rights of authors (and especially the right of integrity), which are a matter of Member States' law, the market fragmentation potential for this lack of legal harmonisation is becoming increasingly central in the digital environment (Margoni, 2014). Indeed, **new technologies multiply the options for transformative uses of copyrighted works and, as a consequence, raise new issues in terms of compliance with national copyright law, especially for what concerns so-called user-generated content (UGC)**. In the current scenario, the creation by end-users of derivative works based on earlier works is easier and cheaper than ever before (Mazziotti, 2008). In addition, UGC is becoming commercially relevant by virtue of the availability of new and easily accessible distribution channels (e.g. web platforms, social networks, blogs) and licensing schemes.<sup>164</sup>

### Box 1. User-generated content

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

<sup>160</sup> Directive 2009/24/EC.

<sup>161</sup> Directive 96/9/EC.

<sup>162</sup> Exceptions and limitations apply to these exclusive rights.

<sup>163</sup> Interestingly, several transformative uses (e.g. use for the purpose of caricature, parody or pastiche) are listed in Article 5(3) of the InfoSoc Directive among the optional exceptions and limitations that can be implemented by Member States.

<sup>164</sup> See European Commission (2013), *Public Consultation on the Review of the EU Copyright Rules*, Consultation Document available at: [http://ec.europa.eu/internal\\_market/consultations/2013/copyright-rules/docs/consultation-document\\_en.pdf](http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/consultation-document_en.pdf).

The OECD<sup>165</sup> has defined UGC on the ground of three main criteria: “i) a content that has been made publicly available over the Internet; ii) which requires a certain amount of creative effort; and iii) which has been created outside of professional routines and practices” (Margoni, 2014). However, a formal categorisation of UGC following those criteria remains difficult: while the formulation adopted by the OECD is still general, some underlying concepts such as originality, transformative use and derivative work are not harmonised across Europe. An attempt to categorise UGC types was made by De Wolf & Partners (2013) that identified three main types of content: i) “user-created content” or “user-authored content”, i.e. original works that do not rely on transformative uses of pre-existing works (‘creation from scratch’) and are made available by their authors through the Internet; ii) ‘user-copied content’, i.e. protected or non-protected content provided by a third party and made available without any substantial alteration (e.g. video format shifting or mere upload); iii) ‘user-generated derivative content’, i.e. works that combine pre-existing works with inputs of original creativity giving birth to a proper secondary creation.<sup>166</sup> The emergence of the third type of UGC is relatively new in terms of scale and distributional impact on the creative content value chain. This phenomenon becomes even more complex when it comes to reuse of copyrighted content for the emergence of new business models for commercial purposes.

So far, the main issue raised in the debate is whether UGC should be subject to particular exceptions and limitations. The heart of the problem stems from the fact UGC blurs traditional distinctions between professional versus amateur dichotomy, as between public and private spheres (especially when distinguishing the private/non-private reproduction or making available to the public or to a private group), as well as the commercial and non-commercial purpose criterion. Although a work has not originally been designed as commercial in the first place, its success and popularity over time could generate substantial revenues via advertising incomes. The emergence of new licensing and monetising schemes for small-scale users of copyrighted content provides practical commercial and contractual solutions to ease UGC and facilitate micro-licensing for private or small commercial users. However, as highlighted in the Commission’s Communication on Content in the Digital Single Market,<sup>167</sup> the main challenge lies in fostering transparency and access to information related to the scale and coverage of licenses and to the terms of agreements between publishers and platforms.<sup>168</sup> In addition, the information related to a particular content should provide greater certainty to end-users over the potential legitimate and illegitimate uses of copyrighted work to facilitate rights clearance for small users.

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<sup>165</sup> See OECD, DSTI/ICCP/IE (2006)7/Final, Working Party on the Information Economy (2007), Participative web user-created content, available at: <http://www.oecd.org/sti/38393115.pdf>.

<sup>166</sup> In light of the abundance of content available over the Internet that are easily usable or copied and of the increasingly blurred distinction between copyrighted and non-copyrighted content online, the possible copyright infringement in the case of a ‘user-generated derivative content’ is considered very high.

<sup>167</sup> See Communication from the Commission, *On content in the Digital Single Market*, COM(2012)789 final.

<sup>168</sup> The terms of agreement between platforms and third parties are usually not accessible. Moreover, some monetising schemes based on views or clicks rates raise concerns in terms of transparency and good practice.

### 2.1.2.2. Authorship

The notion of ‘authorship’ of copyrighted works has not been subject to a significant harmonisation at the EU level, except for the EU provisions on computer programmes and databases<sup>169</sup> and cinematographic and audiovisual works.<sup>170</sup> Nonetheless, for the latter, while Member States are obliged to consider the principal director as the author of the work, they are still free to designate co-authors; hence the harmonisation degree of this measure is quite limited (see Table 1).

**Table 1. Audiovisual authors in a sample of Member States**

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

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

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

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

<sup>169</sup> See Article 4 of the Database Directive (Directive 96/9/EC) and Article 2 of the Software Directive (Directive 2009/24/EC).

<sup>170</sup> See Article 2(1) of the Term of Protection Directive (Directive 2006/116/EC).

incentives to the creation of creative content and affecting the Internal Market on the supply side.

### 2.1.3. Territorial exercise of the right

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

**Copyright territoriality does not pose any obstacle to the integration of the Internal Market when it comes to the distribution of tangible copyrighted goods.** In fact, according to Article 4(2) of the InfoSoc Directive, the distribution right is limited by the exhaustion principle. This principle, which was for the first time laid down by the ECJ in the *Deutsche Grammophon* case, provides that once a copyrighted good has been sold by the right-holder, or with his/her consent, in a territory of the European Union, further distribution of this good cannot be prevented.<sup>171</sup> In other words, parallel imports of tangible copyrighted works are lawful as long as consent for their exploitation has been given in at least one Member State. Hence, the principle of exhaustion mitigates the market fragmentation effects of the principle of territoriality (see Section II.1.2.4).

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

Notwithstanding the prevalent interpretation of the principle of exhaustion, in many circumstances the online transmission of digital copyright works that are purchased by end-users and downloaded on their own computer is equivalent, in its effects, to distribution of tangible copyrighted goods. **Interestingly, the Dutch Court of Appeals (Hof Amsterdam), in a preliminary ruling, extended the controversial findings of the UsedSoft case<sup>172</sup> to the resale of e-books.<sup>173</sup>** The progressive extension of the principle of exhaustion to download-to-own<sup>174</sup> copyrighted goods by national Courts may potentially lead to additional problems in terms of Internal Market as only in some Member States a

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<sup>171</sup> Case C-78/70, *Deutsche Grammophon v. Metro-SB-Grossmarkte*.

<sup>172</sup> Case C-128/11 *UsedSoft GmbH v. Oracle International Corp.*

<sup>173</sup> For further details see <http://kluwercopyrightblog.com/2015/01/28/the-dutch-courts-apply-usedsoft-to-the-resale-of-ebooks/>.

<sup>174</sup> The term download-to-own refers to the legal download to a private computer of copyrighted good via a network such as the Internet.

second-hand market of copyrighted digital works (e.g. films, video-games, MP3 files) would be lawful.<sup>175</sup> In addition, this new interpretation of the principle of exhaustion would deeply affect commercial strategies of online business models that currently sell digital copies of content on a strictly territorial basis and might foster the switch towards access-based services.

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

## 2.2. Territorial licensing and geo-blocking in specific sectors

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

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

- **First, they limit cross-border portability of copyrighted works.** In a nutshell, consumers that lawfully subscribe to online services in their Member States to stream, e.g. music or audiovisual content, are not able to access the same service when moving, even temporarily, to another Member State.<sup>176</sup> Limited portability may affect up to 4.7 million of Europeans per day, including both short-term migrants and travellers (Plum Consulting, 2012).
- **Second, and most important, they limit cross-border trade.** Consumers living in a certain Member State are not able to subscribe to online services providing copyrighted content in another Member State. The effect of this ‘trade barrier’ is twofold:

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<sup>175</sup> It is worth stressing that, besides the lawfulness under the current EU copyright framework, the reselling of digital copies also raises additional issues such as: i) the need to avoid resellers keeping a copy of the file in their own computer; and ii) the creation of a market for second-hand digital files that are of the same quality of first-hand ones and potentially never deteriorate.

<sup>176</sup> It is worth stressing that, in the music sector, some service providers operating in more than one Member State allow for cross-border portability in geographic areas covered by their services. This is for instance the case of Spotify, which ensures full portability to premium users across 25 EU countries (Croatia, Romania, and Slovenia are still excluded). In such a context, cross-border portability is the result of the business acumen of some providers that are able to meet a pan-European demand by acquiring licenses in more than one Member State. In fact Spotify ensures portability beyond EU borders, in 60 countries worldwide.

- Some EU consumers cannot access contents that are instead available to other EU consumers;<sup>177</sup>
- Even when the same service is provided in several EU Member States, consumers can access only their 'national' offer.<sup>178, 179</sup>

These problems have been faced by the vast majority of end-users responding to the public consultation on the review of the EU copyright rules launched by the European Commission in 2013.<sup>180</sup>

The fragmentation of the Internal Market stemming from territorial licensing and geo-blocking is certainly rooted in the territoriality of copyright and related rights. **On the one hand, the insufficient harmonisation of copyright law across the EU obliges providers of copyrighted works to clear relevant exploitation rights on a national basis.** The transmission of copyright content in digital networks involves two different rights: i) the reproduction right;<sup>181</sup> and ii) the communication to the public right, which includes the right of making copyrighted works available to the public. As a result a single act of exploitation requires clearing two autonomous and independent rights, which might raise transaction costs and make the rights clearance more complicated in sectors, like the music business, where these categories of rights might be held by different right-holders in different several Member States.

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<sup>177</sup> For instance Italian consumers cannot subscribe to Netflix, an online service that is instead available to UK and Ireland consumers. More generally, the availability of online music services largely varies among Member States: in 11 countries fewer than five services were available in 2012; in seven countries between five and nine; only in nine countries were more than ten service providers detected (see European Commission (2012), Impact Assessment Accompanying the Document Proposal for a Directive of the European Parliament and of the Council on Collective Management of Copyright and Related Rights and Multi-territorial Licensing of Rights in Musical Works for Online Uses in the Internal Market, SWD(2012)2014 final).

<sup>178</sup> For instance, although Apple iTunes reached EU-wide coverage, German consumers can purchase content only from their national iTunes Store and available content varies significantly among national web-stores. YouTube created a local version of the service in some EU countries where additional content is provided, but a consumer from Italy cannot access the UK national version. Also, content provided by Xbox Live is filtered according to the location. For further details see Plum Consulting (2012) and JURI Committee (2011), *Copyright in the Music and Audiovisual Sectors*, Working Document, European Parliament 29 June 2011.

<sup>179</sup> The compatibility of these business arrangements with Article 20(2) of the Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (referred to as 'Services Directive') should be further investigated: 'Member States shall ensure that the general conditions of access to a service, which are made available to the public at large by the provider, do not contain discriminatory provisions relating to the nationality or place of residence of the recipient, but without precluding the possibility of providing for differences in the conditions of access where those differences are directly justified by objective criteria'.

<sup>180</sup> See European Commission (2014), Report on the responses to the Public Consultation on the Review of the EU Copyright Rules, available at: [http://ec.europa.eu/internal\\_market/consultations/2013/copyright-rules/docs/contributions/consultation-report\\_en.pdf](http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/contributions/consultation-report_en.pdf).

<sup>181</sup> It is worth stressing that each digital transmission of copyrighted works entails several acts of reproduction, including, *inter alia*, uploading and downloading of the digital work.



**On the other hand, the combined effect of i) the principle of copyright territoriality, ii) the application of the principle of exhaustion exclusively to tangible goods, and iii) the contractual freedom<sup>182</sup> enshrined in the Charter of Fundamental Rights of the EU enables right-holders as well as service providers to exploit copyright and related rights on a national basis without breaching EU law.** Indeed, the online provision of copyrighted content on a territorial basis can be the result of the deliberate commercial decisions of right-holders and/or commercial users. In other words, while the current EU copyright framework may inflate transaction costs<sup>183</sup> and make the online provision of pan-European copyrighted content too costly, right-holders and service providers may autonomously decide to partition the Internal Market irrespective of copyright obstacles to multi-territorial licenses on the grounds of commercial motivations.<sup>184</sup> This is not surprising, especially when considering that geo-blocking measures are adopted also in e-commerce of non-copyrighted goods.<sup>185</sup>

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

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

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<sup>182</sup> The lion's share of sectoral stakeholders agreed that contractual freedom should be preserved and that commercial users of digital content should be free to pursue the commercial strategy they prefer (Mazziotti, 2013). In addition, this principle has been explicitly confirmed by the European Commission (European Commission (2010), Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Digital Agenda for Europe*, COM(2010)245final).

<sup>183</sup> Service providers might be required to negotiate licenses with a wide range of stakeholders located in various Member States rather than clearing all the required rights for all the territories of the EU in a single transaction.

<sup>184</sup> Licensing content on a territorial basis enables not only service differentiation (taking account, for instance, of cultural and linguistic diversity) but also price discrimination. Hence, mono-territorial licensing schemes can be more profitable for right-holders and commercial users than multi-territorial or pan-European licenses.

<sup>185</sup> For instance, Belgian consumers can purchase clothes only on the Belgian Zara website. Similarly, Italian consumers can only access the Italian online Apple Store (and at the time of writing they cannot purchase an Apple Watch which is available only to British, French and German consumers).

### 2.2.1. The audiovisual sector

While the WIPO generally defines an audiovisual work as “a work which appeals at the same time to the ear and to the eye and consists of a series of related images and accompanying sounds”,<sup>186</sup> **this Section focuses only on the film sector as it is characterised by the centralisation of the majority of relevant exploitation rights in the hands of a single entity, namely the film producer.**

As mentioned above (see Section II.0), in principle several intellectual creators (e.g. the director, scriptwriters, music composers, etc.) can be acknowledged as authors of a film; nonetheless, the main economic rights are transferred from the authors (and performers<sup>187</sup>) to the producer, by law or by contractual agreements.<sup>188</sup> As a result, the producer is the single licensing entity for the exploitation of these audiovisual works (Charles River Associates, 2014). Nonetheless, some of the authors or performers involved in the production of the movie can still be entitled to separate remunerations or compensations for certain uses of their creative works incorporated in audiovisual fixation.<sup>189</sup> Remuneration and compensation arrangements for audiovisual authors and performers in principle do not affect licensing schemes as the film producers are still vested with all the relevant economic rights. The only obstacle is represented by certain uses (e.g. online exploitation) of music works (i.e. pre-existing musical compositions or movie soundtracks) embedded in a film.<sup>190</sup> For this kind of content, the relevant rights (including so-called ‘public performance’ rights) have still to be cleared by dealing with the relevant collective management societies<sup>191</sup> and can involve substantial transaction costs on a country-by-country basis.<sup>192</sup>

<sup>186</sup> See WIPO (1980), Glossary of Terms of the Law of Copyright and Neighbouring Rights, World Intellectual Property Organization.

<sup>187</sup> Please note that, besides the fragmentation of authors’ rights, another grey area is represented by the rights of performers (actors) that are not fully harmonised at the EU level (DG INFSO and DG MARKT (2009), *Creating Content in a European Digital Single Market: Challenges for the Future*, A Reflection Document).

<sup>188</sup> See European Commission (2011), *Green Paper on the Online Distribution of Audiovisual Works in the European Union: Opportunities and Challenges towards a Digital Single Market*, COM(2011)427final.

<sup>189</sup> In some Member States (e.g. Belgium, Bulgaria, France), collective management societies representing audiovisual authors collect ‘per use’ remuneration for TV broadcasting of copyrighted audiovisual works. In some other Member States (e.g. Spain), audiovisual performers are entitled to an equitable remuneration for the exploitation of their performances.

<sup>190</sup> Music right-holders are entitled to receive communication/‘making available’ to the public royalties as a result of the broadcast of film on television, the exhibition of the film in movie theatres or the online exploitation. ‘Cue sheets are the primary means by which performing rights organizations track the use of music in films and TV. A typical cue sheet contains a log of all music used in the motion picture and includes such information as the film’s title, air date, music length, song title, composer and publisher information, name of the performing rights society, timing/usage information, and percentage splits among copyright proprietors’ (Kushnir, 2005).

<sup>191</sup> In some Member State (e.g. Czech Republic, Spain, Germany), based on national legislation and collective bargaining agreements, in the audiovisual sector collective management societies play a role also for clearing certain rights (e.g. rental right) of certain right-holders (e.g. performers) (DG INFSO and DG MARKT (2009), *Creating Content in a European Digital Single Market: Challenges for the Future*, A Reflection Document).

<sup>192</sup> See European Commission (2011), *Green Paper on the Online Distribution of Audiovisual Works in the European Union: Opportunities and Challenges towards a Digital Single Market*, COM(2011)427final.

Setting aside issues related to the clearance of rights for music incorporated in films,<sup>193</sup> **in principle the producer is free to decide the optimal licensing scheme for exploiting his/her audiovisual works.** As regards the licensing 'value chain', producers may directly license their works or rely on distributors playing the role of intermediaries between producers and commercial users (see Figure 2). In addition, especially for foreign markets, sales agents can facilitate contractual agreements to transfer the rights from producers to territorial distributors. When it comes to the online supply of copyright audiovisual works, service providers have to acquire online rights (i.e. both the making available right and the reproduction right) from the relevant right-holders. Whereas service providers may directly deal with producers or resort to sales agents or distributors, in many circumstances they clear rights by concluding agreements with aggregators that are companies holding the relevant rights for large catalogues of movies. This is especially the case for video on-demand services (Charles River Associates, 2014).

It is apparent that in the film sector there are no significant obstacles to licensing agreements between producers and commercial users. In addition, in compliance with the current EU copyright system, producers may decide to exploit their rights via pan-European licenses. In principle, EU copyright law does not constitute a major obstacle to market integration. Nonetheless, territorial or multi-territorial licensing schemes<sup>194</sup> are still the prevalent and probably the most profitable system of right exploitation in this sector for a variety of reasons (see below). While licensing practices reflect lawful commercial strategies based on the principle of copyright territoriality, competition policy issues (cf. the *Premier League* case) may still arise, especially when licensing agreements are based on absolute territoriality exclusivity.<sup>195</sup> The compatibility between EU competition law and EU copyright law is an important issue that requires further investigation. In this respect, in January 2014 the European Commission started a formal antitrust proceeding to examine territorial licensing agreements between US film studios and the largest European pay-TV broadcasters that may result in the partitioning of the Internal Market.<sup>196</sup>

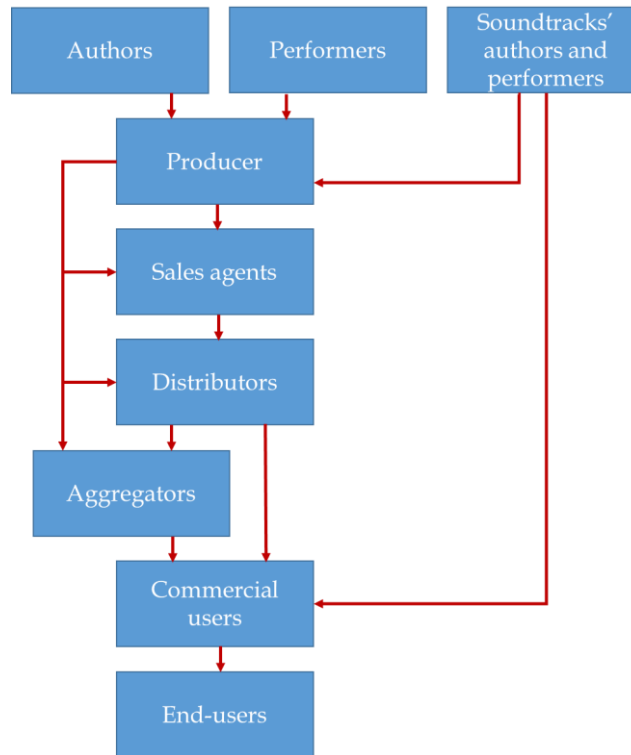
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<sup>193</sup> Please note that in terms of market fragmentation, these issues are equivalent to those discussed below for the music sector.

<sup>194</sup> Several platforms providing on-demand services serve multiple territories of the EU insofar as they can still address customers included in a common language group (see European Commission (2011), *Green Paper on the Online Distribution of Audiovisual Works in the European Union: Opportunities and Challenges towards a Digital Single Market*, COM(2011)427final).

<sup>195</sup> These agreements exclude also the so-called passive sales, i.e. those sales resulting from a response to unsolicited requests from customers residing outside the territory covered by the license of the service provider.

<sup>196</sup> See European Commission (2014), Press Release, 'Antitrust: Commission investigates restrictions affecting cross border provision of pay TV services', 13 January 2014, available at: [http://europa.eu/rapid/press-release\\_IP-14-15\\_en.htm](http://europa.eu/rapid/press-release_IP-14-15_en.htm).

**Figure 2. Licensing chain in the film sector**

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

**One of the main challenges to the development of the Internal Market for audiovisual content lies in the strong cultural and linguistic diversity across EU Member States.** As a result, consumer preferences diverge substantially across EU countries. Accordingly, the provision of audiovisual works requires national adaptations such as subtitling and dubbing as well as tailoring marketing investment and, to some extent, versioning content to meet local preferences (e.g. general consumer tastes, holiday periods). In addition, some works (e.g. European film productions that are targeted to a specific national audience) are able to meet the demand only of a limited part of the EU population in terms of humour, popular characters or local stories and are bound to national contexts.<sup>197</sup> For instance, in 2013 the average share of admissions of EU films in national markets was equal to 79%, in other words four spectators out of five were based in the same Member State where the film was produced.<sup>198</sup> Interestingly, while the cross border penetration rate of EU films is below 10% in the majority of national markets, US films have a market share above 50% all over Europe (see Table 2). Dubbing is still required to release movies in four out of the five largest EU markets (i.e. France,

<sup>197</sup> By way of example, MTV initially decided to provide a pan-European TV channel. At a second stage, the cultural diversity and linguistic specificities within the EU territory obliged MTV to change its strategy and create country-specific TV channels (RBB Economics and Value Partners, 2009 as quoted in Charles River Associates, 2014).

<sup>198</sup> European Audiovisual Observatory (2014), *Yearbook Online Premium Services*.

Germany,<sup>199</sup> Italy and Spain).<sup>200</sup> Against this background, pan-European licensing schemes are often not profitable for right-holders, especially when a substantial pan-European demand is absent.<sup>201</sup>

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

Country	Main language transfer practices	Admissions (% over EU total)	National films (%)	Other EU films (%)	US films (%)
Czech Republic	Subtitling	1.22	24.2	11.06*	64.74
France	Dubbing and subtitling	21.34	33.8	7.29	54.24
Germany	Dubbing and subtitling	14.30	26.2	6.10	65.4
Hungary	Subtitling	1.12	1.5	9.85	86.86
Ireland	Subtitling	1.62	0.9	n.a.	n.a.
Italy	Dubbing	11.76	30.5	9.90	53.7
Poland	Subtitling	4.00	20.4	16.10	63.39
Spain	Dubbing	8.62	14.00	9.99	69.69
UK	Subtitling	18.25	22.1	3.00	72.7

Note: \*Estimated value.

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

**An additional and complementary reason for partitioning the Internal Market is rooted in the financing scheme adopted to fund the production of movies.** A substantial share of the overall budget is gathered by pre-selling exclusive exploitation rights on a territorial basis and for a certain period of time to sales agents, distributors, or television broadcasters in exchange for an upfront payment.<sup>202</sup> In some Member States,

<sup>199</sup> Some small budget films are released in Germany only with subtitles.

<sup>200</sup> Please note that in UK, the share of admission for films in foreign languages is about 3%.

<sup>201</sup> The absence of demand for pan-European licenses, *mutatis mutandis*, can explain the lack of online transmission of sports events on an EU-wide basis (Mazziotti, 2013). Interestingly, in a recent interview, Mathieu Moreuil (Head of EU Affairs at Premier League) stressed that Premier League contents are worth £1 billion in the UK market and about €150 million in the rest of Europe and an even bigger ratio applies to the French *Ligue 1* where €700 million are collected in France and €7 million in the 27 other Member States. See Strömbäck, P. (2015), *Interview with Mathieu Moreuil, Head of EU Affairs at Premier League*, Netopia available at: <http://www.netopia.eu/2015/05/04/be-careful-what-you-wish-sports-on-the-dsm/>.

<sup>202</sup> Based on case study approach FIAPF, IVF and IFTA pointed out that between 32% and 66% of the total financing plan of a European movie is covered by pre-selling rights (Charles River Associates, 2014). It is worth stressing that when it comes to online service providers, some

broadcasting organisations and more rarely telecommunication operators are even obliged to contribute to the financing of audiovisual productions.<sup>203</sup> In addition, some territorial licensing schemes transfer or used to transfer to distributors or commercial users full packages of rights covering also the online exploitation. As a result, **in many circumstances, online exploitation on a pan-European basis is not possible as relevant rights are locked up for a certain period of time in contractual agreements on a territorial basis.**<sup>204</sup> Finally, territorial licensing schemes are deemed instrumental also to distribution strategies based on the so-called ‘release windows’, i.e. on the sequential release of audiovisual content via different media platforms (e.g. cinemas, DVD/Blue Ray, Video on Demand, Pay-TV, and free-to-air television), especially when the dates of first release and/or the length of the various ‘windows’ are different across Member States.

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

### 2.2.2. The music sector<sup>205</sup>

Irrespective of the business model adopted for the supply of digital music, **generally online commercial users have to clear both the reproduction right (the so-called ‘mechanical’ right)** and the making available right (the so-called ‘public performance’ right). Interestingly, in the music sector authors (i.e. composers and lyricists) hold a copyright on their musical compositions whereas performers (i.e. singers and musicians) and phonogram producers (i.e. record companies) hold related rights (‘related to copyright’ or ‘neighbouring rights’), respectively, on their performances and sound recordings of the authors’ musical compositions.<sup>206</sup> These three layers of rights co-exist

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European telecommunication operators have purchased pre-selling rights from major Hollywood film studios to provide video on-demand services in certain territories (KEA, 2010).

<sup>203</sup> In Poland, Germany, Slovakia and Romania, statutory stakeholders’ contributions also involves providers of video on-demand rights, thus posing a potential obstacle to pan-European licensing of online exploitation rights (KEA, 2010).

<sup>204</sup> For instance, the majority of broadcast distribution contracts also entitle broadcasters to the right to make available online the relevant audiovisual work after the first broadcast (KEA, 2010).

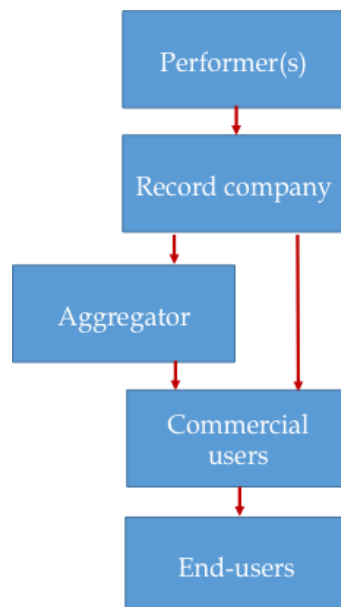
<sup>205</sup> At the outset of this Section, it is worth stressing that in 2014 the European Parliament and the Council enacted a Directive on collective management of copyright and related rights (Directive 2014/26/EU) that is expected to facilitate the clearance of exploitation rights on a multi-territorial or pan-European basis in the music sector. As Member States have to comply with this Directive by 10 April 2016, the present interim evaluation of the EU copyright framework does not take into account the expected outcome of this new EU measure. Before the enactment of the 2014 Directive, the European Commission has sought to simplify and encourage the development of multi-territorial licenses of online music rights (see Section II.1.5.1). In spite of such efforts, music rights are very fragmented thus increasing transaction costs and posing an obstacle to the integration of the Internal Market.

<sup>206</sup> Related rights also belong to broadcasters as regards their own broadcasts.

when it comes to exploitation of recordings, in a way that all such rights should be cleared for each exploitation to be lawful. In addition, each of the aforementioned right-holders is entitled to transfer its economic rights to other entities, as occurs with music authors, who traditionally share their rights with music publishers.

**As for neighbouring rights, they are generally transferred from performers to record companies based on contractual agreements.** As a result, online commercial users can clear the bundle of related rights required for online exploitations by dealing, directly and individually, with record producers. This is usually the case for rights belonging to major labels. For related rights held by smaller independent record companies, instead, given their greater number and limited resources, commercial users interact with rights and content aggregators, on a collective basis.<sup>207</sup> Record companies as well as aggregators, similarly to film producers, are potentially able to grant multi-territorial or pan-European licenses (see Figure 3).

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



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

<sup>207</sup> Interestingly, some aggregators can be specialised in certain online services: 'Aggregators convert and encode music formats and deliver technical copies of the music, and act as distributors of music over the Internet, negotiating directly or through an intermediary the deals with online music services' (KEA & VRIJE Universiteit Brussels, 2012). For instance, Merlin offers a one-stop shop for streaming and mobile services (e.g. Deezer, Spotify) by negotiating licenses on behalf of independent music companies that already possess their own aggregator and distributor services dealing separately with traditional download platforms (e.g. iTunes). Merlin is a non-profit joint-licensing organisation established in 2007 as a global digital rights agency. It gathers 650 members representing more than 20,000 independent labels and distributors worldwide. Its mission is to represent the independent music sector worldwide and to act as a central point of entry to the music repertoires it represents, in particular for digital, new media and mobile rights. Hence, Merlin issues multi-territorial licenses to streaming and mobile services via a single deal and redistributes revenues accrued from its commercial agreements to its members.

**Complexity arises when it comes to the author’s copyright in the music sector.** The vast majority of music authors mandate a certain collective management organisation (CMOs) to manage, on an exclusive basis, their rights of communication to the public, which include the rights of making content available online, by: i) negotiating rates and terms of use; ii) granting licenses to commercial users; iii) monitoring the exploitation of rights and pursuing infringers; iv) collecting royalties and redistributing these revenues to right-holders.<sup>208</sup> A CMO is generally based in a certain Member State where it offers a bundle of rights for its own repertoire as well as for repertoires of its associated CMOs operating in other territories (multi-repertoire licensing).<sup>209</sup> In other words, they grant licenses for exploiting the rights of both national and foreign right-holders in the territory of the Member State where they are established. The licensing of other repertoires is based on a network of reciprocal representation agreements. In principle, a national collecting society can also grant multi-territorial licenses for its own repertoire (provided that the authors’ mandate is not limited to one country). In practice, each collecting society usually grants licenses for all the repertoires in its own country (mono-territorial licensing), at least as regards offline exploitations that require a reasonably high monitoring capacity on a certain territory of operation.<sup>210</sup> More recently, some collective management societies have created regional hubs where online commercial users can obtain multi-territorial licenses for the repertoire of the member societies.<sup>211</sup>

CMOs from continental-European (i.e. *droit d’auteur* or author’s right systems) Member States are generally entitled to manage also the reproduction rights for copyrighted musical works of the authors they represent. Nonetheless, this specific right is usually co-

<sup>208</sup> JURI Committee (2010), *Copyright Territoriality, Collective Management and Remuneration*, Working Document, European Parliament 15 September 2010.

<sup>209</sup> In some Member States several CMOs coexist and represent different right-holders (e.g. authors, publishers) and, in some cases, different rights (European Commission (2012), *Impact Assessment Accompanying the Document Proposal for a Directive of the European Parliament and of the Council on Collective Management of Copyright and Related Rights and Multi-territorial Licensing of Rights in Musical Works for Online Uses in the Internal Market*, SWD(2012)2014 final).

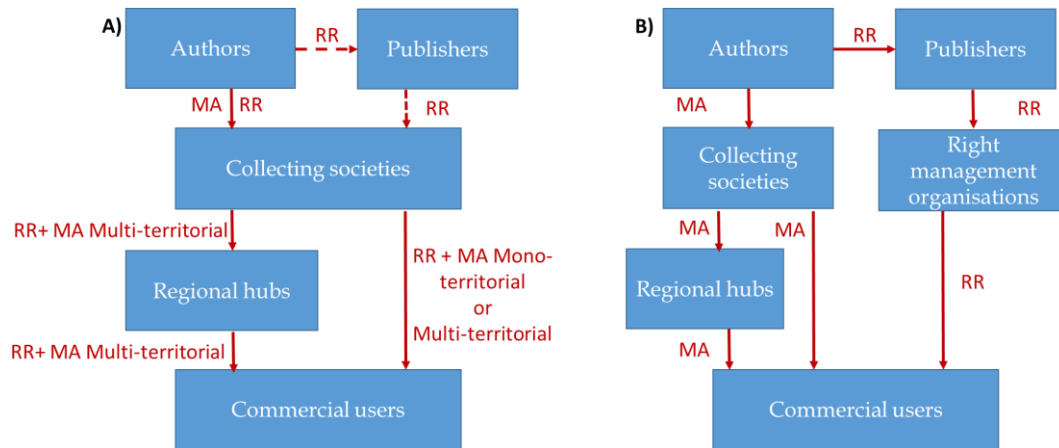
<sup>210</sup> The main reason for this territorial partition is rooted in the need to physically monitor and enforce rights in the ‘offline’ environment (see C-351/12 OSA v. *Lecebne lazne Marianske Lazne*).

<sup>211</sup> ARMONIA and the Nordisk Copyright Bureau are two examples of regional hubs. ARMONIA is the first pan-European hub for the licensing of online services and was founded in 2013 by the SIAE (Italy), SGAE (Spain) and SACEM (France). Recently joined by ARTISJUS (Hungary), SABAM (Belgium) and SUISA (Switzerland), among others, it represents 5.5 million aggregated works and aims at improving the identification of musical works and more accurately claiming authors’ rights. In particular, it seeks to improve processing speed of sales reports and better value the documentation and invoicing tools to simplify relationships with Digital Services Providers through the creation of a one-stop shop for sales reports for Digital Services Providers and the mutualisation of common activities of analysis and validation of sales reports. ARMONIA has signed a series of agreements with Beatport, Google, Deezer and YouTube for access to the repertoires of the member societies as well as those of UMPI, SONY ATV Latino and SPA. The Nordisk Copyright Bureau is the joint-collecting society owned by the Nordic performing rights societies such as KODA in Denmark, STEF in Iceland, STIM in Sweden, TEOSTO in Finland and TONO in Norway. Apart from administering the recording and copying rights on behalf of their owner societies, the Nordisk Copyright Bureau also administers these rights for the Baltic performing rights societies: AKKA-LAA in Latvia, EAÜ in Estonia and LATGA-A in Lithuania. The Nordisk Copyright Bureau also holds 50% of the shares in the Network of Music Partners (NMP), a joint venture company owned by NCB and PRS for Music that provides back-office services to the music copyright administration industry (Mazziotti, 2011).



owned by music publishers, as a result of the contractual arrangements with composers and lyricists.<sup>212</sup> Interestingly, due to a different contractual tradition and a different way the mechanical rights were exploited in the pre-digital era, reproduction rights for Anglo-American repertoires are entirely owned by publishing companies rather than owned or co-owned by authors, in a way that these rights have been exploited by entities entirely controlled by publishers (Mazziotti, 2011). As a result, whereas collecting societies from ‘author’s right’ systems like France’s and Germany’s generally manage mechanical rights also for publishers,<sup>213</sup> **major publishers of Anglo-American repertoires**, which originally managed these rights by themselves (either individually or through their own collective rights management organisations), in response to the European Commission’s initiatives in the area of collective management of online music rights, **have progressively transferred their reproduction rights from their collecting societies to specialised and mono-repertoire rights management organisations whose sole purpose is the multi-territorial or pan-European licensing of these specific rights.**<sup>214</sup>

Figure 4. Licensing chain for copyright in the music sector



Note:

A) Mono-territorial licensing for all repertoires and multi-territorial licensing of Continental repertoire;  
 B) Multi-territorial licensing of Anglo-American repertoire.

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

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

<sup>212</sup> Music publishers are generally distinct from recording companies. They usually manage and promote authors’ compositions in exchange of part of the authors’ rights or a share of authors’ royalties. Music publishers are not considered copyright owners by law: they become right-holders as a result of the transfer of rights from authors (Charles River Associates, 2014; KEA & VRIJE Universiteit Brussels, 2012).

<sup>213</sup> In some Member States, publishers’ rights and authors’ rights are managed by different collecting societies (see note 209).

<sup>214</sup> Mono-territorial reproduction rights of publishing companies are still managed by national collecting societies, also for Anglo-American repertoire (Mazziotti, 2011; Mazziotti, 2013).

- For mono-territorial license of both Continental and Anglo-American repertoire, they have to clear both reproduction and making available rights with national CMOs.<sup>215</sup>
- For multi-territorial license of Continental European repertoire they have to deal either with national collecting societies in all the Member States they intend to serve or, if any, with regional hubs grouping several collecting societies.
- Finally, for multi-territorial license of Anglo-American repertoire, online commercial users have to negotiate with right management organisations for reproduction rights and with national CMOs or regional hubs for making available rights.

**As a result, the fragmentation of copyright and related rights, right-holders, and repertoires as well as the territorial scope of licenses granted by traditional collecting societies force online commercial users to conduct numerous parallel negotiations in each Member State. This inflates transaction costs and creates substantial obstacles to the provision of pan-European online music services as well as other online services requiring the clearance of music copyright and related rights, such as audiovisual services.**<sup>216</sup> According to a study published by KEA & VRIJE Universiteit Brussels, commercial users that provide services in more than one country and offer more than one million titles face transaction costs up to €260,000 per year and need about six employees to deal with licensing issues; in particular, the identification of relevant right-holders may require up to six months and negotiations to clear rights may last up to two years (KEA & VRIJE Universiteit Brussels, 2012).

As explained above, additional reasons may impinge on multi-territorial licensing in the music sector. Similarly to the film sector, to some extent cultural and linguistic diversities may also pose an obstacle to the proper functioning of the Internal Market. The success of several national repertoires is mainly limited to the territory of a certain Member State. EU music works that have a market beyond national barriers usually follow patterns that are set by cultural and linguistic proximity. Only Anglo-American repertoires are truly able to meet a pan-European demand by benefiting from the widespread use of English and the diffusion of the Anglo-American culture throughout Europe.<sup>217</sup> In addition, especially for online advertisement-funded music service, territorial fragmentation may also result from commercial decisions and not only from the territorial scope of copyright and related rights.

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<sup>215</sup> In those Member States where several CMOs representing multiple authors or rights are active, also mono-territorial licensing may require multiple licenses. In this circumstance, a layer of complexity is added by the so-called 'split-copyright' issue. In other words, as many musical works are co-written by several authors and each author may have transferred his/her rights to a different national collecting society, the clearing of rights might be particularly complex for the very same musical work.

<sup>216</sup> See European Commission (2012), Impact Assessment Accompanying the Document Proposal for a Directive of the European Parliament and of the Council on Collective Management of Copyright and Related Rights and Multi-territorial Licensing of Rights in Musical Works for Online Uses in the Internal Market, SWD(2012)2014 final.

<sup>217</sup> See European Parliament (2009), *Collecting Societies and Cultural Diversity in the Music Sector*, Directorate-General for Internal Policies.

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

### **Box 2. Virtual Private Networks (VPN)**

“A virtual private network (VPN) extends a private network across a public network, such as the Internet. It enables a computer or network-enabled device to send and receive data across shared or public networks as if it were directly connected to the private network, while benefiting from the functionality, security and management policies of the private network”.<sup>218</sup> VPNs offer a higher level of privacy and security against any kind of cyber-attack, intrusion or eavesdropping. Two main types of VPN are increasingly used to privatise the exchange of data over the public Internet: ‘site-to-site VPN’ allows multiple offices in fixed locations to establish secure connections with each other; and ‘remote access VPN’ which offers individual users secure connections with a remote computer network (Hussein FCMI & Abdul HadiQais, 2013).

VPN providers set their own prices based on their geographic coverage and the quality of services they would guarantee (see Table 3). Generally, the most expensive offers would cover a broader geographic zone and guarantee a higher level of privacy protection as well as of bandwidth. Commercial services providers are constantly developing network innovations and new techniques to circumvent any VPN-blocking or throttling systems. The most expensive services usually provide additional so-called ‘socks’ to hide the user’s IP address and ensure higher levels of anonymity while surfing the web, to circumvent restrictions on websites and quickly change the geographic location by switching the user’s IP address with one belonging to the service provider’s proxy server.<sup>219</sup> There are also free VPN services that usually are not able to guarantee the quality of loading or the safety of transmitted data.

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

<sup>218</sup> See Virtual Private Network, Wikipedia ([http://en.wikipedia.org/wiki/Virtual\\_private\\_network#cite\\_ref-1](http://en.wikipedia.org/wiki/Virtual_private_network#cite_ref-1).)

<sup>219</sup> See TheSafety.US website at <http://thesafety.us/en>.

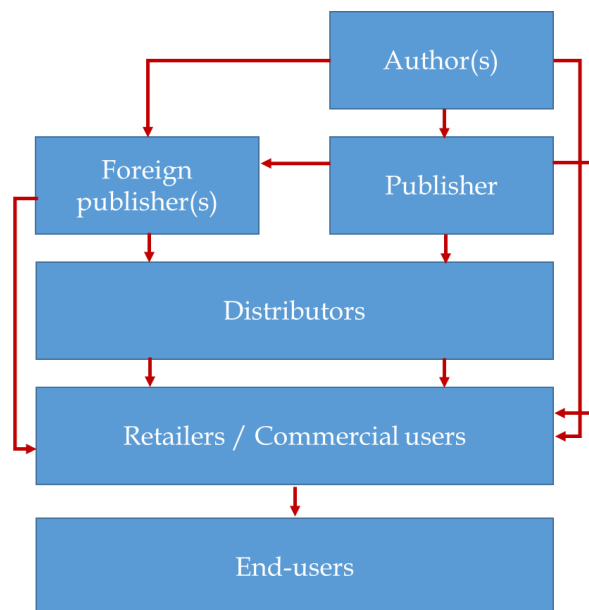
**Table 3. Sample of commercial VPN service providers**

Provider	IP Addresses	Locations	P2P	Monthly fee
HideMyAss	116,607	311 Servers	No	\$6.55
		193 Countries		
VyprVPN	200,000	52 Servers	Yes	\$5.00
		43 Countries		
PureVPN	77,000	125 Servers	Some	\$4.16
		100 Countries		
Private Internet Access	3,000	23 Servers	Yes	\$3.33
		15 Countries		
SaferVPN	5,000	30 Servers	No	\$5.99
		22 Countries		
IP Vanish	25,000	76 Servers	Yes	\$6.49
		60 Countries		
Invisible Browsing VPN	2,000	62 Servers	Yes	\$3.08
		39 Countries		
Express VPN	10,000	97 Servers	Yes	\$8.32
		78 Countries		
Hotspot Shield	n.a.	6 Countries	n.a.	\$2.49
EarthVPN	3,000	150 Servers	Some	\$3.33
		32 Countries		
IronSocket	n.a.	50 Servers	Yes	\$4.16
		36 Countries		
StrongVPN	n.a.	44 Servers	Yes	\$4.58
		22 Countries		
Proxify	n.a.	1290 Servers	n.a.	\$10.00
		78 Countries		
NordVPN	633	20 Countries	Yes	\$4.00
TheSafety.us	200	23 Servers	n.a.	\$30.00
		20 Countries		
Tunnel Bear	n.a.	12 Countries	n.a.	\$4.16

### 2.2.3. The book publishing sector

The licensing value chain of the book publishing sector includes three main typologies of actors: i) the authors of literary content; ii) the publishers; and iii) the distributors (see Figure 5). Authors are the content creators who materially draft manuscripts. Publishers select or commission literary works and add value to them by hiring, *inter alia*, editors, designers, illustrators, indexers in order to package a book edition. In addition, publishers make marketing and sales efforts to increase demand for their publications. By virtue of a distribution agreement, in the offline world distributors play the role of intermediaries between publishers and retailers such as bookstores. Nonetheless, the boundaries that traditionally divided publishers and distributors are progressively fading out. For instance, several large publishing companies have also their own distribution networks as well as bookstores. In the digital world, publishers can directly deal with online retailers and also smaller publishing companies may directly reach consumers via their own web-store and/or by adopting new alternative distribution mechanisms such as print-on-demand.<sup>220</sup> More recently, some large retailers, such as Amazon, started to move upward along the value chain and provide publishing services, thus directly acquiring exploitation rights from authors.

**Figure 5. Licensing value chain in the book publishing sector**



Source: Authors' own elaboration.

<sup>220</sup> Print-on-demand is a technology and innovative business process through which copies of a book or any press document are printed singly and entirely in a pre-defined quantity, once an order has been received. Therefore, it offers advantages such as quicker technical set-up for offset printing as well as reduced storage, handling and inventory costs.

**Licensing schemes in the book publishing sector hardly fit in a pre-defined model as they are usually based on private negotiations between authors/writers of manuscripts<sup>221</sup> and publishers.<sup>222</sup>** The outcomes of these negotiations are affected by national laws regulating the form and content of licensing agreements as well as rights and obligations of the parties and the termination of the contracts.<sup>223</sup> A preliminary distinction can be made between the cases in which an author assigns his/her copyright to a certain publisher<sup>224</sup> and the cases in which only certain rights are transferred to a publisher via a licensing agreement (the so-called ‘publishing contract’ or ‘head contract’). The former arrangement transforms the publisher in a single licensing entity comparable to the producers of audiovisual work. In other words, the publisher is fully entitled to exploit and enforce all the economic rights connected with a certain literary work. A comparable result is achieved when publishing contracts transfer to a publisher all the economic rights connected to a literary work on an exclusive basis (Clark & Philips, 2014). Against this background, the publisher is certainly able to distribute digital copies of a book, online on a pan-European basis.

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

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<sup>221</sup> Authors/writers of manuscripts are the first owner of copyright as they are the creators of literary content. In some circumstances and under some national law provisions, the publisher can be considered the first owner of copyright. This is the case, for instance, of projects such as dictionaries or encyclopaedias or copyrighted materials created by employees during their work hours (WIPO, *Managing Intellectual Property in the Book Publishing Industry*, Creative Industries – Booklet No. 1). It is worth stressing that the identification of the author of a literary work can become particularly complex and subject to national rules when the creators produce content as part of their employment duties or when the work is created by several creators working together (the so-called ‘collaborative works’) or when creators are directed by a principal (the so-called ‘collective works’) (JURI Committee (2010), *Copyright and Digitisation of Books*, Working Document, European Parliament 18 March 2010).

<sup>222</sup> Please note that a published book may also include drawings, paintings or photographs. Therefore, the publisher needs to clear the relevant rights held respectively by illustrators, painters or photographers. For the sake of simplicity, what follows will focus exclusively on the rights held by authors of literary content.

<sup>223</sup> For instance, in some Member States, such as France and Germany, publishing contracts are subject to specific interpretation rules; in some other Member States, such as UK, general contract rules apply (DG INFSO & DG MARKT (2009), *Creating Content in a European Digital Single Market: Challenges for the Future*, A Reflection Document).

<sup>224</sup> In some countries this option is precluded by law (WIPO, *Managing Intellectual Property in the Book Publishing Industry*, Creative Industries – Booklet No. 1).

agreements of non-existing/future mode of exploitation)<sup>225</sup> do not include the making available right; hence, electronic publishing still requires the written authorisation of authors. In more recent ‘head contracts’, this right is usually transferred to publishers (Strong, 2003).

**Also, ‘subsidiary rights’ can be an additional source of conflict while negotiating a licensing agreement.** A few examples can be mentioned: i) the digest rights required to publish an abridgement; ii) the serial rights required to serialise the work in newspapers or magazines; iii) the dramatisation and documentary rights as well as the film rights required for the adaptation of the work for the screen; iv) the merchandising rights. In general, few authors have enough bargaining power to carve out commercially-relevant rights from a standard licensing agreement, especially when they deal with large publishing companies. Nonetheless, ‘head contracts’ with small publishers, in particular when the author is assisted by professional agents, can lead to a fragmentation of rights between the publisher and the original copyright owner. In addition, in some jurisdictions the licensing agreement has to include a maximum duration.<sup>226</sup> When duration is not included in the agreement, the contract may still include termination clauses such as the option to revert the rights to the author when the publication goes out of the print and the publisher is not interested in reprinting it. The issue of the duration can potentially lead to a fragmentation of the rights over the time.

It is worth stressing that collective management societies also play a role in the book publishing sector when it comes to managing reproduction rights. The so-called reproduction rights organisations (RROs) are authorised by right-holders (either authors or publishers) to exercise the exclusive right of reproduction of literary works.<sup>227</sup> Traditionally these organisations, which operate on a strictly territorial basis and are linked by bilateral agreements similar to those in force in the music sector, have been mandated to manage reprographic reproduction of copyrighted publications by granting authorisation to copy only a portion of a work, in a limited number of copies (Rudolph, 2005). Recently, several RROs deal also with reproduction of parts of literary works in the digital environment;<sup>228</sup> this should affect only marginally digital publishing as long as right-holders still reserve for themselves the reproduction rights (for the entire publication) required for distributing their works over the Internet. It is worth stressing that, in the book publishing sector, the issue of printing and copying a whole digital publication can be effectively tackled via digital right management tools and TPMs.

In conclusion, in spite of the potential fragmentation of commercially-relevant rights between publishers and authors as well as the validity of the principle of territoriality also for digital publishing of literary works, **in practice copyright territoriality does not**

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<sup>225</sup> See WIPO, *Managing Intellectual Property in the Book Publishing Industry*, Creative Industries – Booklet No. 1).

<sup>226</sup> *Ibid.*

<sup>227</sup> In some countries right-holders can decide to exercise this right themselves; in some other countries reproduction right organisations are entitled by law to also manage the rights of non-represented right-holders.

<sup>228</sup> See WIPO, *Managing Intellectual Property in the Book Publishing Industry*, Creative Industries – Booklet No. 1).

represent the main obstacle to the Internal Market integration. It is to some extent a minor issue when compared to the linguistic fragmentation experienced within the EU. And in fact, it is customary not to attach any territorial restriction to a book published in a given language.<sup>229</sup> Nonetheless, in the markets for eBooks some licenses are being territorial restricted.<sup>230</sup>

### Box 3. Identification of right-holders

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

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

<sup>229</sup> JURI Committee (2010), *Copyright and Digitisation of Books*, Working Document, European Parliament 18 March 2010.

<sup>230</sup> See European Commission (2014), *Report on the responses to the Public Consultation on the Review of the EU Copyright Rules*, available at:

[http://ec.europa.eu/internal\\_market/consultations/2013/copyright-rules/docs/contributions/consultation-report\\_en.pdf](http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/contributions/consultation-report_en.pdf).



The European Commission funded several initiatives to support the use and interoperability of identifiers and ensure better access to right-holders and works-related information. The first attempt to create an Internet portal providing fast access to information on rights holders' organisations in Europe was the 'Open Right System'. More recently, the 'Linked Content Coalition' (LCC)<sup>231</sup> and the 'Right Data Integration' (RDI)<sup>232</sup> aimed to develop a standardised and interoperable architecture that would allow right users to access a central information and transformation hub. Specific to the music sector, the 'Global Repertoire Database' is an attempt to create a one-stop shop for copyright management, meaning a single global and authoritative source of multi-territory information about the ownership or control of the musical repertoires. Additionally, the Accessible Registries of Rights Information and Orphan Works towards Europeana (ARROW) aims also at facilitating the management of rights and keep track records of diligent searches<sup>233</sup> related to orphan works, through an automated system that meets the needs of digital libraries for enhanced legal certainty and that supports the preservation and the dissemination of European cultural heritage.

## 2.3. The market fragmentation effects of copyright exceptions and limitations

### 2.3.1. Exception and limitations at EU and Member State level

#### 2.3.1.1. The EU legal framework

As explained in more detail in Section II.1.2.5 above, the system of exceptions and limitations<sup>234</sup> provided by the InfoSoc Directive determined the emergence of the following situation.

- **First, Member States are free to choose which exceptions and limitations to adopt in their national legislation as well as, to some extent, to tailor the content of the exceptions and limitations taken from the EU closed list.** In addition, national courts may provide divergent interpretations of some exceptions. Interestingly, while in some Member States the three-step test is recognised either explicitly (in France) or implicitly (in Germany) as an instrument in judicial revisions of the copyright law, in

<sup>231</sup> LCC is a non-profit global consortium of standards bodies and registries aiming to facilitate and expand the legitimate use of content in the digital network through the effective use of interoperable identifiers and metadata. LCC members are organisations that create and manage data standards associated with content of one or more types, particularly for identifiers, metadata and messaging through a common 'Rights Reference Model'; see <http://www.linkedcontentcoalition.org>.

<sup>232</sup> The RDI project aims at addressing the need for better solutions for discovering, licensing and delegating intellectual property rights, and providing users with access to information and enabling creators and right-holders to be properly rewarded; see <http://www.rdi-project.org>.

<sup>233</sup> The Directive on certain permitted uses of orphan works lays down basic requirements constituting a diligent search and entrusts the Office for Harmonization in the Internal Market to establish and manage a European database containing the information related to orphan works and records of diligent searches across the European Union, in coordination with relevant national authorities.

<sup>234</sup> The term 'exceptions' is used in this Section interchangeably with the term 'limitations'.

other Member States such as the UK the test is addressed to the legislator only and cannot be used by courts.<sup>235</sup> Hence, some uses may be lawful in certain Member States and not lawful in others.

- **Second, Member States are responsible for finding the right balance between copyright exceptions and limitations and TPM and they have a large margin of discretion in pursuing this objective;** hence, some uses may be technically possible in certain Member States and not possible in others.

In what follows, the potential Internal Market fragmentation effects stemming from Articles 5 and 6 of the InfoSoc Directive are discussed. In particular, **the following copyright exceptions and limitations, which are deemed to have the most relevant impact on the Internal Market in the digital era, are carefully assessed**<sup>236</sup>:

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

The national implementation of the exceptions and limitations listed above are assessed in a sample of Member States comprising **France, Germany, Ireland, Italy, Poland and the UK**. Selected countries represent about 70% of the total gross domestic product (GDP) generated by copyright-intensive industries at the EU level in 2010 (approximately €366 billion out of €535 billion) and about 65% of the total workforce directly employed in the same sectors (approximately 4.5 million out of 7 million).<sup>237</sup> In particular, France, Germany, the UK and Italy are the top four EU Member States contributing to copyright intensive industries in terms of both GDP and employment. Similarly, Poland tops the list of Central Eastern European Member States for both dimensions. The inclusion in the sample of the UK and Ireland enables a comparison between civil law and common law

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<sup>235</sup> The three-step test has not been implemented in the national legislation of all Member States, despite in principle its application is mandatory (see Annex A for further details).

<sup>236</sup> See European Commission (2007), Report to the Council, the European Parliament, and the Economic and Social Committee on the Application of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, Commission Staff Working Document, SEC(2007)1556; and European Commission (2013), Public Consultation on the Review of the EU Copyright Rules, Consultation Document available at: [http://ec.europa.eu/internal\\_market/consultations/2013/copyright-rules/docs/consultation-document\\_en.pdf](http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/consultation-document_en.pdf).

<sup>237</sup> See European Patent Office and Office for Harmonization in the Internal Market (2013), *Intellectual property rights intensive industries: contribution to economic performance and employment in the European Union*; absolute values have been computed on Eurostat data for GDP and employment.

countries. Interestingly, Ireland is also the EU country with the highest GDP share (8.1%) ascribable to copyright-intensive industries.

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

### 2.3.2. Transient and incidental copies

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

While in the Netherlands this limitation was deemed to define the scope of the reproduction right, **in all the other Member States it was implemented by reflecting carefully the text of the InfoSoc Directive** (Queen Mary Intellectual Property Research Institute, 2007; see Annex A for further details). Notwithstanding the literal transposition, this provision can still lead to issues of **market fragmentation due to diverging interpretation by national courts**, especially when it comes to new uses and new technologies.<sup>238</sup>

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

**Libraries, educational establishments, archives and museums<sup>239</sup> are covered by two exceptions under Article 5 of the InfoSoc Directive.<sup>240</sup> Article 5(2)(c) provides an exception to the reproduction right for specific acts of reproduction made by these institutions, provided that no direct or indirect economic or commercial advantage results from such acts.** Interestingly, the provision does not specify the acts that are exempted, it does not cover the making available on the Internet of copies of copyrighted works (cf. Recital 40) and does not contain any indication on ‘format shifting’ (e.g. the digitisation of books via scanning technologies) or the number of copies that can be

<sup>238</sup> For instance, a Belgian court (*Google v. Copiepresse*, Brussels Court of First Instance (TGI), 13 February 2007) did not apply this limitation to the copy of a web page stored in Google’s servers and accessible through a link available on the Google search website. In addition, a Swedish court (*Danske Dagbladets Forening v. Infopaq Sverige AB*, District Court Stockholm, 14 August 2014) decided that this limitation does not apply to scanning technologies. The jury is still out when it comes to the application of Article 5(1) to text and data mining.

<sup>239</sup> According to Recital 40 of the InfoSoc Directive, these exceptions apply to ‘non-profit’ institutions such as publicly accessible libraries.

<sup>240</sup> Please note that an optional public lending exception is formulated in Article 6 of the Rental and Lending Directive (Directive 2006/115/EC).

made. In compliance with the three-step test, this exception has been interpreted to allow only certain special acts of reproduction that are usually identified with preservation and archiving purposes.

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

**In principle, this exception has no cross-border effects, as the acts of reproduction for preservation and archiving purposes are made by privileged institutions within the territory of the State where they are located and on copyrighted works available in their collections.**<sup>241</sup> Nonetheless, **in the digital era some acts of reproduction might become crucial when it comes to mass digitisation**, i.e. the activity of digitising, in full or partially, collections held by certain institutions, such as libraries and archives, with the purpose of preservation. These digitised works are then, usually, made available to the public.<sup>242</sup> The provision included under Article 5(2)(c) of the InfoSoc Directive can potentially exempt from right-holders' authorisation reproduction acts requiring 'format-shifting' (e.g. scanning of books), thus accelerating the digitisation of library and archive collections. Nonetheless, according to a recent decision of the CJEU, this exception would not allow the digitisation of an entire collection held by privileged institutions (cf. *Technische Universität Darmstadt*). At this stage, the scope of this exception is still shaped

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<sup>241</sup> Some issues linked to the principle of territoriality may arise when libraries and other institutions decide to outsource the acts of reproduction to companies that are based in a different State (De Wolf & Partners, 2013).

<sup>242</sup> See European Commission (2013), *Public Consultation on the Review of the EU Copyright Rules*, Consultation Document available at: [http://ec.europa.eu/internal\\_market/consultations/2013/copyright-rules/docs/consultation-document\\_en.pdf](http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/consultation-document_en.pdf).

to a large extent by national transposition as well as by national courts' interpretations, especially when it comes to 'format shifting'. **As a result, institutions based in certain EU Member States may have a 'competitive' advantage in mass digitisation activities as well as in providing copyrighted contents for transnational projects such as Europeana.**<sup>243</sup> On this issue, the Commission intervened in 2006 with a Recommendation and advised Member States to improve conditions for digitisation of, and online accessibility to, cultural material and to establish national strategies for the long-term preservation of (and access to) digital material, in compliance with copyright law.<sup>244</sup> Specifically, the Commission recommended enacting provisions that enable multiple copying and migration of digital cultural material by public institutions for preservation purposes, in full respect of both EU and international copyright legislation. It is worth remarking that at any rate the exception formulated in Article 5(2)(c) does not cover the making available to the public of digitised, copyrighted works.

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

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

**At this stage, given the limited spatial (on the premises of the privileged institutions) and technical (via dedicated terminals) scope of application, this exception has no impact on the functioning of the Internal Market** (De Wolf & Partners, 2013). Nonetheless, according to the CJEU this exception incorporates an 'ancillary right of dissemination' that would allow the digitisation of copyrighted works included in the collections of the privileged institutions in order to enable on-site consultation (cf. *Technische Universität Darmstadt*). As a result, **Article 5(3)(n) might become key to**

<sup>243</sup> Europeana is an Internet portal acting as an interface to millions of books, paintings, films, museum objects and archival records that have been digitised throughout Europe.

<sup>244</sup> See European Commission (2006), Commission Recommendation of 24 August 2006 on the Digitisation and Online Accessibility of Cultural Material and Digital Preservation, (2006/685/EC).

**facilitating a mass digitisation project.** It is worth stressing that for those publications that are largely available in digital format, such as academic publications in peer reviewed journals, many libraries and educational establishments have entered into licensing agreements with right-holders (i.e. publishers) in order to provide remote consultation<sup>245</sup> to part of their collections. These arrangements are less frequent for non-born-digital content such as books and journals printed in the pre-digital era.

#### 2.3.4. Teaching or scientific research

Article 5(3)(a) of the InfoSoc Directive gives the option to Member States to implement **exceptions and limitations allowing uses of copyrighted works for the sole purpose of illustration for teaching or scientific research without commercial purposes.** Such uses require, whenever possible, the indication of the source and the author's name. According to the text of the InfoSoc Directive, the requirement of illustration applies only to teaching rather than to scientific research. Recital 42 includes distance learning (e.g. e-learning) in the scope of application of this exception. In principle, the formulation of Article 5(3)(a) is quite open, thus leaving room for diverging implementation at Member State level.<sup>246</sup>

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

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<sup>245</sup> Remote consultation usually includes 'on campus' access via the university network and, with increasing frequency, 'online' access via proxy servers or virtual private networks.

<sup>246</sup> European Commission (2013), *Public Consultation on the Review of the EU Copyright Rules*, Consultation Document available at: [http://ec.europa.eu/internal\\_market/consultations/2013/copyright-rules/docs/consultation-document\\_en.pdf](http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/consultation-document_en.pdf).

establishments, archives and museums and for research or private study. In Italy, the quotation exception deals also with illustration for teaching and for scientific research; the purpose of illustrations is mandatory also for scientific research and the making available on the Internet is permitted only for certain types of works (music works and pictures at low resolution or low quality) (see Annex A).

The exception under Article 5(3)(a) of the InfoSoc Directive may hinder the functioning of the Internal Market for what concerns distance learning that may include a cross-border dimension. In particular, by virtue of the principle of territoriality, in e-learning services the copyright law of both the State where the university/educational establishment is located and the State where the student is accessing the course apply.<sup>247</sup> Whenever students follow classes or get access to copyrighted materials in a Member State other than the country where the university is based, copyright infringement may result from the diverging transposition of Article 5(3)(a) between Member States or by different interpretations given by national courts. In principle, a certain university or practitioner that intends to provide a multi-territorial e-learning service is required to seek legal advice in each concerned Member State in order to avoid being liable for copyright infringement. Another problem arises from the introduction in some countries of fair remuneration requirements; in particular, in cross-border uses the jury is still out when it comes to the determination of the party liable as well as the territory where the payment is due (De Wolf & Partners, 2013). Against this background, **the current fragmentation at the EU level may potentially discourage the provision of e-learning beyond national borders and the creation of an Internal Market for distance education.**<sup>248</sup>

Similarly, discrepancies in **the application of this exception to research activities might impinge on the dissemination of research results within the EU as well as on cross-border cooperation in research activities.** Paradoxically, copyright law might constitute a barrier to the functioning of the European Research Area (which is defined by the Commission as “a unified area open to the world, in which scientific knowledge, technology, and researchers circulate freely”.)<sup>249</sup> as long as researchers based in different Member States can benefit from a different bundle of exceptions and limitations to copyright and related rights.

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<sup>247</sup> Distance learning activities can be categorised in four groups: i) supplementary e-learning, when supplementary materials are provided online to students enrolled in a ‘standard’ course; ii) e-learning courses provided by a certain university, where an entire course or a substantial part of it is taught online to students who can follow classes via the Internet; iii) massive open online courses (MOOC), which aim at unlimited participation and open access via the web; iv) e-learning courses provided in the context of transnational collaborations between universities, which are cross-border by their very nature. The cross-border dimension is increasingly important going from category i) to category iv) (De Wolf & Partners, 2013).

<sup>248</sup> This issue is particularly significant when considering that the education market is estimated to be worth some \$4.2 trillion worldwide, i.e. treble the size of the media and entertainment market, and over the next ten years the e-learning market is expected to represent 30% of the total education market (Edxus Group, 2013).

<sup>249</sup> See the European Research Area web-page at: [http://ec.europa.eu/research/era/index\\_en.htm](http://ec.europa.eu/research/era/index_en.htm).

### 2.3.5. Reporting of current events

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

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

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



### 2.3.6. Quotations

According to Article 5(3)(d) of the InfoSoc Directive, Member State may allow **quotations for purposes ‘such as’ criticism and review**. It is apparent that criticism and review are listed by way of example, thus leaving room to additional justifications for quotations. Four cumulative conditions apply: i) the quotation relates to a work or subject matter made lawfully available to the public; ii) the source and the author are indicated whenever possible; iii) the use complies with fair practice; and iv) the quotation is no longer than what is required by the specific purpose. Interestingly, the CJEU interpreted this exception as not precluding Member States to allow quotations also when they are not made in a subsequent copyrighted work, but for instance in a mere press report.<sup>250</sup>

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

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

### 2.3.7. Parody, caricature and pastiche

Article 5(3)(k) enables Member States to exempt **uses for the purpose of caricature, parody or pastiche**. Absent a uniform definition under EU law, a parody is defined by the CJEU as a work whose essential elements are the evocation of an existing work in a noticeably different manner as well as the expression of humour or mockery.<sup>251</sup>

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

Interestingly, in several Member States, such as Italy, this exception has not been implemented as **the relevant uses are considered covered by the freedom of expression**.

<sup>250</sup> See C-145/10 *Eva-Maria Painer v. Standard Verlags and Others* (2011).

<sup>251</sup> See Case C-201/13 *Johan Deckmyn v. Helena Vandersteen and Others*.

This is not surprising both because exceptions listed under Articles 5(2) and 5(3) of the InfoSoc Directive are optional and because in several other cases explicit exceptions coexist with implicit exceptions conferred under constitutional principles, legal doctrine and/or case law. Nonetheless, **in the digital era where options to create derivative works have multiplied and are available at low cost also to private individuals, the absence of a well-defined exception has the effect of increasing legal uncertainty.** This can potentially hinder creative activities based on transformative uses of copyrighted works. In particular, private individuals may incur disproportionate costs to understand which acts are lawful and which instead constitute copyright infringements when a proper license has not been granted by relevant right-holders (De Wolf & Partners, 2013).

### 2.3.8. Freedom of panorama

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

This exception is central in the modern digital age when both pictures and videos are posted on websites and platforms making these contents immediately available on a cross-border basis. **In light of national implementations, sharing pictures and videos of copyrighted works permanently placed in public spaces may be classified as a copyright infringement in many EU jurisdictions and lead to heavy penalties.**<sup>252</sup>

### 2.3.9. Private copying

Article 5(2)(b) of the InfoSoc Directive provides Member States with the option to enact **an exception for reproduction on any medium made by natural persons for private uses and for purposes that are neither directly or indirectly commercial.** Right-holders are entitled to receive **fair compensation** for such non-authorised private copying activities. Compensation schemes have to take into account TPMs to the extent that they may restrict or control private copies made by end-users (for further details on the legal

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<sup>252</sup> The authors Labert *et al.* mention the case of Claes Oldenburg and Coosje van Bruggen, two sculptors who claimed a copyright infringement under the US law and obliged the Wikimedia Foundation to take down from Wikipedia the pictures of their sculptures, although these sculptures were permanently placed in public spaces in several countries (Labert *et al.*, 2015).

aspects of this exception see Section II.1.5.2). It is worth stressing that the InfoSoc Directive does not provide for a right to private copying.<sup>253</sup>

**All Member States implemented the private copying exception under Article 5(2)(b) of the InfoSoc Directive. The only deviation is represented by Ireland** where a narrow exception applies only to copies of broadcasts for the purpose of time shifting (i.e. later viewing) that are made by natural persons or certain establishments and to copies of performances made by natural persons for private and domestic uses. **National transposition considerably varies among Member States** (see Annex A). In France, copies are allowed for strictly private purposes; this exception applies only to natural persons and does not cover file-sharing. **In Germany**, private copying comprises domestic and personal purposes as well as other ‘own’ uses beyond the private sphere such as scientific purposes, ‘own’ archive and information about current events. While in the private sphere copies can be made only by natural persons or by third parties on behalf of the privileged person, copies for ‘own’ uses can be made also by legal entities. The German exception allows both digital and analogue copies as long as they come from a lawful source and are not used for sharing files on the Internet. In Italy, the private copying exception covers only copies of phonograms and videograms<sup>254</sup> made by natural persons for personal uses and without commercial purposes and can be restricted by contractual arrangements; these copies cannot be made by third parties and have to come from a legal source. **In Poland**, private uses (which include but are not limited to single copies) are permitted to a larger group of beneficiaries, including circles of persons having personal relationships (e.g. consanguinity), affinity or social relationships. The exception under Article 5(2)(b) has been recently introduced also **in the UK**<sup>255</sup> where personal copies of copyrighted works are currently permitted, provided that the concerned work is lawfully owned by the privileged person and copies are made for private use and for ends that are neither directly nor indirectly commercial; interestingly, ‘format shifting’ is explicitly permitted and contract terms aiming at preventing or restricting private copying are unenforceable.

As regards the fair remuneration condition expressly introduced by the InfoSoc Directive, both the UK and Ireland do not have any compensation scheme in force and remuneration for certain private uses is left to collective licensing agreements between right-holders and end-users. Interestingly, **the UK is the only European country where the private copying exception is not accompanied by a right to fair remuneration, in stark contrast to the InfoSoc Directive**<sup>256</sup>. The other surveyed countries have introduced

<sup>253</sup> Both the Brussels Court of Appeal (Belgium) and the *Cour de Cassation* (France) stated that the private copying exception does not constitute an enforceable right for private users. See European Commission (2007), Report to the Council, the European Parliament, and the Economic and Social Committee on the *Application of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society*, Commission Staff Working Document, SEC(2007)1556.

<sup>254</sup> Copies on paper or a similar medium are included in the reprographic exception even when made for personal use.

<sup>255</sup> Up to the reform introduced in 2014, in the UK a narrow exception covered recording of broadcasts for purposes of time shifting.

<sup>256</sup> Interestingly, a UK court stated the UK government erred in law when introduced a new private copying exception without a compensation scheme ensuring fair remuneration to right-holders. For

levy schemes for private copying which aim at compensating right-holders for the harm suffered when copyrighted works and other subject matter are copied without their authorisation (see Annex A). **Levies are generally applied to blank carriers, devices with storage capacity and recording equipment and are paid by manufacturers and importers<sup>257</sup> and collected by one or more national collecting societies.** Exports are either exempted ex ante or subject to an ex post reimbursement scheme for paid levies. Generally levies do not apply to blank carriers and devices purchased for professional uses; accordingly, professionals may either benefit from an upfront exemption or apply for refunds. In Italy and Poland, methods of application and calculation are determined by a decree of the Minister of Culture; in France by a commission of stakeholders (including consumers' organisations); in Germany by national collecting societies after negotiating with associations of manufacturers and importers. As a result, there are considerable differences across the EU in terms of level of remuneration, products subject to levies, and overall revenues (see Table 4).

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

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

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

*Source: Authors' own elaboration on WIPO 2013.*

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

further details see: Press Association (2015), "Music groups win court battle over private copying of CDs", The Guardian, Friday 19 June ([www.theguardian.com/business/2015/jun/19/music-groups-win-court-battle-private-copying-cds](http://www.theguardian.com/business/2015/jun/19/music-groups-win-court-battle-private-copying-cds)).

<sup>257</sup> Levies for reprographic copying are usually also paid by copy centres and libraries.

According to the report resulting from the mediation on private copying and reprographic levies drafted by Mr Antonio Vitorino,<sup>258</sup> the existing discrepancies among national levy schemes are a source of frictions hindering the proper functioning of the Internal Market. In this respect, **three major problems can be identified: i) double payments in cross-border transaction of levied products; ii) undue payments of levies by professional users; iii) uncertainty in the determination of the amount of levies as well as of media and equipment concerned.** Mr Vitorino argued that, to some extent, solutions to these Internal Market issues have been provided by the case law of the CJEU. In the *Padawan* case,<sup>259</sup> the CJEU stated that all media, equipment and devices capable of making copies of copyrighted content can be subject to levies, provided that they are used by natural persons for private uses. In addition, the CJEU explained that fair compensation has to be computed on the basis of the actual 'harm' caused to right-holders by the introduction of the private copying exception. In the *Opus* case,<sup>260</sup> the CJEU concluded that the 'harm' to be compensated via a levy scheme always occurs in the Member State where the final private user resides; hence levies should be collected only in the State where the end-user is based.

**On paper, the majority of Member States have introduced ex ante exemptions or reimbursement mechanisms to avoid or mitigate both double payments in cross-border transactions and undue payments for professional uses. Nonetheless, these mechanisms are deemed very burdensome** (e.g. reimbursement generate substantial administrative burdens and may take months or years) and/or non-functioning at all.<sup>261</sup> As a result, levies can still constitute a financial obstacle to cross-border trade of products subject to levies as well as unduly increase business costs of certain professional users. Interestingly, according to the CJEU, reimbursement mechanisms applied by Member States are a lawful alternative to ex ante exemptions, both for exports and for private uses, on condition that they are effective and do not make it excessively difficult to get refunded.<sup>262</sup>

Also, **processes setting the levies are deemed cumbersome and, especially when it comes to new products, are able to paralyse the functioning of the market for devices and media in some Member States.**<sup>263</sup> In several EU countries, stakeholders have initiated lawsuits that resulted in the adoption of provisional levies or in the introduction

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<sup>258</sup> Vitorino, A. (2013), Recommendations Resulting from the Mediation on Private Copying and Reprographic Levies, available at:

[http://ec.europa.eu/internal\\_market/copyright/docs/levy\\_reform/130131\\_levies-vitorino-recommendations\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/levy_reform/130131_levies-vitorino-recommendations_en.pdf).

<sup>259</sup> See C-467/08, *Padawan SL v. SGAE* (2010).

<sup>260</sup> See C-462/09 *Stichting de ThuisKopie v. Opus Supplies Deutschland* (2011).

<sup>261</sup> See Vitorino A. (2013), Recommendations Resulting from the Mediation on Private Copying and Reprographic Levies, available at: [http://ec.europa.eu/internal\\_market/copyright/docs/levy\\_reform/130131\\_levies-vitorino-recommendations\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/levy_reform/130131_levies-vitorino-recommendations_en.pdf).

<sup>262</sup> See Case C-521/11, *Amazon v. Austro Mechana* (2013), and C-463/12 *Copydan Bandkopi*.

<sup>263</sup> See Vitorino A. (2013), Recommendations Resulting from the Mediation on Private Copying and Reprographic Levies, available at: [http://ec.europa.eu/internal\\_market/copyright/docs/levy\\_reform/130131\\_levies-vitorino-recommendations\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/levy_reform/130131_levies-vitorino-recommendations_en.pdf).

of levies with retroactive effects on certain categories of products. On the one hand, legal uncertainty increases commercial risks for manufacturers and importers that miss information on a significant component of the final price of the products they sell. On the other hand, long disputes to avoid or postpone payments also affect right-holders as the collection and in turn the distribution of levies can be substantially delayed.

### **2.3.10. Relationship between technological protection measures and copyright exceptions and limitations**

Article 6(4) of the InfoSoc Directive intends to **safeguard some of the exceptions and limitations<sup>264</sup> from restrictions imposed by TPM** (for the legal aspects of TPM see Section II.1.3). Specifically, this provision obliges Member States to: i) promote the adoption of ‘voluntary measures’ by right-holders; ii) monitor and evaluate whether such ‘voluntary measures’ are taken and how they work; iii) intervene with ‘appropriate measures’ when right-holders do not enable users that have legal access to the work to engage in acts allowed under the relevant exceptions and limitations. **Interestingly, when it comes to copyrighted digital content, the safeguard provision introduced by Article 6(4) does not apply to on-demand online services; therefore, in the online world technological measures can override to a large extent all the exceptions and limitations provided by national laws** (Mazziotti, 2008). In this respect, the CJEU has recently intervened by arguing that the legal protection granted under Article 6 of the InfoSoc Directive should not go beyond the purpose of restricting uses that require authorisation by right-holders.<sup>265</sup>

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

As for the Internal Market aspects, the relationship between technological measures and exceptions and limitations may be relevant, especially on the supply side. For online uses, technological protections are not subject to safeguard measures; hence commercial users are able to tailor the scope of copyright for digital content made available to the public on the Internet. Conversely, for tangible copyrighted goods (e.g. DVDs, CDs), the same

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<sup>264</sup> In a nutshell, Article 6(4) of the InfoSoc Directive aims at ensuring that right-holders make available to users the following exceptions and limitations: i) reprographic copying; ii) archiving made by publicly accessible libraries, educational establishments, museums or archives; iii) ephemeral recordings; iv) reproduction of broadcasts made by social institutions; v) quotations for teaching or scientific research purposes; vi) uses for the benefit of people with a disability; and vii) uses for the purposes of public security. Member States may also optionally safeguard the ‘private copying’ exception.

<sup>265</sup> See Case C-355-12 *Nintendo v. PC Box*.

technological protection measure might be lawful in certain Member States and unlawful in others, thus potentially requiring national adaptations (in principle a music CD sold in Germany can prohibit private copying for domestic purposes; selling the same CD in Italy would potentially lead to a dispute resolution before an administrative body to safeguard the private copying exception). The issue is particularly thorny as the lawfulness of certain technological measures is quite difficult to assess ex ante and this increases uncertainty both for distributors of copyrighted products and for end-users. Paradoxically, **in the online market where the principle of exhaustion does not apply, copyright territoriality is a potential source of Internal Market fragmentation; in the market for tangible copies, where instead the principle of exhaustion is an effective measure to create a pan-European market, the adaptation of TPM to the extent required by each Member State may still hamper the free movement of tangible copyrighted goods within the Internal Market.**

### 3. Industry aspects of copyright enforcement in the digital environment

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

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

However, **contrary to expectations and because of technological developments over the Internet, copyright enforcement by means of TPMs has remained residual and strongly sector-based (e.g. video games, e-books, etc.) both in terms of market share and recourse to anti-circumvention provisions in courts (Derclaye, 2009).**<sup>266</sup> In fact, it appears that most digital copyright infringement takes place over the Internet in already decrypted files by means of file-sharing and other open modalities of access, rather than by willing acts of TPM circumvention. When TPMs have been successful in allowing effective enforcement of copyrights, they have usually been based on closed proprietary standards operating in physically separate devices which has raised parallel issues of interoperability and concerns about the potential market distortive effects of related lock-in strategies (so called ‘walled gardens’).

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

While the initial intention of the InfoSoc Directive legislator has seemingly been to encourage economic players to move towards a more finely tuned and individualised form of rights management in the online environment, it is doubtful whether the purely

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<sup>266</sup> There are therefore few industries where recourse to TPM remains notable and has also given rise to substantial litigation in court on the scope of related provisions, see for instance the Case C-355/12 *Nintendo v. PC Box*.



contractual-based approach actually put in place by the Directive has been evenly responsive to the interests of all parties involved.<sup>267</sup>

In fact, after only a few years following its adoption, the Commission itself already conceded that:<sup>268</sup>

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

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

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

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

In particular, **the structure of the current copyright enforcement framework in the digital environment has resulted in a set of potentially conflicting, very broad provisions whose concrete scope of action has had to be slowly clarified by means of**

<sup>267</sup> A Dutch web firm that sells second-hand e-books has recently complained to the country's competition authorities that it is being boycotted by three of the largest Dutch publishers that have blocked it from selling their new e-books through its website, allegedly to block further sales of second-hand licenses. According to standard terms and conditions for digital media, when people 'buy' e-books, they only really purchase a license to use that product, and do not have a right to resell it. But when the retailer opened its virtual doors in mid-2014, it justified its business model with a 2012 ruling by the CJEU in the case of *Oracle v. UsedSoft*, in which the court ruled that a software license could in fact be resold. Other national courts, however, have ruled differently (see Section II.2.1.3). A German court decided in 2013 that the Oracle case could only be cited in software-related cases.

<sup>268</sup> European Commission, Communication from the Commission, *The Management of Copyright and Related Rights in the Internal Market*, COM(2004)261 final, Brussels, 16.04.2004, p. 10.

*case law by the CJEU* over time.<sup>269</sup> This lack of clarity has represented a strong incentive for industry to revert to self-regulation and codes of conduct (Hugenholz, 2012).

Coherence and coordination issues have arisen, for instance, on the need to limit the costs right owners could impose on intermediaries through the very broad language of Article 8(3) by means of the general mitigating reasonableness and proportionality principles stated in Article 3 of IPRED. Most important, issues have been raised on how the right to information stated in IPRED Article 8 could actually be enforced in the digital world.

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

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

### **3.1. Suitability of IPRED for use in the digital environment**

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

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

Then, civil actions aimed at large-scale commercially-motivated infringers have been hindered either by their being not sufficiently dissuasive (*ad hoc* sanctions to infringing websites in Spain can reach as high as €300,000 or even double that amount for advertisers), or by the difficulties faced in their implementation when it comes to the identification of infringers (in the Netherlands, for only one in five of the sites that are

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<sup>269</sup> See in particular C- 275/06, *Promusicae v. Telefonica*; C-70/10, *Scarlet Extended v. SABAM*; C-360/10, *SABAM v. Netlog*, and more recently C-314/12 *UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH* (2014).

suspected of infringement can the actual infringer be traced<sup>270</sup>) and have been replaced by criminal proceedings where support can be received from police forces in the identification of transgressors.

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

As also reported in the public hearing on the challenges posed to Directive 2004/48 (IPRED) in the digital environment, this has created a situation where most copyrights online are either privately or administratively enforced by means of mechanisms not necessarily envisaged in the Directive or are being dealt with as criminal cases with fines and other types of sanctions to dissuade infringers and restore right owners.<sup>271</sup>

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

Conversely, the implementation of the IPRED provisions online has suffered from the lack of a clear distinction between infringements related to operations carried out on a commercial scale and for commercial purposes, and infringements at the individual subscriber level. The Commission has finally started tackling this key definition as recently as autumn 2014 by setting up a workshop on the subject.<sup>272</sup>

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

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<sup>270</sup> The BREIN Foundation is the joint anti-piracy programme of authors, artists, publishers, producers and distributors of music, film, games, interactive software and books; available at: <http://anti-piracy.nl/english.php>.

<sup>271</sup> See European Commission, MARKT/ZH D(2011), Public Hearing on Directive 2004/48/EC and the challenges posed by the digital environment, Brussels, 07.06.2011 ([http://ec.europa.eu/internal\\_market/iprenforcement/docs/conference20110607/hearing-report\\_en.pdf](http://ec.europa.eu/internal_market/iprenforcement/docs/conference20110607/hearing-report_en.pdf)).

<sup>272</sup> Workshop on the concepts of ‘commercial scale’ and ‘commercial purpose’ in the context of infringements of intellectual property.

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

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

In particular, although the European Parliament and the Council rejected at that time the Commission's original proposal and refrained from implementing any kind of punitive statutory damages as envisaged in the US law, **the principle has remained that judicial authorities should order an infringer to pay the right owner damages in reparation of the total loss incurred (including the total court costs, lawyers' fees and any other expenses incurred by the successful party) to the extent that these costs are reasonable and proportional.** For some countries, this means that a higher recovery of legal costs is possible while litigating with consumers in online copyright infringement cases than in other civil cases. The size of this potential liability can then be used as an improper incentive to induce alleged infringers to refrain from their right to a fair trial and force them to settle cases out of court.

While most instances of vexatious litigation have thus far concerned the US, where statutory damages are enforced and a market for 'trolls' has actually been created, Germany, where the mechanisms of civil injunctions has been particularly efficient and therefore widely used, has also felt the need to approve legislation limiting the amount of damages paid at the consumer level to some €1,000<sup>273</sup> (i.e. €155.30 in damages plus forfeit legal expenses) instead of the €10,000 and more that could be allowed by the courts when legal expenses are fully considered. It did that by amending the copyright act and introducing a clear distinction in the liquidation of damages between commercially-motivated and other infringements. On the other hand, when faced with operations on a commercial scale, right owners often have difficulties in proving the exact scope of infringement and courts in some Member States do not easily award the profit generated by the infringer (unjust enrichment). So the relatively low damages awarded in cases involving a significant profit for the infringers (again some €10,000-15,000 or so in some Member States) and a lack of clarity about unjust enrichment also act as a disincentive for right owners to act and receive effective remedy.

The CJEU itself has left the Member States and national courts substantial room for manoeuvre in defining the boundaries within which IPRED enforcement principles can

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<sup>273</sup> See Act against dubious business practices - what changes in copyright law? (<http://www.mucportal.de/2013/07/01/gesetz-gegen-unseriose-geschäftspraktiken-was-andert-sich-im-urheberrecht/>).

be implemented in the digital environment. This is, first and foremost, the case of the so-called preliminary ‘right to information’ about the identity of alleged infringers. Article 8(1) of the IPRED Directive foresees the possibility of securing from intermediaries “disclosure of information on the origins and distribution networks of infringing goods or services in response to a duly justified and proportionate request”.

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

However, the CJEU, in its watershed *Promusicae* interpretation of the Directive,<sup>274</sup> has given Member States and national courts significant room for manoeuvre in substantiating this right, which has resulted in major differences in implementation across the EU. In fact, the Court found that the competent judicial authorities are not obliged by the Directive itself to release injunctions along these lines, but retain a margin of discretion and *may* or *may not* order that the information be provided.

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

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

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<sup>274</sup> See Case C-275/06 *Productores de Música de España (Promusicae) v. Telefónica de España SAU*, judgment of 29 January 2008 Protection of intellectual property rights – data ([http://ec.europa.eu/dgs/legal\\_service/arrets/06c275\\_en.pdf](http://ec.europa.eu/dgs/legal_service/arrets/06c275_en.pdf)).

### 3.2. Coherence issues between IPRED and the InfoSoc Directive

Coherence and coordination issues between IPRED and the InfoSoc Directive have materialised in a widely fragmented enforcement framework across Europe as concerns the scope of the obligations and related costs that can be imposed on intermediaries under Article 11 of IPRED and Article 8(3) of the InfoSoc Directive. The resulting variety of practices and behaviours has been slowly harmonised by the CJEU by means of case law, but substantial differences remain in the way enforcement of online copyrights is actually managed across the Member States.<sup>275</sup>

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

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

These generic principles have been variously understood in the past, but the underlying rationale is that contrary to the InfoSoc line of reasoning there are limits to the costs that intermediaries must bear to ensure copyright enforcement on behalf of right owners, i.e. to the social cost that enforcement implies.

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

So, for instance, the Court has recently allowed a very stringent interpretation of the obligation to terminate access to a website deemed 'structurally infringing', by means of whatever measure could be requested to this aim, and left technical reasonableness considerations to the discretion of the national judge.<sup>276</sup> Moreover, courts in different Member States have also given different interpretations of the ISPs' obligation to

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<sup>275</sup> This does not apply to copyright only, but is a more general problem with the implementation of IPRED injunctions in the different legal systems. See European Observatory on Counterfeiting and Piracy, *Injunctions in Intellectual Property Rights*, available at: [http://ec.europa.eu/internal\\_market/ipenforcement/docs/injunctions\\_en.pdf](http://ec.europa.eu/internal_market/ipenforcement/docs/injunctions_en.pdf).

<sup>276</sup> See C-314/12 *UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH* (2014).

collaborate with right owners in carrying out investigations on the identity of infringers and bear related costs.

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

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

### 3.3. Interaction between copyright enforcement and the e-Commerce Directive

Cost considerations have also driven the difficult interaction between online copyright enforcement and the e-Commerce Directive. The TPM-based model could no longer realistically serve as a tool to ensure low-cost machine-based enforcement of copyright and doubts have been increasingly cast in a number of Member States on the effectiveness and feasibility of purely Article 8-based deterrent strategies. **Hence, there has been growing support from content owners to replace both methods with filter-based mechanisms implemented at the ISP level that – being also machine-based<sup>277</sup> – would allegedly allow a similarly low cost enforcement environment** (see also Section II.1.6.1).

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

**Copyright injunctions should rather limit themselves to well-defined specific instances of ‘notice and take down’, or – in well substantiated cases – to termination of structurally infringing sites.** Injunctions aimed at terminating access to ‘structurally infringing’ websites remains therefore the strongest remedy possible under the current

<sup>277</sup> On the request to have copyrights enforced through a machine-based mechanism see also: [http://ec.europa.eu/internal\\_market/iprenforcement/docs/conference20110607/hearing-report\\_en.pdf](http://ec.europa.eu/internal_market/iprenforcement/docs/conference20110607/hearing-report_en.pdf).

legal framework. However, this is subject to substantial burden of proof limitations and very different risks of paying related damages if the claim is deemed not sufficiently substantiated in the different legal systems, which leaves websites in very different competitive positions as concerns their potential business risks and liabilities.<sup>278</sup> Most important, services can easily be moved to other countries and the ban circumvented through other means (e.g. VPNs).<sup>279</sup>

**One option entails reconsidering the level of protection offered to online intermediaries, which exempt them from an active duty to monitor, and checking whether the conditions for such exemption of responsibility under Article 12 of the e-Commerce Directive apply.** To invoke the exemption, the service provider should not play any role in initiating communication, or cannot select the receiver of the information, or cannot select or modify the information provided (a principle that the CJEU has recently interpreted in very broad potential terms, for instance, in the case of e-Commerce on *e-Bay v. L'Oreal*).

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

### **3.4. Interaction between copyright enforcement and the Charter of Fundamental Rights**

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

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<sup>278</sup> Martin Husovec Injunctions against Innocent Third Parties: The Case of Website Blocking, 2013 ([www.jipitec.eu/issues/jipitec-4-2-2013/3745/husovec.pdf](http://www.jipitec.eu/issues/jipitec-4-2-2013/3745/husovec.pdf)).

<sup>279</sup> Stakeholders have also raised concerns that notice-and-takedown regimes merely displace hosting activity to other countries and civil injunction remedies would have some chance to apply cross-border only if the infringing sites are hosted within another Member State. However, to cope with the erratic behaviour of courts, in this case criminal proceedings seem to be the preferred option (see, for instance, the well-known Pirate Bay case).



In particular, the Court has found that the fundamental rights to protection of property and to an effective redress underlying Article 8 of the InfoSoc Directive should be balanced on the one hand with the parallel fundamental right to respect for private life as foreseen in Articles 7 and 8 of the Charter,<sup>280</sup> and on the other hand with the freedom to run a business<sup>281</sup> as envisaged under Article 16 of the Charter.

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

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

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

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

The recently released Commission Action Plan on the enforcement of intellectual property rights contains no specific provisions on the enforcement of copyright in the digital environment. It refrains from supporting enforcement strategies at the final consumer level based on civil injunctions and generally endorses the '*follow the money approach*' targeting intellectual property rights infringement on a 'commercial scale' by means of self-regulatory instruments aimed at advertisers and payment providers.<sup>282</sup> It represents, therefore, one more example of the Commission's general positive attitude towards self-regulation by means of Codes of Conduct in the digital environment.

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<sup>280</sup> In the landmark *Promusicae* case the CJEU added consideration of two further fundamental rights, namely the right that guarantees protection of personal data and hence the right that guarantees protection of private life as laid down in Article 7 of the Charter and Article 8 of the European Convention on Human Rights.

<sup>281</sup> In the judgment on *Scarlet Extended v. SABAM* the CJEU found that the broad filtering measure requested by the Belgian collecting society SABAM would have led to a serious restriction of the freedom of the ISP to conduct its business.

<sup>282</sup> For a review of the rationale and concrete experiences so far, see Manara (2012).

**The approach has already materialised in a Memorandum of Understanding<sup>283</sup> on counterfeited goods online and aims at depriving intellectual property infringers of their revenue streams by fostering contractual cooperation agreements between right owners and payment services and by promoting the development of related codes of conduct.** This is in line with Article 17 of the IPRED provision that Member States should encourage the development of codes of conduct by trade associations or organisations, aimed at contributing to the enforcement of intellectual property rights.

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

A study commissioned by the Digital Citizen Alliance<sup>284</sup> shows that 60% of copyright infringing websites finance themselves by disseminating various forms of malware, but as high as 30% provide links to primary brands and another 40% to so-called 'secondary' ones (legitimate gaming, online gambling and content aggregation sites).

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

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

### 3.5.1.1. The 'follow the money' approach

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

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<sup>283</sup> The Commission intends to establish new Stakeholder Dialogues in 2014 and 2015, involving advertising service providers, payment services and shippers, with the objective of achieving in 2015 further Memoranda of Understanding that would help keep intellectual property-infringing products off the Internet.

<sup>284</sup> See Digital Citizen Alliance 'Good Money Gone Bad' (<http://media.digitalcitizensactionalliance.org/314A5A5A9ABBBBC5E3BD824CF47C46EF4B9D3A76/4af7db7f-03e7-49cb-aeb8-ad0671a4e1c7.pdf>).

definition on which the industry can rely upon has therefore represented an obstacle in making informed decisions and cooperative agreements intended to bridge this gap.

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

For instance **the UK** has launched the experimental programme ‘Operation Creative’, with apparently positive results in the period when it was monitored (-12% illegal traffic),<sup>285</sup> but the Infringing Website List compiled by right owners and industry sources was overseen in cooperation with the City Police of London. Moreover, Operation Creative had to rely on an external provider for the assessment of the degree of online intellectual property infringement risk. **Italy** has also begun to engage in its own ‘*follow the money*’ initiatives where the advertising industry and the content industry have recently entered into a Memorandum of Understanding. The agreement lays the foundation for a self-regulatory mechanism that aims to block advertising on pirate sites in a similar way to Operation Creative in the UK, but without police oversight. Right-holders are to report to a joint committee, which will then communicate with agents and advertisers. Similar initiatives are also underway in **Germany and Finland**. **Spain**, conversely, has opted for including action aimed at advertisers in *ad hoc* legal provisions administered under the *Ley Lassalle*.

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

There are two main concerns that have been voiced on this kind of initiative. First, **targeted websites would be offered few remedies for improper or erroneous action or not be given a right to a fair trial.** Second, **concerted action from advertisers or payment services can be construed as discriminating behaviour in antitrust proceedings against them.** This is the reason why similar initiatives being attempted

<sup>285</sup> See ‘Follow The Money: Financial Options To Assist In The Battle Against Online IP Piracy’, Discussion Paper by Mike Weatherley, MP, Intellectual Property Adviser to the Prime Minister, 2014.

elsewhere in the world have also sought preliminary approval from regulators (e.g. Australia). On the positive side the approach – if successful – could make copyright enforcement in the digital environment even smoother and much more flexible in adapting to technological developments.

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

The EU Strategy for Enforcing Intellectual Property Rights in Third Countries recognises that forcing ISPs to act against infringing sites in third countries lacking appropriate legislation and/or willingness to take action is especially problematic. Actually, migration of websites to such countries often represents a last resort defence against enforcement action at the EU level and requests to shut down ‘structurally infringing’ sites.<sup>286</sup> Since the Anti-Counterfeiting Trade Agreement has not been ratified, the measures envisaged in the strategy (negotiation of intellectual property rights in bilateral trade agreements and recourse to dispute settlement mechanisms at the international level) are generic in scope and not necessarily focused on civil enforcement of copyright in the digital environment, but eventually more on criminal enforcement aspects.

The Agreement on Trade-Related Aspects of Intellectual Property Rights plus clauses generally included in the Free Trade Agreement negotiated since 2006 or in the Eastern Partnership Treaties with Georgia and Moldova have mainly focused on other intellectual property rights enforcement aspects, because it is relatively easy for infringers to move from one host country to another. Past evaluations of the strategy have also highlighted how lack of harmonisation within the EU itself affected the credibility of the messages addressed to third countries and how the lack of reliable and comprehensive data on sources of infringements online made it difficult to prioritise redressing policies through diplomatic action as the US extensively does.<sup>287</sup>

However, in a notable alignment between its external strategy and the internal action plan, the Commission has endorsed in its latest version of the strategy – in addition to traditional public policy measures in its relations with third countries – support for voluntary industry-led soft law initiatives such as codes of practice for Internet operators and enhanced collaboration with right owners through Memoranda of Understanding. It has to be noted that in a couple of notable cases courts in third countries have ruled against action taken by payment service providers.<sup>288</sup>

<sup>286</sup> Again for a review of the most egregious cases of website migrations to avoid prosecution, reference can be made to the US Out-of-cycle Review of Notorious Market.

<sup>287</sup> Ade (2010), *Evaluation of the Intellectual Property Rights Enforcement Strategy in Third Countries*, Final Report, Volume I, November, at:

[http://trade.ec.europa.eu/doclib/docs/2010/november/tradoc\\_147053.pdf](http://trade.ec.europa.eu/doclib/docs/2010/november/tradoc_147053.pdf).

<sup>288</sup> See for instance Steadman, I. (2013), ‘Icelandic court declares WikiLeaks donation ban “unlawful”’, *Wired*, available at: [www.wired.co.uk/news/archive/2013-04/26/wikileaks-wins-visa-case](http://www.wired.co.uk/news/archive/2013-04/26/wikileaks-wins-visa-case); and with reference to the 2006 AllOfMP3 case, see *Russian Pirates get Visa in Court* <http://eng.cnews.ru/news/top/indexEn.shtml?2007/07/13/258719>.

### 3.6. Effect of the current provisions on the level of infringements

Since in many Member States the EU legal framework on copyright enforcement has been transposed with substantial delay and related implementation reports were far from detailed, there are little public updated data to draw detailed conclusions on their level of implementation and impact.<sup>289</sup>

However, already back in 2010, based on the findings reported in the Staff Working Paper accompanying the Commission Report on the Application of the IPRED, **the Commission had concluded that the legislative and non-legislative instruments in place could not be considered powerful enough to combat online infringements of intellectual property rights effectively.**<sup>290</sup>

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

Most of the more recent quantitative evidence available at the EU level comes from the statistics of the 2012 public consultation on civil enforcement of intellectual property rights: efficiency of proceedings and accessibility of measures, and hardly any pan-European comparative study has been specifically dedicated to the topic of copyright enforcement online.<sup>291</sup>

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<sup>289</sup> Few Member States transposed the Enforcement Directive on time, i.e. by the agreed deadline only five Member States (Denmark, Hungary, Italy, Slovenia and the UK) were compliant. Most Member States were late. As a result, 20 infringement procedures for non-communications had to be started, namely against Austria, Belgium, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Ireland, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovak Republic, Spain and Sweden. A referral to the CJEU was made for Germany, Luxembourg, Sweden, France and Portugal. The last Member States to implement the Directive were Germany (July 2008), Sweden (April 2009) and Luxembourg (June 2009), after a decision confirming an infringement had been taken by the CJEU. When the Commission in 2010 reported about status of transposal Greece seemed not to have implemented the Directive in its entirety, but only in respect of copyright and related rights. Source: Commission Staff Working Document, *Analysis of the application of Directive 2004/48/EC of the European Parliament and the Council of 29 April 2004 on the enforcement of intellectual property rights in the Member States*. However, as late as end-2010 details on concrete implementation at the national level were often missing or provided with very limited details so that the Commission could not reach a conclusion on the implications the Directive had on the development of the information society particularly in Cyprus, France, Luxembourg, Malta, the Slovak Republic and the UK. No further reports on implementation were envisaged.

<sup>290</sup> See Staff Working Paper accompanying the Commission Report on Application of Directive 2004/48/EC of the European Parliament and the Council of 29 April 2004 on the enforcement of intellectual property rights SEC(2010) 1589

<sup>291</sup> The notable exception is represented by the UK Intellectual Property Office (2015), *International report on the Comparison of Approaches to Online Copyright Infringement*, from which most of the information reported in this Section is drawn on.

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

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

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

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

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

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

The limited effectiveness of current InfoSoc provisions is proven by the fact that **many countries have felt the need to encourage extrajudicial procedures, not only to decrease costs but to speed up implementation. This has led to the emergence of codes of**

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

In addition to quicker action, the lower cost (a HADOPI administrative notification would cost around €1 plus an additional €2 for the ISP, although these data are controversial<sup>292</sup>) and increased simplicity for rights owners means that even small and medium enterprises can engage with the process in some countries, e.g. Italy, where this was reported not to be the case in the past because of the complexity of getting injunctions from courts.

In the EU, there are few studies on the effectiveness of civil injunctions in curbing infringement at the consumer level. To the contrary, in the US a substantial amount of economic literature has been made available about the theoretical assumptions under which an action undertaken upon an anticipated loss could be justified with a view to its expected deterrent effect (Litman, 2005; Hughes, 2005). The industry decision of moving to Memoranda of Understanding with ISPs as soon as these became possible and refraining from taking further civil injunctions seems to indicate that undertaking a loss-generating civil injunction was considered a second-best strategy by right-holders themselves.<sup>293</sup>

### 3.7. The difficulties in estimating online infringements

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

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

<sup>292</sup> HADOPI, «Réponse graduée – Les chiffres clés», June 2014 (<http://www.hadopi.fr/sites/default/files/ChiffresRGjuin14.pdf>).

<sup>293</sup> See on the subject M. Masnick (2010), ‘RIAA Spent \$17.6 Million in Lawsuits ... To Get \$391,000 in Settlements?’, *Techdirt* ([www.techdirt.com/articles/20100713/17400810200.shtml](http://www.techdirt.com/articles/20100713/17400810200.shtml)).

to the reliability of their own estimates and the fact that these would already somehow incorporate anticipated infringements so as to make the proposed methodology circular.

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

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

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

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

The French, for instance, refer to the number of HADOPI notifications as a success criterion, which tends to overlook the problem of possible consumer changes in illegal content fruition modalities. It would be a matter worth further investigation whether



there is a trade-off between propensity to act at the Internet subscriber level and recourse to civil injunctions towards commercial scale infringers, as France reports a total of two such commercially-oriented injunctions in the period.

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

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

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

**Finally, and possibly most important, it is extremely hard to disentangle analysis of effectiveness and efficiency of enforcement provisions from other broader context factors.** For instance, there is a growing body of studies<sup>294</sup> – admittedly not always from independent sources – showing that as legal online alternatives become known and available in the Member States and consumer satisfaction with their quality and reduced transaction costs improves, demand for illegal services decreases. HADOPI statistics in France would seem to confirm this. Awareness of the legal offer in music is quite high among French Internet users (68%) and is also considered easy to find (77% of users). In

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<sup>294</sup> Spotify, for instance, has published their own ‘Spotify’s impact on piracy’ research, which reviews a small number of country studies that suggests that legal streaming services are turning the tide against piracy, with previously illegal users migrating to legal consumption (Spotify, 2013, <https://www.spotifyartists.com/spotify-explained/#spotify-s-impact-on-piracy>). Other studies that look at the levels of traffic to individual legal services compared with traffic to sites known to contain very high levels of copyright infringing content suggest similar conclusions. For instance, a 2012 Sandvine report covering North America reported that Netflix represented 24.4% of total Internet traffic volume in North America over one 24-hour period, well ahead of BitTorrent, at 14.2%. See: <https://www.sandvine.com>.

comparison, legal offers of TV series and films have slightly lower awareness (64% for both) and are also equally considered harder to find. These are also the two cultural product categories that are most likely to be consumed illegally, with 30% of users stating that they consume them via means that infringe copyright as compared to 23% for digital cultural products overall.

### 3.8. Concluding remarks

There are several elements that no longer make IPRED fit for purpose in the digital environment. These largely pertain to the lack of a clear distinction between commercial operations and infringement at the consumer level and the problems this creates in the management and quantification of damages and legal expenses that can be considered prone to abusive, strategic litigation or insufficiently dissuasive.

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

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

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

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

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

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

Very limited data are available on the actual impact of the various provisions and strategies in curbing copyright infringement online, and comparisons between different approaches face notable methodological limitations, not least because of still unsolved underlying uncertainties and disagreements on how to measure the economic value of online copyright infringement itself. This difficulty in making comparisons is compounded by the fact that stakeholders’ enforcement choices seem to be influenced by the features of the administrative and legal systems they operate in and the implicit subsidies they provide. As a result, no clearly preferable approach has appeared. The conduct of operators themselves and the ongoing debate seem to show that there are great expectations of the potential effectiveness of the newly introduced ‘follow the money’ approaches, which however remain relatively untested. And instances of expectations not met by results have already been experienced in the field of online copyright enforcement in the past.

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

## 4. Remuneration and compensation of authors and performers

### 4.1. Economic analysis of legal provisions on remuneration and compensation

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

This is not to say the EU policymaking and *acquis* are not concerned with authors and performers’ remuneration and compensation. In several policy documents, the Commission acknowledges that “authors and other creators expect a fair return for the use of their work” and that “it is often the case that performers, including professional ones, are not duly recognised and rewarded for their creative input to an artistic work”.<sup>295</sup> At the same time, the Commission Work Programme for 2014, where the review of the copyright regime was included among the incoming legislative initiatives, lists the effective remuneration of right-holders among the regulatory objectives.<sup>296</sup> Still, the Commission falls short of identifying specific legal means through which to achieve these objectives, apart from the general consideration that a more solid copyright framework would be beneficial for authors and performers, as well as to every right-holder. Interestingly, the Commission suggests that improving the Single Market for creative content is one way to increase authors’ and performers’ revenues, if not the only one.<sup>297</sup> In a nutshell, **the Commission’s attitude towards remuneration and compensation can be grossly summarised as acknowledging the issue, though adopting a ‘market-knows-best’ approach.**

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

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

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<sup>295</sup> Communication from the Commission, A Single Market for intellectual property rights, COM(2011)287.

<sup>296</sup> Annexes to the Communication from the Commission, Commission Work Programme 2014, COM(2013) 739 final.

<sup>297</sup> For instance, in the Impact Assessment accompanying the document ‘Proposal for a Directive of the European Parliament and of the Council on the collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the Internal Market’, SWD(2012)204. Cf. also European Commission, *Green Paper on the only distribution of audiovisual works in the European Union: opportunities and challenges*, COM(2011)427.

Besides, Recital 31 of the InfoSoc Directive calls for the safeguarding of a “fair balance of rights and interests between the different categories of right-holders” as well as between users and right-holders. **However, it is fair to state that, with the exception of the issue of fair remuneration, the Directive does not provide for any actionable legal means to pursue these principle claims.**

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

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

1. As discussed in Section II.1.2.5 above, most of exceptions and limitations are optional for the Member States.<sup>298</sup>
2. Hence, Member States shall determine what exceptions should be granted to the rights of reproduction, communication and distribution, and *only then* shall determine when fair compensation is due.
3. For some exceptions, fair compensation is mandatory, namely:
  - a. reprography (par. 2, lett. (a));
  - b. private copying (par. 2 lett. (b));
  - c. reproductions of broadcasts made by social institutions for non-commercial purposes (par. 2 lett. (e)).

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

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<sup>298</sup> The only exemption from this principle is the exception for transient and incidental reproductions which are an integral part of a technological process whose purpose is to enable a transmission of content in a network for lawful use and with no independent economic significance. For transient and incidental reproductions, the exception from the reproduction right is mandatory. Cf. Article 4.1 of the InfoSoc Directive.

society to track every single use. Hence, a sort of per-use tax, or levy, compensates for the impossibility of measuring uses.

**Fair compensation is not economically negligible in some cases.** For instance, in the period 2004-09 between €400 million and €600 million accrued to right-holders in the EU only thanks to the fair compensation levy for private copying (Kretschmer, 2011). Where data is available at national level, it represented between 4% and 9% of total collecting society revenues. WIPO (2013) reports that the trend is now decreasing: its 2012 data, which cover most EU Member States, show revenues from private copying falling to slightly more than €300 million.<sup>299</sup>

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

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

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

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<sup>299</sup> As confirmed by other sources (e.g. SAA, 2015).

The InfoSoc ‘hands-off’ approach is not the only one known by the EU copyright framework concerning authors’ and performers’ remuneration and compensation. Other EU provisions aim at directly interfering with market equilibria. This is the case of **Directive 2011/77/EC, which trades off an extension of the copyright terms with the earmarking of 20% of the revenues originating from this extension as a supplementary royalty to certain categories of performers.**<sup>300</sup>

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

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

Before going further with the comparison of the hands-off and paternalistic approaches, it is useful to discuss what the specific economic value of this right is, i.e. when a remuneration can be considered equitable under the Rental Directive. This issue was tackled by the CJEU in the ‘SENA’ case.<sup>301</sup> At paragraphs 23-25, the Court states that the concept of equitable remuneration is an autonomous provision of Community law, which is to be interpreted uniformly in all Member States. However, in paragraph 34 it also states that the EU *acquis* does not prescribe any method to determine *what* constitutes uniform equitable remuneration nor the parameters on which it is based. **The uniform interpretation of equitable remuneration implies that Member States should ensure a proper balance between the interests of performers and other right-holders, in relation with the economic value of the use under consideration.** Hence, a general determination of when remuneration can be considered equitable does not strictly follow from the principle of equitable remuneration.

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<sup>300</sup> See the Impact Assessment accompanying the Proposal for a Council Directive amending Council Directive 2006/116/EC as regards the terms of protection of copyright and related rights, SEC(2008)2287. Cf. also European Parliament, Committee on Legal Affairs, Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States, Study, January 2014.

<sup>301</sup> Judgment of the Court (Sixth Chamber) of 6 February 2003. Case C-245/00 *Stichting ter Exploitatie van Naburige Rechten (SENA) v. Nederlandse Omroep Stichting (NOS)*.

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

**In a nutshell, market power, rather than the provisions of waivable versus unwaivable rights, remains the key determining factor of the remuneration and compensation of authors and performers.** The norms regulating contractual mechanisms for authors and performers matter much more than the approach subsumed in the EU copyright framework. However, contractual mechanisms fall currently under national competence (in addition, they border labour regulation in some cases).<sup>302</sup> Further to that, a uniform effectiveness of adequate remuneration and compensation provisions for all authors and performers is also prevented by the diversity in arrangements and parties’ market power across different value chains.<sup>303</sup>

**Finally, it is worth discussing that several contributions<sup>304</sup> seem to link the concept of equitable remuneration to some kind of compensation-per-use, as opposed to lump-sum payments in exchange for authors and performers waiving (most of) their rights.** This indeed ensures that best-selling authors and performers do enjoy a fairer share of their success, even if at the moment of concluding the contract they were in a weaker position. However, less-than-successful authors may not benefit, or indeed lose, from such a remuneration scheme. Further to the distribution of revenues between best-selling and other authors and performers, it is to be mentioned that compensation-per-use schemes also have drawbacks. First, compensation-per-use schemes shift the entrepreneurial risk from the publisher/producer to the author/performer, who may not want to bear this risk. For instance, it is often quoted that authors and performers having signed a contract in the non-digital age are not fairly remunerated for the online use of

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<sup>302</sup> This is also acknowledged by the authors’ contribution to the Public Consultation on the Review of the copyright framework. The German system is quoted as a positive example in this respect. It states that remuneration is adequate if it corresponds to what is customary and fair in business relations and, possibly most important, adequacy is presumed if remuneration is in line with collective agreements. Cf. European Commission, Report on the responses to the Public Consultation on the Review of the EU Copyright Rules, July 2014; European Parliament study, *supra* note 300. Cf. also the 2011 *Green Paper*, *supra* note 297; European Parliament, Committee on Legal Affairs, Working Group on Copyright, Working Document: Copyright in the Music and Audiovisual Sectors, 29.06.2011.

<sup>303</sup> As acknowledged in European Parliament, Committee on Legal Affairs, Working Group on Copyright Territoriality, Collective Management and Remuneration, 15.09.2010.

<sup>304</sup> See European Commission, Report on the responses to the Public Consultation on the Review of the EU Copyright Rules, July 2014.



the content. However, online distribution has been a positive demand shock that authors and performers have not benefited from; at the same time, lump-sum contracts also shield them from negative shocks. Secondly, pay-per-use schemes entail more transaction costs, in some cases significantly more, than lump-sum payments. Additional transaction costs represent an efficiency loss that needs to be distributed among the contracting parties. Especially in the online environment, monitoring uses can be costly and imply trust issues. Finally, adding an unwaivable right to per-use remuneration *on top* of buy-out clauses would unavoidably decrease the market value of such clauses, and it is not clear whether authors and performers, and which ones among them, would end up with a higher share of the creative content revenues.

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

In this sub-Section, the focus shifts from the analysis of legal provisions to a literature review concerning the online creative content value chains and how resources are allocated therein. We try to report data and specific information that can be found in the available material, rather than interested parties' claims. However, the evidence on revenue allocation remains scant and anecdotal.<sup>305</sup>

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

A very good example is a study on copyright revenue streams in creative industries in Finland (Koskinen-Olsson & Mulkku, 2014). While it only covers the Finnish creative industries, and is thus an excessively thin basis for generalising about the whole Single Market, <sup>306</sup> it includes novel data and a comprehensive approach. For each creative industry including press and literature, music, audiovisual, radio, TV, software, video games, photography, visual arts and advertising, the authors estimate the overall revenue stream. Then, from public sources and interviews with stakeholders, they estimate the amount of revenues (or the share of revenues) that accrue to the right-holders, including

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<sup>305</sup> For this reason, the European Commission has recently awarded two service contracts concerning research on this subject. The first is on the remuneration of authors and performers for the use of their works and the fixations of their performances; the second is on the remuneration of authors of books and scientific journals, translators, journalists and visual artists for the use of their works. Both contracts were awarded to European Economic Research, the former in February 2014 and the latter in November 2014.

<sup>306</sup> Based on Eurostat data, Finland represents only 1.5% of the Single Market GDP.

royalties, fees, salaries, and rights collected by CMOs. While the results are underpinned by several assumptions, to fill data gaps, the analysis is comprehensive and the methodology transparent. According to these estimates, in 2012 direct copyright revenue streams in Finland amount to €2.9 billion, up from €2 billion in 2008. If such an exercise had to be replicated at EU level. Indeed, in each country primary information from stakeholders and secondary information from national-specific secondary sources should be retrieved to assess the allocation of revenues along the various value chains. As discussed, allocation of revenues depends on the national legal framework – since authors and performers’ remuneration and compensation are almost not regulated by EU-wide acts – and on parties’ market power, which in turns derives from country-specific factor, such as the negotiation mechanism or market demand features.

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

#### **4.2.1. Audiovisual products**

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

Concerning revenue generation, audiovisual content providers may be:

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

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

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

1. interactive services that offer a catalogue of titles based on subscription or pay-per-view system, termed video on-demand services; and

2. services consisting of the time-delayed extension of existing linear TV broadcasters, termed on-demand television services.

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

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

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

Online platforms, which provide the content to the final user (CRA, 2013a).

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

#### 4.2.2. Music

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

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

1. artists and repertoire activities, focusing on discovery, development and promotion of artists and music recordings;

2. distribution and commercial exploitation, including distribution of sound recordings to wholesalers and retailers (Leurdijk & Nieuwenhuis, 2012).

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

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

Internet platforms mostly act as online distributors and hence function like new distribution channels, rather than additional steps in the value chain. Authors enter into contact, and contract, with the companies, or company divisions, carrying out artistic and repertoire activities.<sup>307</sup>

#### 4.2.3. Books

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

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

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

Publishers are the main operator of the value chain. They perform several activities, such as aggregation of supply, presentation of creative content, pricing, marketing, and dealing with support technical activities. They also bear the entrepreneurial risks and the upfront costs (Simon & de Prato, 2012). Online platforms play the role of mass retailers

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<sup>307</sup> Cf. Decision of the European Commission, CASE COMP/M.6456 Universal Music Group/EMI Music.

(CRA, 2013b), as well as venturing into the publishers' turf by directly contracting authors.

Unlike the music industry, the most common revenue generating strategies consist of a pay-per-access strategy, i.e. book sales. Recently, subscription-based models have also been introduced, such as Amazon's Kindle Unlimited, but they still play a more limited role compared to other media industries. As far as authors' remuneration and compensation are concerned, bestsellers receive an advance payment in exchange for their copyright, and once the advance is covered by sale revenue, the author receives additional royalties (e.g. per-unit of content sold) (Simon & de Prato, 2012). This does not apply to minor authors, who may only receive a per-unit payment, i.e. no advance; they may even have to bear upfront costs. Amazon adopts a revenue system, so that authors receive between 30-35% of revenues from any e-book sold on its platform, regardless of sales performance, without bearing any upfront cost and receiving no support in terms of, e.g. marketing. The higher share of revenue that Amazon grants depends on the stiff reduction of publishers' costs (e.g. logistics, production costs, scouting).<sup>308</sup>

#### 4.2.4. Online platforms

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

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

What all these platforms have in common:

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<sup>308</sup> Cf. 'Take Control with Self-Publishing', available at: <http://www.amazon.com/gp/seller-account/mm-summary-page.html?topic=200260520>, last accessed on June 2015.

1. **Being online rather than brick and mortar businesses, they are affected to a more limited extent by physical constraints, such as logistics, location, rental,** etc. Hence, they enjoy very large economies of scale in distribution of creative content.
2. **Being Internet-based, they potentially face a global market, even though the creative content industry is still segmented at national level for many product segments.** For this reason, online platforms largely adopt a global strategy. Again, this triggers very large economies of scale.
3. **Being user interfaces,** they are best-positioned for knowing and exploiting demand features. Most important, they know consumers to an unprecedented extent, thanks to the amount of personal data that they collect, process and store whenever an individual buys a product or just visits their website.

**All in all, these online operators have further globalised creative content markets, and displaced other operators' activities, thus compressing their share of revenues.** While obviously acknowledging the innovation and gains for consumers brought about by these platforms, they most probably represent the single most important reason why all other players on the value chain lament the reduction of revenues and profit margins. Revenues have indeed shifted, to a variable extent, from the creative industry to these new forms of global mass distributors.

#### **4.2.5. Advertisers**

As discussed above, online platforms capture both consumer attention and personal data. This makes them perfect candidates to run ad-based business models.

When consumers interact with online intermediaries, they release, voluntarily or not, a flow of personal information. This information is collected, processed and used to 'profile' consumers. Profiling can be very simple, such as in the case of retargeting ads, where consumers who have looked in the past for a certain product are retargeted with ads of the same product. In other cases, profiling can be more complex and try to infer future purchase paths from consumers' past history. Profiling and connecting users with the 'right' ad, and thus with the right product, can either be done by the platform itself, that is through 'first-party advertising', or be outsourced to specialised firms, such as ad networks, through 'third party advertising' (Luchetta, 2013).

**Advertisers thus buy the right to deliver an ad to a certain class of profiled users. The ad can be bought based on two pricing schemes: cost per impression or cost per click.** The former scheme, analogous to the case of old media, requires advertisers to pay a fixed price per quantity of viewers (usually expressed as 'cost-per-million'). The latter scheme, born in the online environment where consumer behaviours can be tracked, provides for the advertisers to pay a sum each time a viewer clicks on the ad – the so-called 'cost-per-click' (Ratliff & Rubinfeld 2010). This is disruptively innovative, because for the first time the advertiser can know which consumers are attracted by what ad. In the offline world, companies "waste half of the money spent in advertising, but do not

know which half".<sup>309</sup> In the online world, companies know the effectiveness of every single euro they spend on ads.

In 2013, expenditures on online advertisement in the EU reached €22 billion, which is coming closer to expenditures on TV ads (€26.3 billion). In 2009, online and TV ads generated, respectively, €13 billion and €26.7 billion: while online ads revenues have doubled in four years, TV ads have slightly decreased. Today, online ads represent about 27% of total ad expenditures in the EU, a share higher than that of ads on newspapers, magazines, radio, cinema and outdoor advertising (European Audiovisual Observatory, 2014).

#### 4.2.6. Data on revenues

**While data on the allocation of revenues across the value chain are scant, data on the economic value of the creative content industry and of the copyright revenue streams could be identified.**

First of all, defining creative industries and the activities included therein is not easy. WIPO (2002) defines creative industries, or copyright-based industries, as those “wholly engaged in creation, production and manufacturing, performance, broadcast, communication and exhibition, or distribution and sales of works and other protected subject matter”. In addition to this definition, it is also appropriate to include ‘digital delivery’ as a separate phase, given the subsequent market developments (Koskinen-Olsson & Mulkku, 2014).

Creative industries – though the exact definition varies from study to study – represent a significant part of EU GDP. In 2012, Ernst & Young (2014) reports that they generate over €500 billion in revenues, or 4.2% of the EU economy. The largest segments are visual arts, advertising and television. At the same time, these industries employ more than 7 million people, the largest segments being performing arts, visual arts and music. According to SAA (2015), the European audiovisual industry generates €122 billion in revenues, €90 billion of which are generated by TV broadcasters (data refer to 2013). In the same year, box office revenues amounted to €6.3 billion, and the number of European movies reached about 1,550 units, collecting about a quarter of box office revenues.

The total collection of authors’ rights royalties in 2013 amounted to €4.7 billion, 83% of which was for the musical repertoire. The audiovisual repertoire triggered a revenue collection of €431 million, or 9.1% of the total copyright revenue. For the audiovisual industry, including TV broadcasting, authors’ right royalties represented about 0.4% of its total revenues. In 2009, the digital sector accounted for 1.6% of total collections for all the repertoires combined (Simon, 2012).

These aggregate data do not show how much each value chain part gains (Simon, 2012). The same is true for the scant data reflecting individual and aggregate authors’ revenues

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<sup>309</sup> Attributed to John Wanamaker, quoted in Picker (2009).

(such as Kretschmer, 2005), which are far from sufficient to paint any kind of picture of their share of profits over total revenues. Unsurprisingly, as in any value chain, each party claims that their slice of the cake is too small. This is not to say that authors and performers' claims for a larger share of the profit are not reasonable. It is just to highlight how there is hardly any independent evidence that may justify any claim in a way that can justify an evidence-based policy cycle.

The reason why there is such little evidence is not peculiar to the creative content markets. **In all value chains, one of the most important industrial secrets is how much value each counterpart is able to extract from other operators. And indeed, most copyright contracts do include non-disclosure clauses.** Since most value chains are non-transparent concerning contractual conditions, prices, and thus market power, the case for granting special treatment to copyright holders seems thin. Of course, the need to protect cultural creation may be a solid ground to invoke reinforced protection. The issue would then become whether transparency provides authors and performers with a stronger or weaker market position. In economics, it is known that information flows have an unclear effect on market conditions: on the one hand, they may be used to limit competition, and facilitate collusion, while on the other a very transparent market can also be very competitive. Therefore, depending on which counterparts become more or less competitive, authors and performers may either benefit or lose from any additional transparency provision.

### 4.3. Techno-economic analysis

**In the digital environment, and even more in a both digital and globalised market for creative content, two natural laws work at an unprecedented scale: the Power Law and the Law (Taleb, 2007) of the Fat Tails (Anderson, 2006).**

'Success', i.e. the number of copies of creative content sold, increasingly approximates a **Power Law distribution**. It means that the market will feature a very small number of extremely successful authors, who 'absorb' most of the market, and increasingly numerous cohorts of 'small' authors selling a limited number of copies. In the words of Taleb (2007), authors will be a population with "a very small number of giants and a huge number of dwarves". The Power Law depends on the fact that authors and performers work in a scalable environment. Scalability is induced by the 'winner-takes-all' nature of success in larger and larger digital markets for creative content, combined with self-reinforcing trends, in a feedback loop. Scalability creates a small league of global viral phenomena, whether R.J. Rowling's Harry Potter or Psy's 'Gangnam style', that can arise at any point on the global market. Scalability also implies a very unequal environment, where one single author can have a disproportionately high share of the market. While comprehensive data are not available, a recent media report claims that 1% of authors generate about 77% of global artist revenues.<sup>310</sup>

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<sup>310</sup> VICE News, 'Why Artists Don't Make Money - The Business of Life (Episode 3)', available at: <http://news.vice.com/video/the-value-of-creativity-the-business-of-life-episode-3>, last accessed on June 2015.



**However, the Law of the Fat Tails compensates, to some extent, the effect of the Power Law: even though minor authors become (relatively) more minor, they are not kicked out of the market, because the progressively lower significance of physical constraints, such as warehousing and shelf space, allow online platforms to maintain a very diverse and deep catalogue of works.** In a nutshell, small niches, which would have been unprofitable in the brick and mortar economy, can now thrive and survive in the online environment (Anderson, 2006). This fosters protection of cultural and linguistic diversity.

While these two laws to some extent compensate for each other, by keeping the giants from kicking dwarves out of the market, at the same time they create a population of authors whose median remuneration or compensation is constantly decreasing. Indeed, even assuming for sake of simplicity that the increase in supply is matched with a corresponding increase in demand, in the online market for digital content the Power Law makes the rich richer, while the Law of the Fat Tails increases the number of minor authors. Hence, even assuming constant mean remuneration or compensation, a larger group of authors will enjoy lesser benefits and the very few will enjoy much greater ones. For example, the median income for a European screenwriter was €22,000 in 2012, while for UK screenwriters amounted to €11,000 (SAA, 2015). In the research team's opinion, this explains, possibly to a larger extent than that of the copyright legal framework, why a constantly higher number of authors feels their position is threatened to the point of not earning enough to live off their creative production.

**The revolutions taking place in the digital and global market for creative content do not only affect authors and performers, but also the industrial players of the old value chains.** The balance of power in the digital market for creative content is moving downstream, from authors and 'old' publishers to online platforms that have direct contact with consumers' eyeballs. Access to consumers seems to be the new key asset in the creative content industry, protected by brands, patents and trade secrecy rather than by copyright. To the contrary, the main asset of authors and legacy players' was, indeed, content. For this reason, legacy players are trying to get direct access to consumer markets (Simon, 2012a).

**Indeed, content markets are facing both a disintermediation from old publishers, be they music labels, book publishers or newspapers, and a re-intermediation via new online distribution platforms (such as the big four, otherwise called GAFa: Google, Amazon, Facebook and Apple), that seem to become additional gravity centres of the industry, also in terms of value extraction.** While in the old world, intermediation was necessary because each player performed a core activity and relied on other operators along the value chain, now activities intermingle and large players tend to occupy a large part of the value chain. At the same time, re-intermediation via these platforms is compelling because they possess the new key asset, that is, access to consumers and consumer data. This asset also gives online platforms a certain, though variable, degree of market power to impose revenue sharing conditions on legacy players (Simon, 2012b). To the contrary, fully disintermediated business models, in which authors and performers directly contact consumers, thus acquiring larger revenue shares, have so far remained marginal, especially relative to the big online platforms. Indeed, building and

maintaining an audience requires investment, which only companies, be they online platforms or legacy intermediaries, can undertake (Leurdijk & Nieuwenhuis, 2012).

As anticipated in the previous sub-section, on the one hand these new platforms may disintermediate authors from publishers. As such, they are able to offer significantly better conditions to the large cohort of minor authors. By cutting the number of intermediaries, the shares for the bottom and top steps of the value chain increase. On the other hand, by working as retailers within the old value chain, online distributors, because of their size and their knowledge of consumers, can extract a larger share of revenues than brick and mortar retailers. Finally, they are able to create new streams of revenues from advertisers, and capture the old streams, thanks to their deep knowledge of consumer profiles (Oliver & Ohlbaum Associates, 2013). This has led to a progressive disintegration of the old vertically integrated big legacy players, and at the same time to a progressive disruption of copyright-based business models.

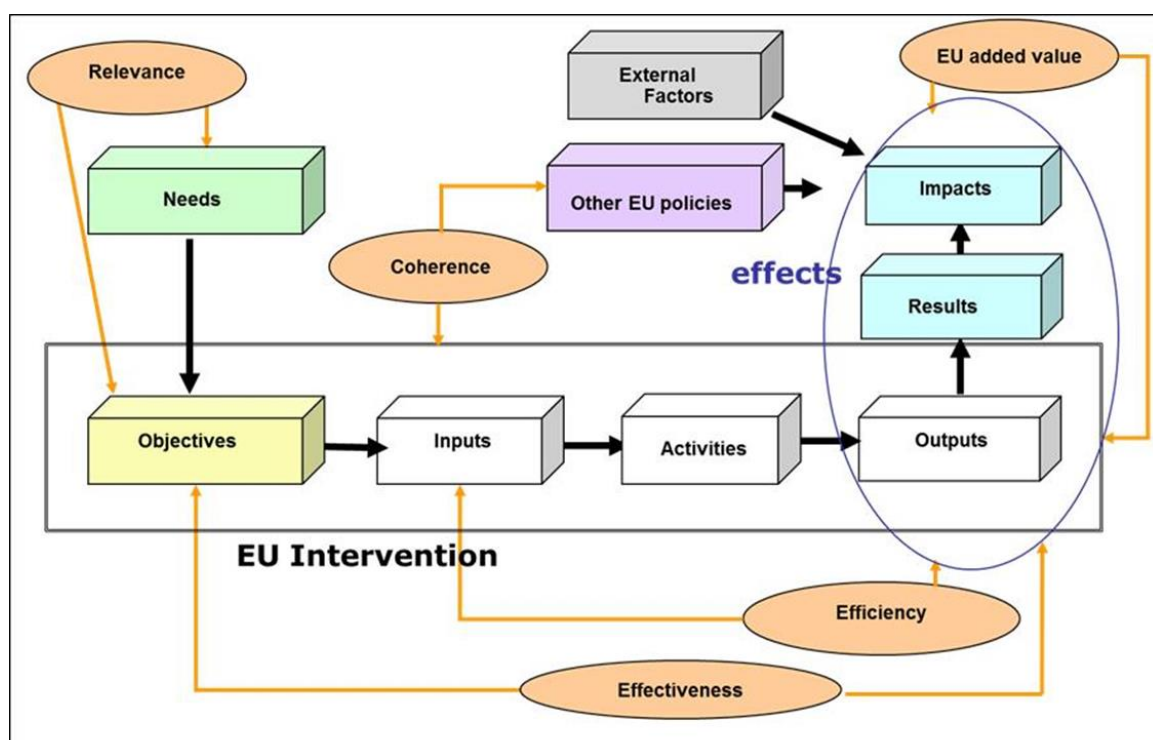
**All in all, the current techno-economic situation is far from optimal, for both content creators and legacy entrepreneurs, such as newspapers, music companies or book publishers, which have been cut out of large revenue streams.** Both content creators and content entrepreneurs are necessary for the copyright environment to flourish; at the same time, both are constrained by the new features of markets and technical contexts. Once these largely exogenous factors are taken into account, what is the role for the EU copyright framework in supporting a 'desirable' allocation of revenues along the copyright value chains? On the one hand, ensuring some form of fair distribution is a significant need for authors but a true challenge in a 'Power Law' environment. On the other hand, the 'Law of the Fat Tails' 'automatically' helps in achieving other objectives, such as the promotion of cultural and linguistic diversity. At the same time, protection of innovation, i.e. of publishers, needs to take place in a radically different, i.e. disintermediated and re-intermediated, market structure, where old legal tools can hardly deliver the desired outcomes.

## Part III: General Ex-Post Evaluation

### 1. Introduction: The framework of our evaluation

In what follows, we provide the main findings of our evaluation exercise, with specific reference to the questions asked by the European Parliament in its tender specifications. The overall framework for evaluation is illustrated by Figure 6 below, which specifies the key criteria that should be adopted in order to evaluate a given piece of legislation, namely the effectiveness, efficiency, coherence and relevance of the rules under evaluation. An additional criterion, EU added value, is not considered here as required by the European Parliament.

Figure 6. Overall framework for ex-post evaluation



Source: European Commission's 2015 Better Regulation Guidelines - Toolkit.

More specifically, the four criteria relevant to the present Study are defined as follows:

- **Effectiveness** analysis considers how successful EU action has been in achieving or progressing towards its objectives. The EU better regulation guidelines clarify that the evaluation should form an opinion on the progress made to date and the role of the EU action in delivering the observed changes. If the objectives (general, specific, operational) have not been achieved or progress is not on track, an assessment should be made of the extent to which progress has fallen short of the target and what factors have influenced successes and failures. Consideration should also be given to whether the objectives can still be achieved on time or with what delay. The analysis should also try to identify if any unexpected or unintended effects have occurred.

Typical examples of effectiveness questions:

- To what extent have the objectives been achieved?
  - What have been the (quantitative and qualitative) effects of the intervention?
  - To what extent do the observed effects correspond to the objectives?
  - To what extent can these changes/effects be credited to the intervention?
  - What factors influenced the achievements observed?
  - To what extent did different factors influence the achievements observed?
- **Efficiency** considers the relationship between the resources used by an intervention and the changes generated by the intervention (which may be positive or negative). Differences in the way an intervention is approached and conducted can have a significant influence on the effects, making it interesting to consider whether other choices (e.g. as demonstrated via different Member State interventions) achieved the same benefits at less cost (or greater benefits at the same cost). Efficiency analysis can differ depending on the type of intervention being evaluated. Typical examples of efficiency questions include:
- To what extent has the intervention been cost effective?
  - To what extent are the costs involved justified, given the changes/effects that have been achieved?
  - To what extent are the costs proportionate to the benefits achieved? What factors are influencing any particular discrepancies?
  - What factors influenced the efficiency with which the achievements observed was attained?
  - How affordable were the costs borne by different stakeholder groups, given the benefits they received?
  - If there are significant differences in costs (or benefits) between Member States, what is causing them?
- **Relevance** looks at the relationship between the needs and problems in society and the objectives of the intervention. Things change over time – certain objectives may be met or superseded; needs and problems change, new ones arise. Relevance analysis is very important – because if an intervention does not help to address present needs or problems, then it does not matter how effective, efficient or coherent it is – it is no longer appropriate. This is why there is a strong link between relevance analysis and the criteria of EU added value – which assesses whether action continues to be justified at the EU level. Typical examples of relevance questions include:
- To what extent is the intervention still relevant?
  - To what extent have the (original) objectives proven to have been appropriate for the intervention in question?
  - How well do the (original) objectives (still) correspond to the needs within the EU?
  - How well adapted is the intervention to subsequent technological or scientific advances?
  - How relevant is the EU intervention to EU citizens?
- **Coherence**. Checking *internal coherence* means looking at how the various internal components of an EU intervention operate together to achieve its objectives. Similar issues can arise externally at different levels: for example, between interventions within the same

policy field (e.g. a specific intervention on drinking water and wider EU water policy) or in areas which may have to work together (e.g. water policy and chemicals policy, or chemicals and health and safety). At its widest, *external coherence* can look at compliance with international agreements/declarations. The focus on coherence may vary depending on the type of evaluation and is particularly important in Fitness Checks, where coherence analysis will look for evidence of synergies or inconsistencies between actions in a related field which are expected to work together. Even when evaluating an individual intervention, it can be important to check coherence with (a limited number of) other interventions. Typical examples of coherence questions include the following:

- To what extent is this intervention coherent with other interventions that have similar objectives?
- To what extent is the intervention coherent internally?
- To what extent is the intervention coherent with wider EU policy?
- To what extent is the intervention coherent with international obligations?

Below, we apply these four main criteria to our evaluation of the InfoSoc Directive and related legislation.

## 2. Main evaluation questions

### 2.1. How effective is the current InfoSoc Directive?

As observed in Part I above, the InfoSoc Directive had the following major operational objectives:

- **To align EU legislation with international law**, especially after the 1996 WIPO Treaties that, *inter alia*, introduced the three-step test and addressed the issue of TPM.
- **To strengthen intellectual property protection in light of the emerging technological developments** that led to the emergence of the Internet as a major distribution channel for content.
- **To reduce the existing disparities** between national legal systems in terms of the basic definition of copyright, the scope of the rights to reproduction, communication, and distribution, the allowed exceptions and limitations, and the enforcement methods and practices.
- **To ensure an adequate level of remuneration and compensation of authors and performers.**

More than a decade down the road, it is fair to state that the first objective has largely been achieved, with the other objectives having only been partially achieved, and in some instances, arguably not achieved at all. The InfoSoc Directive managed to introduce, at least partially and not without exceptions,<sup>311</sup> the three-step test into the legal system of the EU Member States, and

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<sup>311</sup> For instance, whereas in some Member States the three-step test is recognised as an instrument in judicial revisions of the copyright law, in others it is addressed to the legislator only and cannot be used by courts. The adoption of the ‘new public’ criterion for hyperlinking by the CJEU in both the *Svensson* and

led to a very broad definition of intellectual property rights coupled with the effective endorsement of TPMs as a viable way to enforce copyright, at the same time enabling a system of copyright protection through the prosecution of actors that circumvent TPMs.

The same cannot be said for the other objectives, however. First, while rights were defined very broadly in the InfoSoc, this is by itself not a guarantee that protection will be stronger. There are three essential elements to the protection of a property right: i) the scope of the protection; ii) the mode of protection (property rules, liability rules); and iii) the effectiveness of enforcement. **In the case of the InfoSoc Directive, the weak part of the protection system envisaged by the EU legislator was, without doubt enforcement, compounded by an excessive reliance on TPMs that in the end did not develop into the predominant approach for protecting online content**, contrary to expectations when the InfoSoc Directive was first enacted. This led to a situation in which the remaining enforcement option in the InfoSoc Directive was Article 8(3), which provides for the possibility of filing injunctions against online intermediaries for the takedown of infringing content from their networks. This remedy, however, ended up being inconsistent with the 'mere conduit' principle established in Articles 12-15 of the 2000 e-Commerce Directive, and was gradually marginalised in particular due to difficulties in access to justice and in identifying infringers. Member States have then gradually relied on other methods, including regulations based on administrative remedies (e.g. HADOPI) and codes of conduct (e.g. BREIN). All in all, the level of protection for copyright holders today cannot be considered high enough, which in turn leads to the conclusion that the overall objective to strengthen copyright protection was not achieved, and even less so if one looks at the original remedies envisaged by the InfoSoc Directive to protect copyright in the online world.

**Likewise, it is possible to conclude that the objective of reducing fragmentation in the copyright regimes of the Member States was not fully achieved.** This is due to a number of factors. First and foremost, as we already noted, despite the fact that the legal basis of the InfoSoc Directive was rooted in Article 114 TFEU (then Article 95 TEC), the Internal Market goal of the InfoSoc ended up being subordinated to the necessity of adapting EU legislation to reflect the WIPO treaties, and to strengthening copyright protection: as a result, the EU today is still characterised by 28 different copyright systems. To be sure, some progress was made in that exceptions and limitations were limited in number: however, most of them have remained optional, and fragmentation was only partly avoided by the decisions provided by the CJEU in recent years. As we have shown in Part II, Section 2 above, **the implementation and scope of exceptions and limitations in a selected number of Member States portrays a widely fragmented picture, which still harms both copyright holders and end-users.**

Finally, it is widely recognised that **the InfoSoc Directive was not successful in securing an adequate level of remuneration and compensation for the majority of authors and performers.** Not only was the Directive largely silent as regards possible means of achieving this goal; the re-intermediation observed in most content markets has led to the emergence of new, powerful online intermediaries, who represent necessary interlocutors for right-holders. The balance of power between authors and performers on the one hand and distributors on the other hand is such that reliance on market forces for the determination of a fair remuneration and compensation is likely to be a desirable choice only for those 'happy few' whose works enjoy a significant degree of success; the vast majority likely to be under-remunerated.

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*Bestwater International* cases represents another example of inconsistencies with international copyright law.

**To sum up, only one out of the four initial objectives of the InfoSoc Directive can be considered achieved.** A remaining issue is whether subsequent legislation has remedied this underachievement. Without any doubt, IPRED does not seem to have significantly contributed to the effectiveness of copyright protection online: if anything, its Article 3 has created a constraint for the application of aggressive injunctions and the imposition of filtering techniques to ISPs and other online intermediaries. Some of the recent legislation adopted a more ‘paternalistic’ approach, which aimed at securing that a minimum share of the revenues be attributed to authors and performers, but this is only a small exception to the rule, i.e. reliance on market forces and freedom of contract in the determination of the remuneration and compensation of authors and performers. And while the CJEU has certainly played a major role in trying to promote the consistent interpretation of main rights and exceptions provided for by EU copyright legislation, its role has become very complex and controversial over time.

## **2.2. How efficient is the present EU copyright framework structure?**

Concerning the efficiency of the intervention, there are serious doubts about cost-effectiveness, where the assessment is negative overall, since the level of effectiveness was found to be extremely low in the previous Section. Another important aspect is that the **InfoSoc Directive has not solved the problem of having to negotiate licences under 28 different legal regimes, and has created a situation in which costs borne by consumers for the remuneration and compensation of artists (e.g. through levies) are significantly diverging across Europe.** As already mentioned, a recent study estimated that commercial users that provide services in more than one country and offer more than one million titles face transaction costs of up to €260,000 per year and require about six employees to deal with licensing issues; in particular, the identification of relevant right-holders may require up to six months and negotiations to clear rights may take up to two years. This costly and bureaucratic process, in a context that is still dominated by micro-enterprises, might be considered as a serious shortfall on the legislative objectives of EU copyright law. Furthermore, **the failure of Member States to implement a consistent set of copyright exceptions and limitations, at least for those that have a significant impact on cross-border activities, has also led to a system that is inefficient for specific categories of users, affecting research and innovation in particular, namely the viability of new products and services that could target the whole EU Internal Market (e.g. social networks).**

But even more than the costs, it is the benefits side that deserves careful consideration. **The current *acquis* on copyright seems to have secured very few benefits for authors and performers and end-users,** for a variety of reasons (ineffectiveness of enforcement, absence of provisions on fair remuneration and compensation, technological development that deviated from the use of TPMs, availability of technical measures to circumvent copyright protection without incurring liability). This means that, **as things stand, the InfoSoc Directive and related legislation are, when taken together, limited in terms of their measurable general positive effect on industry and consumers, and lack overall efficiency** (see Section 2.5.2 below for more details).

## 2.3. On the effectiveness of monitoring and evaluation

### 2.3.1. Have the existing implementation and monitoring tools been sufficient?

Policymakers can learn from the evolution of the market if they make use of suitable monitoring and evaluation arrangements throughout the life of a given piece of legislation. **An emerging way of securing this type of ‘maintenance’ of the legal rules is to select adequate indicators for monitoring and evaluation already when the piece of legislation is being adopted, and selecting a suitable time frame for evaluation (typically four to five years from implementation). This did not occur for the InfoSoc Directive**, which was adopted before the European Commission started introducing these practices in its impact assessments (introduced as of 1 January 2003). Another, increasingly used method of monitoring and evaluating the effectiveness, efficiency, relevance, coherence and EU added value of existing legislation, especially when it comes to enforcement, is **the setting up of specific cross-country groups or a dedicated agencies in charge of producing implementation reports** (e.g. in the case of e-communications, the creation of national regulatory authorities, the ERG and later BEREC has greatly facilitated the comparison of implementation practices in Member States). **But also in this case, this did not happen with the InfoSoc Directive.** In the case of copyright the European Commission has limited itself to the release of two implementation reports, in 2004 (but in this case without covering the InfoSoc Directive) and in 2007.

### 2.3.2. Is the available evaluation work on the Copyright Directive sufficient?

As a result, and as already observed, today there is a remarkable lack of data on a number of important aspects related to the effectiveness and efficiency of the InfoSoc Directive. These include data on the allocation of revenues along the value chain in different sectors, on the relative diffusion of legally consumed versus infringing content, on the effectiveness and diffusion of TPMs, and on many other aspects relevant to the effectiveness of the copyright *acquis*.

**A lot of work has been done on the evaluation of the InfoSoc Directive.** The European Commission has relied on a large number of studies dedicated to many aspects of the Directive. These, altogether, created a large information basis for the analysis of the impact of specific rules in Member States, including the impact of diverging implementation and interpretation of optional exceptions and limitations.

As a result, it is possible to observe that despite the relatively large amount of resources spent in collecting information on the implementation of the InfoSoc Directive, little has been done to collect data on the actual effects and impacts of the EU *acquis* on copyright. A few studies have focused on specific sectors, with a view to assessing transaction costs and other costs generated by the fragmentation of existing legislation, but all in all it is very difficult to explore the impact of re-intermediation on the redistribution of revenues along the value chain in a number of sectors. In this respect, the recently launched Fitness Check on the creative content sector (DG GROW) and the sectoral inquiry into the e-commerce sector (DG COMP) are likely to shed more light on the impact of this process on the sustainability of existing business models, as well as on incentives to engage in creative content creation in the years to come.



## 2.4. On implementation gaps

### 2.4.1. 'Internal' coherence: what are the main gaps and fragmentation in the application of the existing EU InfoSoc Directive and related broader framework?

The 'internal coherence' criterion refers to the degree of coherence between the various legal instruments that compose the EU legal framework on copyright. This is different from "effectiveness", since it does not entail any assessment of the extent to which the legal rules achieve their intended objectives.

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

- **absence of clarity** as regards the compatibility of the InfoSoc Directive and IPRED with other legislation, most notably on fundamental rights, data protection, e-commerce;
- **absence of a clear legal framework for the remuneration and compensation of authors and performers**, due to the absence of clear provisions in the InfoSoc Directive;
- **uncertainty as regards the responsibility of online intermediaries**, which have today become central in the distribution of content online, and who are increasingly able to monitor traffic flowing through their servers;
- **absence of clear rules on geo-blocking practices**, characterised by a sound distinction between practices that respond to a lawful and legitimate business need, and practices that should be considered as discriminatory and detrimental to end-users (e.g. the deliberate geo-blocking of service portability);
- **uncertainty over the applicability of private international law** such as on which criteria apply to the determination of the applicable law in the case of copyright infringements occurring online;<sup>312</sup>
- **uncertainty as regards the applicability of the exhaustion principle** to making content available on intangible media, in particular for what concerns borderline cases such as 'download-to-own' (see the *UsedSoft* decision and, to some extent, the *Premier League* decisions of the CJEU);
- **lack of flexibility and adaptability to new uses** (e.g. mass digitisation, text and data mining, e-lending, e-learning, UGC);
- **lack of clarity on the implementation of specific exceptions** (e.g. the exception covering parody, caricature, and pastiche, the exceptions for the purpose of libraries and similar institutions);
- **lack of clear rules on access to justice and collection of evidence** to be used in civil proceedings.

The main sources of fragmentation are summarised below.

- **Divergent definitions on key aspects of copyright law**, including the definition of originality (elaborated by EU case law and based on the 'author's intellectual creation standard'); the definition of derivative works/transformative uses (left to Member States'

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<sup>312</sup> Interestingly, on the assumption that a copyright enforcement action can be brought in each Member State where the infringed work can be accessed, the 'accessibility' criterion recently selected by the CJEU paves the way for a multiplication of courts and applicable national rules.

discretion and increasingly central in the digital environment); the authorship of copyrighted works (left to Member States' discretion and with potential impact on both the demand and supply side of the Internal Market).

- **Divergent implementation and interpretation of exceptions and limitations** across EU Member States, with some countries now even introducing new exceptions not originally envisaged by the InfoSoc Directive. For example, as far as text and data mining is concerned, UK law allows researchers to copy any copyrighted works for the purpose of computational analysis if they have already accessed the copyright work lawfully, without having to obtain additional permission to make the necessary copies from the copyright holder.
- **Limited consideration of the cross-border effects of specific exceptions.** These include *inter alia* the already-mentioned exceptions for private copying, but also the exceptions for teaching and scientific research, and also in relation to certain cases concerning the freedom of panorama exception.
- **Divergent enforcement practices in Member States**, with some countries relying on administrative procedures to counter infringing behaviour, and others relying on codes of conduct and other voluntary measures, and others relying on neither of the two.
- **Different approaches to the remuneration and compensation of authors through private copying levies.** As we already observed, the disparate national treatment of exceptions, as a well as the related levy systems, have so far raised significant barriers to and created distortions of cross-border trade within the Internal Market.

#### 2.4.2. What are the economic and other quantified costs incurred by citizens, society and stakeholders due to these gaps and fragmentation?

There are several sources of costs that can be identified in the case at hand.

- While authors often manage to reduce their transaction costs by relying on collective rights organisations, distributors face in some circumstances **direct costs in the form of substantive compliance costs and transaction costs** due to the need to negotiate licenses on a country-by-country basis with one or more counterparties. The absence of a one-stop shop for licensing in specific sectors is clearly an additional cost that can, over time, discourage creation and circulation of content.
- Against this background, **limited content availability** generated by the territoriality of copyright offerings generates costs (better, foregone opportunities) for end-users: the same applies for losses of consumer surplus generated by limitation of the portability of content access across borders. Portability issues may potentially affect about 5 million Europeans per day (Plum Consulting, 2012). In addition, in the audiovisual sector up to 120 million EU citizens are potentially interested in content available in another Member State, and long-term migrants (13 million European) generate a potential demand for subscription-based cross-border services of between €760 million to €1.61 billion per year (Plum Consulting, 2012). The limited cross-border availability of content can add **costs for end-users in the form of higher retail prices**. This form of market inefficiency limits price competition and as such leads to suboptimal quantities sold on the market.
- Another source of **direct costs is the existing uncertainty** about the rights and obligations of different types of industry players, as well as over-enforcement mechanisms.

- **Inefficiency is generated by a confusing and contradictory interpretation of certain exceptions and limitations, as well as by the interaction between the use of TPMs and available exceptions and limitations.** In particular, to the extent that the current situation leads to the impossibility for libraries to fully engage in e-lending, or for researchers to engage in productive data processing for research and teaching purposes, this will lead to foregone benefits for society as a whole.
- In the era of big data, data-driven innovation and new business models, the **absence of legal certainty on text and data mining can also be hugely detrimental** to the development of new offers and services, which in turn limits benefits to society through a direct negative impact on so-called dynamic efficiency (e.g. innovation and the development of new welfare-enhancing products and services).
- **Furthermore, the lack of a level playing field between 'traditional' distributors and online intermediaries** (especially in the audiovisual sector) can lead to insufficient incentives for the creation of content from the outset, which in turn would translate into a lack of dynamic efficiency. This problem can also account for a lack of adequate funding and exposure for 'niche' content.
- **The existence of dominant positions of specific players, if proven, could lead to unequal bargaining strength and consequently undesirable welfare losses** in the contracts concluded between authors and intermediaries.
- Finally, **the absence of a fully integrated Single Market for creative content dramatically reduces the value end-users derive from Internet access.** This is a direct corollary of the so-called 'Metcalfe's law', which postulates that in an end-to-end network, the value of the network increases exponentially as the number of end-users increases linearly. Likewise, the richer the amount of content that can be circulated among all users in the EU, the greater the value of the EU Digital Single Market as a whole.

It is difficult to estimate these costs in terms of GDP. However, available data sets show that a fully integrated Digital Single Market could contribute between €260 billion and €520 billion to European GDP (European Parliamentary Research Service, 2014)). The long term growth impact of the digital reform effort already undertaken has been estimated to be at above 1%, and further efforts in line with the Digital Agenda for Europe targets are expected to generate an additional 2.1% of GDP growth (Lorenzani & Varga, 2014).

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

**Among the main gaps we identified in Section 2.4.1 above, only a narrow subset could be partly filled if the existing *acquis* were clarified and made more consistent both in terms of interpretation and implementation.** This is perhaps the case for the compatibility of the InfoSoc and IPRED Directives with other legislation, most notably on fundamental rights, data protection and e-commerce, for which non-legislative documents and clarification efforts could probably address some outstanding problems without requiring legislative reform. Similarly, the lack of flexibility and adaptability of exceptions and limitations to new uses (mass digitisation, text and data mining, e-lending, e-learning, UGC) could be partly remedied if, for example, text and data mining were directly included in the scope of the mandatory exception for transient copies. And the lack of clarity on the implementation of specific exceptions (e.g. the

exception covering parody, caricature and pastiche) could be remedied, at least partly, through more coordinated and consistent implementation.

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

## 2.5. Relevance

### 2.5.1. To what extent has the EU legislative framework been able to keep up with technological developments, in particular with the digital transformation?

As already clarified throughout this report, **the EU legislative framework, and in particular the InfoSoc Directive, can be considered increasingly out-dated in light of technological developments:** not only are the exceptions and limitations included in the closed list under Article 5 now increasingly misaligned with technological developments; they also potentially limit the development of welfare-enhancing uses of information. Moreover, enforcement mechanisms outlined in the InfoSoc and IPRED Directives have been largely overtaken by technology, and countries today hardly ever rely on civil litigation to enforce copyright laws.

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

Interestingly, a recent report for the European Commission clearly highlights that text and data mining "is useful to researchers of all kinds, from historians to medical experts, and its methods are relevant to organisations throughout the public and private sectors". In addition, text and data mining lowers research costs, and as such can lower barriers to entry in a number of markets for small and medium-sized enterprises and micro-enterprises. Europe's uncertain legal treatment of text and data mining is even more serious in light of the emerging automation of service industries (automation of thinking), as well as the widespread use of data-driven analytics in the Internet of Things and its industrial applications (Industry 4.0). The

above-mentioned report confirms that European researchers “may be falling behind, especially with regard to researchers in the United States” in this field, and that such a lag “results, at least in part, from the nature of Europe’s laws with regard to copyright, database protection and, perhaps increasingly, data privacy” (European Commission, 2014).

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

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

Section 2.2 above already identified a number of inefficiencies associated with the current inadequacy of the InfoSoc Directive. Generally speaking, such inefficiencies can be divided into the following categories:

- **Productive inefficiency.** Current legislation in the field of copyright increases costs for content producers and distributors, and also limits the availability of content for end-users. In particular, inefficient enforcement limits incentives to produce and distribute new valuable content for right-holders. In addition, current rules do not incentivise those users who would make use of such content to create UGC or to engage in text and data mining based activities. This means that the overall content production is hampered by an unnecessarily complex and restrictive *acquis*, and this might explain differences in the relative performance of the EU *vis-à-vis* its global competitors in specific areas (e.g. as reported by the recent Report on a Commission High Level Group, in the area of text and data mining, in which European researchers seem to be lagging behind their US counterparts, who reportedly benefited from the existence of the more flexible ‘fair use’ doctrine as opposed to the more rigid and still unevenly implemented set of exceptions and limitations existing in the EU-28). Although any attempt to quantify the relative weight of the InfoSoc Directive and related legislation on Europe’s digital content production are necessarily doomed to inaccuracy, there are good reasons to believe that both the production of knowledge (e.g. through exceptions for teaching purposes and text and data mining) and its dissemination (e.g. through clearer and more future-proof rules on panorama exceptions, e-lending) would greatly benefit from the availability of more up-to-date rules, which would couple greater effectiveness in enforcement with more user-friendly rules on content consumption, reuse and transformation.
- **Allocative inefficiency.** This effect refers to the inefficient allocation of resources through the market mechanism. As already mentioned throughout the report, legal fragmentation and limits to the availability of content in the Internal Market fundamentally reduce the value of the Internet for European end-users, because the end-to-end design of the Internet (i.e., the ability of each user to communicate and exchange files with every other user) cannot be fully exploited to share and access all sorts of content. This is, to some extent, also a violation of basic users’ rights as typically included in net neutrality legislation, normally aimed at preserving users’ possibility to access any content, any time, through any device and anywhere (and thus also, inevitably, from any Member State). The untapped consumer and producer surplus brought on by the lack of availability of content and by widespread copyright infringement account for reductions in allocative efficiency that reverberate on the value of digital content available online, and hence also on the value of Internet access for

end-users. Nevertheless, this does not necessarily lead to the conclusion that all price discrimination in the Single Market should be prohibited: as noted throughout this Study, there are several instances of price-discrimination, even those based on geo-blocking practices, which can be considered as welfare-enhancing, not welfare-reducing. The difficulty in the reform exercise consists precisely in singling out welfare-reducing practices and curbing them while treating pro-competitive, welfare-enhancing forms of price discrimination as perfectly viable business solutions.

- **Dynamic inefficiency.** This type of inefficiency refers to the negative impact that an inadequate copyright *acquis* can exert on innovation and the production of new content. Again, typical examples are the dissuasive effects of piracy and ineffective enforcement, and also the impact of current uncertainty and existing legal constraints on fast growing new forms of content production such as UGC and text and data mining based activities. Crucially, the reduction in quantity and quality of content available to end-users can also lead to a reduction in the demand for improved Internet connectivity and bandwidth, and could thus also end up stifling incentives to deploy broadband networks due to a sustained slowdown in demand from end-users. As a matter of fact, greater incentives to deploy ultra-high speed broadband have been attributed by experts not only to a more favourable regulatory treatment (e.g. the absence of network access obligations for broadband networks that characterises the Federal Communications Commission regulatory approach since 2003), but also to greater user demand triggered by greater availability of content of interest for end-users.

Finally, and even more important, it is undeniable that, whatever the negative impact associated with the sources of inefficiency identified, it is only likely to increase over time as the Internet permeates a growing number of activities and carries an even larger share of copyrighted creative content. As already mentioned in the previous Sections, the growth of Internet content markets has been consistently stronger than that of traditional media markets in recent years, and the trend is likely to continue in the coming years. The advent of the Internet of Things and the growing deployment of ultra-fast broadband networks is expected to further boost this trend, leading Internet-based content dissemination, production and consumption to dominate the market in the years to come.

### 3. Summary table

The table below summarises the results of our ex post evaluation on the InfoSoc Directive and its related instruments and is based on four key criteria, namely effectiveness, efficiency, coherence and relevance. Table 5 provides a score from • (lowest) to ••••• (highest) to each evaluation criterion, while the cell on the right end of the table includes a brief illustration of the motivation behind the decision to attribute a specific score.

Table 5. Summary ex-post evaluation

Criterion	Score (1 to 5)	Motivation
Effectiveness	••	<p>Of the four main operational goals pursued by the InfoSoc, only one can be said to have been fully achieved (<b>alignment with international legislation</b>), and even in that case there are exceptions and divergences (e.g. on the three-step test, on the ‘new public’ criterion for hyperlinking).</p> <p>The goal to <b>strengthen copyright and broaden its scope</b> fell short of identifying a suitable enforcement framework, and ended up colliding with equally important policy principles.</p> <p>The specific goal to achieve a <b>fully integrated Internal Market</b> was not fully pursued by the InfoSoc, and this is reflected <b>in the many areas of legislation in which no harmonisation was achieved</b>, from the basic definition of the right (e.g. standard of originality) to the adoption and interpretation of exceptions and limitations.</p> <p><b>Competitiveness-related goals</b> were hampered by the rigidity and uncertainty generated by the system, especially for what concerns exceptions on text and data mining and the overall framework for UGC. The goal of <b>achieving a fair remuneration and compensation</b> for authors and performers was stated but not actively pursued by any specific provision in the InfoSoc Directive and also in most related legislation.</p>
Efficiency	•	<p>Not only the copyright framework is inefficient because it does not achieve its goals in the first place (i.e. <b>lack of intended benefits</b> means very low cost-effectiveness). The framework generates costs that can exert an inhibiting factor for content production, distribution and creation. Specific sources of inefficiency include <b>transaction costs</b> (e.g. having to negotiate licences under 28 different legal regimes) and <b>fragmentation costs</b> (e.g. divergences in the scope of legislation and the failure to implement a consistent set of copyright exceptions and limitations, at least for those that have a significant impact on cross-border activities and create inefficiencies in particular in the case of teaching and research, but also for the viability of new products and services such as social networks, streaming services, ‘online’ libraries, etc.).</p> <p>More generally, inefficiency takes the form of:</p> <ul style="list-style-type: none"> <li>- <b>Productive inefficiency.</b> Current legislation increases costs for content producers and distributors, and limits availability of content for end-users. Inefficient enforcement limits incentives to produce and distribute new valuable content. Current rules do not incentivise users who would make use of such content to create UGC or to engage in text and data mining based activities.</li> </ul>

Criterion	Score (1 to 5)	Motivation
		<ul style="list-style-type: none"> <li>- <b>Allocative inefficiency.</b> The foregone consumer and producer surplus generated by lack of availability of content and by widespread copyright infringement, respectively, constitute reductions of allocative efficiency that reverberate on the value of digital content available online, and hence also on the value of Internet access for end-users.</li> <li>- <b>Dynamic inefficiency.</b> Besides hampering production and consumption in the first place, the reduction in quantity and quality of content available to end-users reverberates on the competitiveness of Europe's Internet markets as a whole. For example, it can lead to lower demand for Internet connectivity, and could therefore end up stifling incentives to deploy broadband networks.</li> </ul> <p>Some instruments, such as the Directives on Orphan Works and Collective Rights Management, are too recent to evaluate in full.</p>
Coherence	•••	<p>While the InfoSoc has achieved an unprecedented level of coherence in the European Union's legislation on copyright and has been complemented by additional instruments (e.g. Orphan Works and Collective Rights Management Directives), several problems remain. In terms of <b>internal coherence</b>, gaps and sources of fragmentation are numerous and range from the absence of common basic definitions to the wide variety of practices in the areas of exceptions and limitations, to the even wider variety of enforcement approaches. Problems have emerged over time also in terms of <b>external coherence</b>: the enforcement provisions contained in the InfoSoc Directive and IPRED have gradually collided with other, equally important EU legal provisions, e.g. the protection of fundamental rights (privacy, freedom to run a business) and the 'mere conduit' principles contained in the e-Commerce Directive.</p>
Relevance	••	<p>Despite its overall importance and relevance as a domain of legislation in the field of content and media, the EU copyright framework is <b>increasingly outdated in light of technological developments</b>. Exceptions and limitations are increasingly misaligned with technological developments, and potentially limit the development of welfare-enhancing uses of information. Enforcement modes foreseen in the InfoSoc Directive and IPRED have been largely surpassed by technology, and countries hardly rely on civil litigation today to enforce copyright laws. Most notably, the absence of certainty as regards a number of exceptions, including the one on text and data mining, is an important gap in the EU <i>acquis</i> on copyright. In summary, the relevance of the overall approach adopted by the InfoSoc Directive and its subsequent legislation would deserve a careful, but urgent, update.</p>



## Selected References and Case Law

### Main references

ADE (2010), *Evaluation of the Intellectual Property Rights Enforcement Strategy in Third Countries*, Final Report, Volume I, European Commission.

AEPO-ARTIS – Association of European Performers’ Organisation (2009), *Performers’ Rights in European Legislation: Situation and Elements for Improvement - Updated Version*, December, Brussels, Belgium.

Anderson, C. (2006), *The Long Tail: Why the future of business is selling less of more*, Hyperion Books, New York.

Barron, A. (2011), “Graduated response à l’Anglaise’: online copyright infringement and the Digital Economy Act 2010”, *Journal of Media Law*, 3(2), p. 305.

BOP Consulting and DotEcon (2015), *International Report on the Comparison of Approaches to Online Copyright Infringement: Final Report*, for the UK Intellectual Property Office.

Borghi, M. and Karapapa, S. (2011), “Non-display uses of copyright works: Google Books and beyond”, *Queen Mary Journal of Intellectual Property*, Vol. 1, No. 1, April.

Borghi, M. and Karapapa, S. (2013), *Copyright and Mass Digitization: A Cross-Jurisdictional Perspective*, Oxford University Press, Oxford.

Charles River Associates (2014), *Economic Analysis of the Territoriality of the Making Available Right in the EU*, for the European Commission.

Clark, G. and Philips, A. (2014), *Inside Book Publishing*, Routledge, London.

Cohen Jehoram, T. (2001), “European Copyright Law – Even More Horizontal”, 32, *IIC*, p. 532.

De Witte, B. (2006), “Non-market values in internal market legislation”, in Shuibhne (ed.), *Regulating the Internal Market*, Edward Elgar, Cheltenham, p. 61.

De Wolf & Partners (2013), *Study on The Application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society (the InfoSoc Directive)*, for the European Commission.

Derclayes, E. (eds.) (2009) *Research Handbook on the Future of EU Copyright*, Edward Elgar, Cheltenham.

Dusollier, S. (2005), “Technology as an Imperative for Regulating Copyright: From the Public Exploitation to the Private Use of the Work”, *European Intellectual Property Review*, 27(6), p. 201.

Ernst & Young (2014), *Creating growth measuring cultural and creative markets in the EU*, Report for GESAC.

European Commission (2014), *Report on ‘Standardisation in the area of innovation and technological development, notably in the field of Text and Data Mining’*, Report from the Expert Group, European Commission.

European Parliamentary Research Service (2014), *Mapping the Cost of Non-Europe 2014-2019*, European Added Value Unit, European Parliament, Brussels.

Ginsburg, J. (1995), “Putting Cars on the ‘Information Superhighways’: Authors, Exploiters and Copyrights in Cyberspace”, 95, *Columbia Law Review*, p. 1466.

- Ginsburg, J. (2000), *From Having Copies to Experiencing Works: The Development of an Access Right in U.S. Copyright Law*, Columbia Law School, Public Law and Legal Theory Working Group.
- Goldstein, P. (1994), *Copyright's Highway: The Law and Lore of Copyright from Gutenberg to the Celestial Jukebox*, Hill & Wang, New York, NY.
- Gomulkiewicz, R.W. (1998), "The License Is the Product: Comments on the Promise of Article 2B for Software and Information Licensing", *Berkeley Tech. L. J.*, Vol. 13, Issue 3, p. 891.
- Griffiths, J. (2014), "The Role of the Court of Justice in the Development of European Union Copyright Law", in Stamatoudi, I. and Torremans, P. (eds.)(2014), *EU Copyright Law. A Commentary*, *Elgar Commentaries series*.
- Handke, C. and Towse, R. (2007), "Economics of Copyright Collectives", *International Review of Intellectual Property and Competition Law*, Vol. 38, No. 8, p. 937.
- Hargreaves, I. (2011), *Digital Opportunity. A Review of Intellectual Property and Growth*, UK Intellectual Property Office, London.
- Hargreaves, I. and Hugenholtz, B. (2013), "Copyright Reform for Growth and Jobs: Modernising the European Copyright Framework", *Lisbon Council Policy Brief*, Issue 13.
- Hart, M. (2002), "The Copyright in the Information Society Directive: An Overview", *24 EIPR* 2, 58, p. 59.
- Helberger, N. and Hugenholtz, P.B. (2007), "No Place Like Home for Making a Copy: Private copying in European copyright law and consumer law", *Berkeley Technology Law Journal*, Vol. 22, No. 3, p. 1061.
- Hugenholtz, P.B. (2012), *Codes of Conduct and Copyright Enforcement in Cyberspace*, Amsterdam Law School Research Paper No. 2012-41, Institute for Information Law Research Paper No. 2012-35.
- Hugenholtz, P.B. (2000a), "Caching and Copyright: The Right of Temporary Copying", *European Intellectual Property Review*, 22(11), p. 482.
- Hugenholtz, P.B. (2000b), "Why the Copyright Directive is Unimportant, and Possibly Invalid", *European Intellectual Property Review*, 22(11), p. 499.
- Hugenholtz, P.B. and Senftleben, M. (2011), "Fair Use in Europe: The Search of Flexibilities", *Institute for Information Law (IVI)*, Vrije Universiteit, Amsterdam.
- Hugenholtz, P.B. (1996), "Adapting copyright to the information superhighway", in Hugenholtz, P.B. (ed.), *The Future of Copyright in a Digital Environment*, Kluwer Law International, The Hague.
- Hughes, J. (2005), "On the Logic of Suing One's Customers and the Dilemma of Infringement-Based Business Models", *Cardozo Arts & Entertainment Law Journal*, Vol. 20, p. 725.
- Husovec, M. (2012), "Injunctions against Innocent Third Parties: The case of Website Blocking", *4 JIPITEC*, 2, para. 116, see at <http://www.jipitec.eu/issues/jipitec-4-2-2013/3745/husovec.pdf>.
- Hussein FCMI, S.N. and Abdul HadiQais, A.H. (2013), "The Impact Of Using Security Protocols In Dedicated Private Network And Virtual Private Network", *International Journal of Scientific and Technology Research*, Vol. 2, Issue 11, p. 1.
- IVIR - Institute for Information Law, University of Amsterdam (2007), *Study on the Implementation and Effect in the Member States' Laws of Directive 2001/29/EC on the Harmonization of*

*Certain Aspects of Copyright and Related Rights in the Information Society*, Final Report for the European Commission.

KEA and Vrije Universiteit Brussel (2012), "Licensing music works and transaction costs in Europe".

KEA and MINES Paris Tech (2010), "Multi-Territory Licensing of Audiovisual Works in the European Union", European Commission.

Koskinen-Olsson, T. and Muikku, J. (2014), *Direct Copyright Revenue Streams in Creative Industries in Finland an Evaluation*, Publication No. 31, Final Report, Finnish Copyright Institute.

Kretschmer, M. (2005), "Artists' earnings and copyright: A review of British and German music industry data in the context of digital technologies", *First Monday*, Vol. 10, No. 1.

Kretschmer, M. (2010), *Private Copying and Fair Compensation: An empirical study of copyright levies in Europe*, Study for the UK Intellectual Property Office.

Kushnir, V. (2005), "Legal and Practical Aspects of Music Licensing for Motion Pictures", *Vanderbilt Journal of Entertainment and Technology Law*, Winter, p. 71.

Labert et al. (2015), *The EU Public Interest Clinic and Wikimedia Present: Extending Freedom of Panorama in Europe*, HEC - NYU Clinic.

Lessig, L. (1996), "The Zones of Cyberspace", *Stanford Law Review*, Vol. 48, No. 5, p. 1408.

Leudijk, A. and Nieuwenhuis, O. (2012), *Statistical, Ecosystems and Competitiveness Analysis of the Media and Content Industries: The Music Industry*, JRC Technical Reports.

Litman, J. (2005), "The Sony Paradox", *Case Western Reserve Law Review*, Vol. 55, No. 4, p. 917.

Lorenzani, D. and Varga, J. (2014), *The Economic Impact of Digital Structural Reforms*, European Economy, Economic Paper No. 529, European Commission.

Luchetta, G. (2013), *The Law and Economics of Intermediaries of Personal Information*, Working Paper available on SSRN at: <http://ssrn.com/abstract=2228358>.

Manara, C. (2012), "Attacking the Money Supply to Fight Against Online Illegal Content?", EDHEC Business School.

Margoni, T. (2014), "The digitisation of cultural heritage: originality, derivative works and (non) original photographs", *Institute for Information Law (IViR)*, University of Amsterdam.

Masnack, M. (2010), "Defining Success: Were the RIAA's Lawsuits a Success or Not?", *Techdirt*, June 7, 2010, <http://www.techdirt.com/articles/20100606/2308559704.shtml>.

Mazziotti, G. (2008), *EU Digital Copyright Law and the End-User*, Springer, Berlin.

Mazziotti, G. (2011), "New Licensing Models for Online Music Services in the European Union: From Collective to Customized Management", *Columbia Journal of Law and the Arts*, Volume 34(4), p. 757.

Mazziotti, G. (2013), *Copyright in the EU Digital Single Market*, CEPS Report, Brussels.

Minero, G. (2014), "The Term Directive", in Stamatoudi, I. and Torremans, P. (eds.), "EU Copyright Law: A Commentary", *Elgar Commentaries series*, p. 248.

Oliver & Ohlbaum Associates (2013), *The Internet and the Creative Industries: Measuring Growth within a Changing Sector Ecology*, A report for Google.

Oxera (2011), *Is there a case for copyright levies? An Economic impact analysis*, Report for Nokia.

Picker, R. (2009), *Online Advertising, Identity and Privacy*, John M. Olin Law & Economics Working Paper No. 475.

Plum Consulting (2012), *The economic potential of cross-border pay-to-view and listen audiovisual media services*, for the European Commission.

Poort, J.P. and Leenheer, J. (2012), *File sharing 2@12: Downloading from illegal sources in the Netherlands*, IViR & CentERdata.

RAND (2012), *Measuring IPR infringements in the internal market. Development of a new approach to estimating the impact of infringements on sales*.

Ratliff, J. and Rubinfeld, D. (2010), "Online Advertising: Defining Relevant Markets", *Journal of Competition Law and Economics*, Vol. 6., No. 3., p. 653.

RBB Economics and Value Partners (2009), *The benefits of territorial exclusivity in the European audio-visual industry*.

Renda, A. (2011), *Law and Economics in the RIA World*, Intersentia, Amsterdam

Ricolfi, M. (2002), *Comunicazione al pubblico e distribuzione*, Annali Italiani di Diritto d'Autore (AIDA).

Rodríguez Pardo, J. (2003), *Copyright and Multimedia*, Kluwer Law International, The Hague.

Rosati, E. (2011), "Originality in a work, or a work of originality: the effects of the Infopaq decision", *European Intellectual Property Review*, p. 746.

Rudolph, J.W. (2005), *The Administration of Reprographic Rights and the Establishment and Role of Reproduction Rights Organizations*, WIPO National Seminar on Copyright, Related Rights, and Collective Management, WIPO/CR/KRT/05/6.

SAA (2015), *SAA White Paper: Audiovisual authors' rights and remuneration in Europe*, Society of Audiovisual Authors (SAA).

Simon, J.P. (2012a), *The Dynamics of the Media and Content Industries: A Synthesis*, JRC Scientific and Policy Reports.

Simon, J.P. (2012b), *Changing Modes of Asset Management: IPR and Copyright in the Digital Age*, JRC Technical Reports.

Simon, J.P. and de Prato, G. (2012), *Statistical, Ecosystems and Competitiveness Analysis of the Media and Content Industries: The Publishing Industry*, JRC Technical Reports.

Strong, W.S. (2003), "The Legal Framework: Copyright & Trademark", in Kasdorf, W.E. (ed.), *The Columbia Guide to Digital Publishing*, Columbia University Press, New York.

Taleb, N. (2007), *The Black Swan: The Impact of the Highly Improbable*, Random House, New York.

Ullrich, H. (2003), "Legal Protection of Innovative Technologies: Property or Policy?", in Grandstrand, O. (ed.), *Economics, Law and Intellectual Property: Seeking Strategies for Research and Teaching in a Developing Field*, Kluwer Academic Publishers, Boston, p. 439.

Ullrich, H. (2004), "Harmony and unity of European intellectual property protection", in Bently, L. and Vaver, D. (eds.) (2004), *Intellectual Property in the New Millennium: Essays in Honour of William R. Cornish*, Cambridge University Press, Cambridge, p. 20.

Vinje, T. (2000), "Should We Begin Digging Copyright's Grave?", *EIPR*, Vol. 22, Issue 12, p. 551.

Weatherill, S. (1997), *EC Consumer Law and Policy*, Longman, London & New York.

Westkamp, G. (2007), *The Implementation of Directive 2001/29/EC in the Member States*, Part II, Queen Mary Intellectual Property Research Institute, London.

Witten, I. and Frank, E. (2005), *Data Mining: Practical Machine Learning Tools and Techniques*, Elsevier, San Francisco.

Xalabarder, R. (2014), "The Remunerated Statutory Limitation for News Aggregation and Search Engines Proposed by the Spanish government - Its Compliance with International and EU Law", *IN3 Working Paper Series*, Universitat Oberta de Catalunya.

Younison (2010), *Transparency & Accountability in Collective Rights Management*, Facts and Figures, August.

### Other references

Barlow, J.P. (1994), "The Economy of Ideas: Selling Wine without Bottles", 2.03 *Wired* 84.

Digital Citizen Alliance (2014), "Good Money Gone Bad", February, available at: <http://media.digitalcitizensactionalliance.org/314A5A5A9ABBBBC5E3BD824CF47C46EF4B9D3A76/4af7db7f-03e7-49cb-aeb8-ad0671a4e1c7.pdf>.

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

Edxus Group (2013), "Digitalisation of Education will Result in Fifteen fold Growth for e-Learning Market over the next decade", available at: <http://edxusgroup.com/digitalisation-of-education-will-result-in-fifteen-fold-growth-for-e-learning-market-over-the-next-decade/>.

Jobs, S., "Thoughts on Music", at <http://www.apple.com/hotnews/thoughtsonmusic/>.

Madiega, T. (2015), "Digital Single Market and geo-blocking", European Parliamentary Research Service, available at: <http://epthinktank.eu/2015/05/13/digital-single-market-and-geo-blocking/>.

Masnack, M. (2010), "RIAA Spent \$17.6 Million in Lawsuits ... To Get \$391,000 in Settlements?", *Techdirt*, available at: <http://www.techdirt.com/articles/20100713/17400810200.shtml>.

McCreevy, C. (European Commissioner for Internal Market and Services) (2005), Address to the European-American Business Council/Business Software Alliance Conference on Digital Rights' Management, High level Industry Seminar/Global Industry Roundtable on Levies and DRMs, Brussels, 12 October.

Press Association (2015), "Music groups win court battle over private copying of CDs", *The Guardian*, Friday 19 June, available at:

<http://www.theguardian.com/business/2015/jun/19/music-groups-win-court-battle-private-copying-cds>

Steadman, I. (2013), "Icelandic court declares WikiLeaks donation ban 'unlawful'", *Wired*, available at: [www.wired.co.uk/news/archive/2013-04/26/wikileaks-wins-visa-case](http://www.wired.co.uk/news/archive/2013-04/26/wikileaks-wins-visa-case).

VICE News (2015), "Why Artists Don't Make Money - The Business of Life (Episode 3)", available at: <http://news.vice.com/video/the-value-of-creativity-the-business-of-life-episode-3>, last accessed June 2015.

Weatherley, M. (MP Intellectual Property Adviser to the Prime Minister) (2014), “‘Follow The Money’: Financial Options To Assist In The Battle Against Online IP Piracy”, Discussion Paper. Available at:

[http://www.olswang.com/media/48204227/follow\\_the\\_money\\_financial\\_options\\_to\\_assist\\_in\\_the\\_battle\\_against\\_online\\_ip\\_piracy.pdf](http://www.olswang.com/media/48204227/follow_the_money_financial_options_to_assist_in_the_battle_against_online_ip_piracy.pdf)

### **Official documents**

Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994. Available at:

[https://www.wto.org/english/tratop\\_e/trips\\_e/t\\_agm0\\_e.htm](https://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm)

Belgian Law on Copyright and Neighboring Rights of June 30, 1994, as amended by the Law of April 3, 1995.

Berne Convention for the Protection of Literary and Artistic Works, lastly amended on 28 September 1979 available at: [http://www.wipo.int/treaties/en/text.jsp?file\\_id=283698](http://www.wipo.int/treaties/en/text.jsp?file_id=283698).

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

Commission of the European Communities, Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, The Management of Copyright and Related Rights in the Internal Market, COM(2004)0261 final.

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

Commission of the European Communities, First evaluation of Directive 96/9/EC on the legal protection of databases, DG Internal Market and Services Working Paper, 12 December 2005.

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

Commission of the European Communities, Green Paper. Copyright and Related Rights in the Information Society, Brussels, 19 July 1995, COM (95) 382 final.

Commission Recommendation on collective cross-border management of copyright and related rights for legitimate online music services of 18 October 2005, OJ L 276, 21 October 2005.

Commission Staff Working Document, Impact Assessment reforming cross-border collective management of copyright and related rights for legitimate online music services, Brussels 11 October 2005.

Common Position (EC) 48/2000 of 28 September 2000, OJ C 344, 1 December 2000.

Communication from the Commission of 20.11.1996, Follow-up to the Green Paper on Copyright and Related Rights in the Information Society, COM(96) 586 final.

Communication from the Commission, A single market for intellectual property rights, COM(2011)287 final.

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

Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ L 346, 27 November 1992.

Council Directive 93/83/EEC of 27 September 1993 on the co-ordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJ L 248, 6 October 1993.

Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights, OJ L 290, 24 November 1993.

Council of Europe, The European Convention on Human Rights, Rome, 4 November 1950, and its Five Protocols, Paris, 20 March 1952.

Council Regulation (EC) 6/2002 of 12 December 2001 on Community designs, OJ L 3, 5 January 2002.

Council Regulation (EC) 207/2009 of 26 February 2009 on the Community trade mark (replacing Council Regulation 40/94 of 20 December 1993), OJ L 78, 24 March 2009.

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

DG INFSO and DG MARKT (2009), Creating Content in a European Digital Single Market: Challenges for the Future, A Reflection Document.

Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178, 17 July 2000. (Referred to as 'Directive on e-Commerce Directive'.)

Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society OJ L 167, 22 June 2001. (Referred to as 'InfoSoc Directive')

Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art, OJ L 272, 13 October 2001.

Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities. (Referred to as 'Access Directive'.)

Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services, OJ L 337/37. (Referred to as 'Authorisation Directive'.)

Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector, OJ L201/37. (Referred to as 'e-Privacy Directive'.)

Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ L 195, 2 June 2004. (Referred to as 'IPRED'.)

Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376, 27 December 2006. (Referred to as 'Services Directive'.)

Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2008 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services. (Referred to as 'Framework Directive'.)

Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs, OJ L 111, 5 May 2009 (which replaced Directive 91/250/EEC). (Referred to as 'Software Directive'.)

Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights, OJ L 265, 11 October 2011. (Referred to as 'Term Directive'.)

Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, OJ L 299, 27 October 2012. (Referred to as 'Orphan works Directive'.)

Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, OJ L 84, 20 March 2014.

Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L281/31, 23 November 1995. (Referred to as 'Data protection Directive'.)

Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ L 077, 27 March 1996. (Referred to as 'Database Directive')

Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access, OJ, L 320, 28 November 1998.

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

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

European Commission (2007), Report to the Council, the European Parliament, and the Economic and Social Committee on the Application of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, Commission Staff Working Document, SEC(2007)1556.

European Commission (2010), Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Agenda for Europe, COM(2010)245 final.

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

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



European Commission (2012), Impact Assessment Accompanying the Document Proposal for a Directive of the European Parliament and of the Council on Collective Management of Copyright and Related Rights and Multi-territorial Licensing of Rights in Musical Works for Online Uses in the Internal Market, SWD(2012)2014 final.

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

[http://ec.europa.eu/internal\\_market/consultations/2013/copyright-rules/docs/consultation-document\\_en.pdf](http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/consultation-document_en.pdf).

European Commission (2014), Press Release "Antitrust: Commission investigates restrictions affecting cross border provision of pay TV services," 13 January, available at:

[http://europa.eu/rapid/press-release\\_IP-14-15\\_en.htm](http://europa.eu/rapid/press-release_IP-14-15_en.htm).

European Commission (2014), Report on the responses to the Public Consultation on the Review of the EU Copyright Rules, available at:

[http://ec.europa.eu/internal\\_market/consultations/2013/copyright-rules/docs/contributions/consultation-report\\_en.pdf](http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/contributions/consultation-report_en.pdf).

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

European Commission Legal Advisory Board (LAB), Commentaire du Legal Advisory Board sur la Communication de la Commission du 20 novembre 1996 : Suivi du Livre vert "Le droit d'auteur et les droits voisins dans la société de l'information" sous l'éclairage des travaux de la Conférence diplomatique de l'OMPI (WIPO) de décembre 1996. Available (in French) at: <http://www.echo.lu/legal/fr/proprint/labcomment.html>.

European Commission, MARKT/ZH D(2011), Public Hearing on Directive 2004/48/EC and the challenges posed by the digital environment, Brussels, 07 June 2011, available at: [http://ec.europa.eu/internal\\_market/iprenforcement/docs/conference20110607/hearing-report\\_en.pdf](http://ec.europa.eu/internal_market/iprenforcement/docs/conference20110607/hearing-report_en.pdf).

European Observatory on Counterfeiting and Piracy, Injunctions in Intellectual Property Rights, available at: [http://ec.europa.eu/internal\\_market/iprenforcement/docs/injunctions\\_en.pdf](http://ec.europa.eu/internal_market/iprenforcement/docs/injunctions_en.pdf).

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

European Parliament (2010), Committee on Legal Affairs, Working Group on Copyright Territoriality, Collective Management and Remuneration, 15 September.

European Parliament (2011), Committee on Legal Affairs, Working Group on Copyright, Working Document: Copyright in the Music and Audiovisual Sectors, June.

European Parliament (2014), Committee on Legal Affairs, Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States, Study, January.

European Patent Office and Office for Harmonization in the Internal Market (2013), Intellectual property rights intensive industries: contribution to economic performance and employment in the European Union.

Final Report of the High Level Group on Digital Rights Management, 2004, available at: [http://ec.europa.eu/information\\_society/eeurope/2005/all\\_about/digital\\_rights\\_man/doc/040709\\_hlg\\_drm\\_2nd\\_meeting\\_final\\_report.pdf](http://ec.europa.eu/information_society/eeurope/2005/all_about/digital_rights_man/doc/040709_hlg_drm_2nd_meeting_final_report.pdf).

German Copyright Act of 9 September 1965 (Federal Law Gazette Part I, p. 1273), as last amended by Article 8 of the Act of 1 October 2013 (Federal Law Gazette Part I, p. 3714).

HADOPI (2014), "Réponse graduée – Les chiffres clés", June, available at:

<http://www.hadopi.fr/sites/default/files/ChiffresRGjuin14.pdf>

HM Government (2012), Modernising Copyright: A modern, robust and flexible framework, UK Intellectual Property Office, 20 December. Available at:

<http://www.allpartywritersgroup.co.uk/Documents/PDF/Modernising-copyright.aspx>

Impact Assessment accompanying the Proposal for a Council Directive amending Council Directive 2006/116/EC as regards the terms of protection of copyright and related rights., SEC(2008)2287.

Italian Law No. 633 of April 22, 1941, for the Protection of Copyright and Neighboring Rights (as last amended by Legislative Decree No. 154 of May 26, 1997).

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

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

JURI Committee (2011), Copyright in the Music and Audiovisual Sectors, Working Document, European Parliament, 29 June.

French Law 2009/669 of 12 June 2009, amended on 15 September 2009, *Journal officiel de la République française*.

Proposal for a European Parliament and Council Directive on the harmonization of certain aspects of copyright and related rights in the Information Society, COM (97) of 10 December 1997, OJ, C 108, 7 April 1998.

Regulation (EU) 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351/1, 20 December 2012.

Regulation 864/2007 on the law applicable to non-contractual obligations (Rome II), L 199/40, 31 July 2007.

Spanish Revised Law on Intellectual Property, regularizing, clarifying and harmonizing the Applicable Statutory Provisions (approved by Royal Legislative Decree No. 1/1996 of April 12, 1996).

Strömbäck, P. (2015), Interview with Mathieu Moreuil, Head of EU Affairs at Premier League, Netopia, available at: <http://www.netopia.eu/2015/05/04/be-careful-what-you-wish-sports-on-the-dsm/>.

The European Parliament, the Council and the Commission, Charter of Fundamental Rights of the European Union, 2007/C 303/01.

U.S. Department of Commerce, Patent and Trademark Office, Information Infrastructure Task Force, Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights, available at: [www.uspto.gov/web/offices/com/doc/ipnij/front.pdf](http://www.uspto.gov/web/offices/com/doc/ipnij/front.pdf).

Vitorino, A. (2013), Recommendations Resulting from the Mediation on Private Copying and Reprographic Levies, available at:

[http://ec.europa.eu/internal\\_market/copyright/docs/levy\\_reform/130131\\_levies-vitorino-recommendations\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/levy_reform/130131_levies-vitorino-recommendations_en.pdf).

WIPO -- World Intellectual Protection Organisation (1980), Glossary of Terms of the Law of Copyright and Neighboring Rights, World Intellectual Property Organization.

WIPO - World Intellectual Protection Organisation (2002), Guide on Surveying the Economic Contribution of the Copyright-Based Industries, Geneva, Switzerland.

WIPO - World Intellectual Protection Organisation (2013), International Survey on Private Copying Law & Practice 2013, Geneva, Switzerland.

WIPO -- World Intellectual Protection Organisation, Managing Intellectual Property in the Book Publishing Industry, Creative Industries – Booklet No. 1.

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

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

#### **EU case law**

C-117/13, *Technische Universität Darmstadt v. Eugen Ulmer* (2014)

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

C-135/10, *Società Consortile Fonografici (SCF) v. Marco Del Corso* (2012)

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

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

C-162/10, *Phonographic Performance (Ireland) Limited v. Ireland* (2012)

C-170/12, *Peter Pinckney v. KDG Mediatech AG* (2013)

C-173/11, *Football Dataco Ltd v. Sportradar GmbH* (2012)

C-192/04, *Lagardère Active Broadcast v. Société pour la Perception de la Remuneration Equitable (SPRE) and Others* (2005)

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

C-245/00, *Stichting ter Exploitatie van Naburige Rechten (SENA) v. Nederlandse Omroep Stichting (NOS)* (2006)

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

C-275/06, *Promusicae v. Telefonica* (2008)

C-277/10, *Martin Luksan v. Petrus van der Let* (2012)

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

C-302/10, *Infopaq International A/S v. Danske Dagblades Forening* (2012)

C-306/05, *SGAE v. Rafael Hoteles SA* (2006)

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

- C-324/09, *L'Oréal v. eBay International* (2011)
- C-341/87, *EMI Electrola GmbH v. Patricia Im- und Export and others* (1989)
- C-348/13, *Bestwater International GmbH v. Michael Mebes* (2014)
- C-351/12, *OSA v. Lecebne lazne Marianske Lazne* (2014)
- C-360/10, *SABAM v. Netlog* (2012)
- C-360/13, *Public Relations Consultants Association v. Newspaper Licensing Agency and Others* (2014)
- C-387/12, *Hi Hotel v. Uwe Spoering* (2014)
- C-393/09, *BSA v. Ministry of Culture of the Czech Republic* (2011)
- C-403/08, *Football Association Premier League Ltd and Others v. QC Leisure and Others* (2012), referred to as '*Premier League*'
- C-419/13, *Art & Allposters BV v. Stichting Pictoright* (2015)
- C-429/08, *Karen Murphy v. Media Protection Services Ltd* (2011)
- C-435/12, *ACI Adam v. Stichting de Thuiskopie* (2014)
- C-435/12, *Copydan v. Nokia Danmark* (2015)
- C-462/09, *Stichting de Thuiskopie v. Opus Supplies Deutschland* (2011)
- C-463/12, *Copydan Bandkopi*
- C-466/12, *Svensson v. Retriever Sverige AB* (2014), referred to as '*Svensson*'
- C-467/08, *Padawan SL v. SGAE* (2010)
- C-479/04, *Laserdisken ApS v. Kulturministeriet* (2006)
- C-5/08 2009, *Danske Dagblades Forening v. Infopaq Sverige AB* (2009)
- C-5/08, *Infopaq International A/S v. Danske Dagblades Forening* (2009), referred to as '*Infopaq*'
- C-521/11, *Amazon v. Austro Mechana* (2013)
- C-607/11, *ITV Broadcasting Ltd v. CatchupTV Ltd* (2013)
- C-62/79, *Coditel and others v. Ciné Vog Films and others* (1980) ECR 881
- C-70/10, *Scarlet Extended v. SABAM* (2011)
- C-78/70, *Deutsche Grammophon v. Metro-SB-Grossmarkte*, (1971) ECR 487
- Joined Cases C-236/08 and C-238-08, *Google France & Google v. Louis Vuitton and Others* (2010)
- Joined Cases C-457/11 to C-460/11, *VG Wort v. Kyocera and Others* (2013)
- Joined cases C-509/09 and C-161/10, *eDate Advertising GmbH v. X and Oliver Martinez* (2011)

#### **Other case law**

- C-2007/AR/1730, *Google Inc v. Copiepresse* (2011), Court of Appeal 9th Chamber, Brussels

## Annex A: National implementation of selected copyright exceptions and limitations in a sample of Member States

**Table 6. Transient and incidental copies (Article 5(1))**

France	Germany	Ireland	Italy	Poland	UK
Formulation similar to the InfoSoc Directive	Formulation similar to the InfoSoc Directive	Formulation similar to the InfoSoc Directive	Formulation similar to the InfoSoc Directive	Formulation similar to the InfoSoc Directive	Formulation similar to the InfoSoc Directive

*Sources: Authors' own elaboration on Queen Mary (2007) and national legislation.*

**Table 7. Three-step test (Article 5(5))**

France	Germany	Ireland	Italy	Poland	UK
Implemented	Not implemented	Not implemented	Implemented	A two-step test (without reference to certain special uses, i.e. the first step) is in force	Not implemented
The test applies to copyright, related rights, and 'sui generis' databases	The test is addressed to the legislator only	The test is incorporated in a fair dealing test based on the 'unreasonable prejudice' principle (prejudice to the right-holder)	The test applies to copyright and related rights	As the list of exceptions and limitations is closed, also the third step is assumed to be in force	The test is addressed to the legislator only
The test is adopted in judicial revisions of exceptions and limitations	The test is recognised as an instrument in judicial revisions				It cannot be used as a means to introduce 're-exception' to the benefit of right-holders

*Sources: Authors' own elaboration on Queen Mary (2007) and national legislation.*

**Table 8. Libraries, educational establishments, archives and museums (Article 5(2)(c))**

France	Germany	Ireland	Italy	Poland	UK
The exception enables publicly accessible libraries, museums and archives to perform acts of reproduction for preservation and on-site consultation without direct or indirect commercial purposes	No specific implementation	No specific implementation	Reprographic reproductions made by public and scholastic libraries, museums and public archives for their own services and without direct or indirect commercial purposes is permitted	Research centres as well as information and documentation centres may make single, short copies of fragments of copyrighted published works under the 'paper reproduction' exception. Fair remuneration is required if these copies are made available for payment	Libraries (publicly accessible or part of an educational establishment), archives and museums can make copies of all types of works permanently included in their collections in order to preserve or replace works or to supply them to other libraries to replace discarded, lost or destroyed works without any commercial advantage
The exception applies to copyright and related rights	The reproduction and distribution, for non-commercial purposes, of works of art and of photographs, in catalogues published by public libraries, museums or educational establishments in connection with a public exhibition or for the purpose of documentation of a collection is permitted	Copying (analogue and digital) in educational establishments (i.e. schools, not universities) made by persons giving or receiving instructions (or by a third party on behalf of the privileged persons) is covered by very detailed provisions	In public libraries, levies apply	Research and educational institutions are allowed, for teaching purposes or in order to conduct their own research, to use published works in original and in translation, and to make copies of fragments from the disseminated work for the same purpose	This exception is subject to several conditions. For instance: the work should not be available for loan to the public; it is not reasonably practicable to purchase a copy of the work; libraries, archives and museums are not conducted for profit
The exception does not apply to education establishments	The reproduction of works for inclusion into 'own' archive is covered by the private copying exception. This reproduction is allowed only on paper or similar medium. Archive must not be accessible by third parties and not intended for direct or indirect commercial purposes	Libraries and archives (and universities) can make copies only if they act on behalf of a person fulfilling the requirement of research and private study (without 'unreasonable prejudice' to the right-holder). Online delivery is possible as long as libraries and archives act as agents supplying works to other persons covered by exceptions and limitations	Digital copying is explicitly excluded from the scope of this exception	Libraries, archives and schools may prepare or order the preparation of single copies of disseminated works for the purpose of completing, maintaining or preserving their collections and for making them available free of charge	Any contract term which prevents or restricts making these copies is unenforceable

France	Germany	Ireland	Italy	Poland	UK
		Libraries and archives can make copies for preservation purposes or to replace lost works (which cannot be purchased) in other libraries or archives		No explicit restriction to non-commercial uses	Librarians or archivists can make copies (of a reasonable portion) of all types of published copyrighted works on behalf of other persons for commercial purposes, provided that such persons fulfilled the requirements for research and private study for non-commercial uses
		Uses by libraries and archives are subject to ministerial regulations that may impose specific provisions for different libraries and archives		The exception does not apply to museums	
		The exceptions listed above do not apply to museums			

*Sources: Authors' own elaboration on Queen Mary (2007), De Wolf (2013) and national legislation.*

**Table 9. Libraries, educational establishments, archives, and museums (research or private study, Article 5(3)(n))**

France	Germany	Ireland	Italy	Poland	UK
No specific implementation	The exception is limited to dedicated electronic terminals in libraries, museums and archives, for private use and research, without any commercial purpose	The exception applies only to copying and does not cover making available works on dedicated terminals	Allows communication or making available to individual members of the public for purposes of research or private study by dedicated terminals on the premises of publicly accessible libraries, educational establishments, museums or archives	Libraries, archives and schools may make available without charge copies of disseminated works or make their collections available for research or study purposes using terminals located in their premises	Educational establishments, libraries, archives and museums are permitted to offer access to copyrighted works and other subject matter on their premises at dedicated terminals
The exception applies only to establishments in charge of the legal deposit of works (e.g. National Library)	Right-holders may claim reasonable compensation to be administered by collecting societies	The exception allows also the showing or performance of sound recordings, films, broadcast or cable programmes before a school audience for purposes of instruction	Copyrighted works should be included in the collections of these establishments	The exception is not limited to individual members of the public	Works have to be lawfully acquired by the institution
The exception applies only to authorised researchers	The number of copies made simultaneously available cannot exceed the number of copies owned by the concerned institution	Any use for research and private studies should not lead to 'unreasonable prejudice' for the right-holder. Hence, right-holders establishing a licensing scheme may claim for compensation	Copyrighted works should not be subject to purchase or licensing terms for these uses	The exception applies also to work subject to purchase or licensing terms for these uses	Works are not subject to purchase or licensing terms for these uses
The exception applies to copyright and related rights, and database 'sui generis' rights					Works have to be communicated or made available to individual members of the public for the purposes of research or private study
Nonetheless, on-site consultation is also covered by the exceptions on reproduction made by libraries, museum and archives					

Sources: Authors' own elaboration on Queen Mary (2007), De Wolf (2013) and national legislation.



Table 10. Teaching or scientific research (Article 5(3)(a))

France	Germany	Ireland	Italy	Poland	UK
The exception allows communication or reproduction of excerpts of works for the purpose of illustration for teaching or research	No specific implementation	No specific implementation	No specific implementation	Disseminated works (in original or in translation) can be used by research and educational institutions for teaching and research purposes. Making copies of fragments of disseminated works is permitted	Fair dealing with a work for the sole purpose of illustration for instruction does not infringe copyright, provided that: it is for non-commercial purposes; it is made by a person giving or receiving instruction (or preparing for giving or receiving instruction); and it is accompanied by a sufficient acknowledgement (if possible)
Works made for educational purposes, sheet music, and digital editions of literary works are excluded	Making available works to the public for the purpose of illustration, teaching, and scientific research for non-commercial purposes is permitted	Partially covered by exception for educational establishments and for research or private studies purposes	This exception is included in the quotation exception	The full name of the author of the work and the source, when it is possible, should be indicated	Any contract term which prevents or restricts these uses is unenforceable
The public can include only pupils, students, teachers or researchers	The exception is limited to small parts of works, small works and single contributions to journals and newspapers		The exception allows abridgment, quotation, communication or reproduction of excerpts of works for the purpose of illustration for teaching or for scientific research and without commercial purposes	The purpose of illustration is not mentioned	A recording of a broadcast, or a copy of such a recording, may be made by or on behalf of an educational establishment for the educational purposes of that establishment without infringing copyright, provided that: the educational purposes are non-commercial; and it is accompanied by a sufficient acknowledgement (if possible)

France	Germany	Ireland	Italy	Poland	UK
No commercial exploitation is possible	The public must include a limited number of students or scientists (limited access)		The making available on the Internet is permitted only for didactic or scientific uses and only for certain types of works (music works and pictures at low resolution or low quality)	There is no reference to non-commercial purposes	The recording of a broadcast can be communicated by or on behalf of the educational establishment to its pupils or staff also outside the premises of the establishment, if that communication is made by means of a secure electronic network accessible only by the establishment's pupils and staff
Right-holders are entitled to receive fair compensation	The acts of reproduction connected to the making available of rights are allowed		The purpose of illustration is mandatory also for scientific research		The recording of a broadcast is not covered by this exception when licensing agreements are available
The exception applies to copyright and related rights, and database sui generis rights	The purpose of illustration is not mandatory for scientific research				The copying of extracts (up to 5%) of a relevant work by or on behalf of an educational establishment does not infringe copyright, provided that: the copy is made for the purposes of instruction for a non-commercial purpose; and it is accompanied by a sufficient acknowledgement (if possible)
The purpose of illustration is mandatory also for scientific research	Right-holders are entitled to receive fair compensation				The copy of the extract can be communicated by or on behalf of the educational establishment to its pupils or staff also outside the premises of the establishment, if that communication is made by means of a secure electronic network accessible only by the establishment's pupils and staff

France	Germany	Ireland	Italy	Poland	UK
The exception is further regulated by sectoral agreements	Reproduction for uses in schools and educational establishments (excluding universities) is permitted under the private copying exception				The copying activity is not covered by this exception when licensing agreements are available as long as these agreements allow to copy at least 5% of the work
					These exceptions apply to copyright and related rights

*Sources: Authors' own elaboration on Queen Mary (2007) and national legislation.*

**Table 11. Reporting of current events (Article 5(3)(c))**

France	Germany	Ireland	Italy	Poland	UK
No specific implementation	Broadcast commentaries and newspaper articles may be reproduced in newspapers and communicated to the public if they concern current political, economic or religious issues, unless this use has been reserved/prohibited	No specific implementation	The exception allows making copies and communication to the public of articles published in magazines or newspapers as well as of articles broadcast or made available to the public and other subject-matter of the same character	Press, radio and television may disseminate already disseminated reports on current events, updates on political, economic or religious issues (unless their further dissemination is prohibited), current statements and reporter's photographs, short excerpts of the works listed above, reviews of publications and disseminated works, speeches delivered at public meetings and hearings, brief summaries of disseminated works	No specific implementation
Press reviews are permitted	Authors are entitled to a fair remuneration to be administered by collecting societies in case reproduction goes beyond a short part of the article	Fair dealing applies to quotations for purposes of criticism and review	The exception only applies with respect to their uses in other magazines or newspapers or to be broadcast in news programmes	Fair remuneration should be paid to authors of updates on political, economic or religious issues and current statements and reporter's photographs	The exception allows the use of works for the purpose of criticism or review of that or another work or a performance of a work provided that there is acknowledgement and that the work has been made available to the public
The exception allows also whole or partial reproduction for strictly limited information purposes of a work of graphical, plastic or architectural art. News reports cannot be reproduced.	Copyrighted works can be used in connection with the reporting of current events by broadcasting institutions and by press for information purposes	Uses cannot lead to an 'unreasonable prejudice' for the right-holder	The limitations does not apply if these uses are expressly reserved	Works made available during current events can be quoted in reports of current events for informational purposes and without remuneration	Based on public interest also the publication of non-published works may be allowed

France	Germany	Ireland	Italy	Poland	UK
The author's name and the source have to be indicated	The author's name and the source have to be indicated	The source is required	Source, date and the author's name need to be indicated	The full name of the author of the work and the source, when it is possible, should be indicated	The source should be indicated except for cases of news reporting where such acknowledgement would be impossible
			The exception allows reproduction or communication to the public of works or protected subject matter made during current events for the purposes of reporting current events and to the extent justified by informative purposes		
			Source and the author's name need to be indicated		

Sources: Authors' own elaboration on Queen Mary (2007) and national legislation.

Table 12. Quotations (Article 5(3)(d))

France	Germany	Ireland	Italy	Poland	UK
The exception allows short quotations of lawfully divulged works, justified by the critical, polemic, pedagogical, scientific, or informational nature of the work where they are incorporated	The exception allows quotations for the illustration of the content of the quoted, published work	Quotations including a non-substantial part of the work do not infringe copyright	The exception allows quotations, abridgments or reproductions of fragments or parts of a work for the purpose of criticism or discussion	Fragments from disseminated works or minor works in full can be quoted in independent works to the extent justified by explanation, critical analysis, teaching or requirements of a certain creative activity	The exception allows the use of a quotation from a work made available to the public (in compliance with fair dealing), for criticism or review or other purposes and to the extent that the quotation is no longer than what is required by the specific purpose for which it is used
Short quotations generally cannot involve works of visual arts	For musical works the quotation is limited to a few passages	Fair dealing applies to quotations for the purpose of criticism or review	These acts should not conflict with the commercial exploitation of the work	The full name of the author of the work and the source, when it is possible, should be indicated	The quotation should be accompanied by sufficient acknowledgement
	The source should be indicated	The source should be indicated	The exception applies also to purposes of illustration in teaching or research activities having a non-commercial nature		Any contract term which prevents or restricts quotations is unenforceable
			Quotations, abridgments or reproduction have to be accompanied by a mention of the title of the work, the names of the authors, the publisher, the translators (if any)		The exception applies to copyright and related rights

Sources: Authors' own elaboration on Queen Mary (2007), De Wolf (2013) and national legislation.

**Table 13. Caricature, parody or pastiche**

France	Germany	Ireland	Italy	Poland	UK
Caricatures, parodies and pastiches are permitted	Parodies and caricatures are possible and can be based on the free use of another work as long as they do not constitute reproductions or adaptations of the original work	No specific implementation	No specific implementation	No specific implementation	The exception enables (in compliance with fair dealing) uses for the purposes of caricature, parody or pastiche
		Fair dealing applies to caricatures and pastiches for the purpose of criticism or review	Partially covered by the quotations exception, provided it does not conflict with a normal exploitation of the work	Partially covered by the quotations exception in the passage referring to quotations to the extent required by a certain creative activity	Any contract term which prevents or restricts uses for the purposes of caricature, parody or pastiche is unenforceable
		Parodies and caricature are possible as long as they do not use a substantial part of the original work they are based on	Partially covered by the fundamental right of 'freedom of expression' enshrined in Article 21 of the Italian Constitution		The exception applies to copyright and related rights

Sources: Authors' own elaboration on *Queen Mary* (2007), *De Wolf* (2013) and national legislation.

**Table 14. Freedom of panorama (Article 5(3)(h))**

France	Germany	Ireland	Italy	Poland	UK
Not implemented	Reproduction of works located permanently in public roads and byways or public open spaces is permitted. The copies can be distributed and/or made available to the public	Making of paintings, drawing, diagrams, maps, charts, plans, engravings, etchings, lithographs, woodcuts, prints or similar things as well as photographing or filming or broadcasting or including in a cable programme of certain artistic works (buildings, sculpture, models, etc.) which are permanently situated or placed in a public place or in premises open to the public is permitted	Not implemented	Works permanently displayed on public roads, streets and squares or in gardens can be disseminated, but not for the same use	Making of a graphic work, photograph, film, broadcast, or visual image of buildings, sculptures, models for buildings and works of artistic craftsmanship which are permanently situated in a public place or in premises open to the public is permitted
	In the case of buildings, the exception applies only to the façade	The results of such uses can be made available to the public		The full name of the author of the work and the source, when it is possible, should be indicated	Such copies can be distributed or made available to the public
		The exception may not apply to graphic works, i.e. paintings, drawings, diagrams, maps, charts or plans, engravings, etchings, lithographs, woodcuts or similar works permanently situated or placed in a public place or in premises open to the public			The exception does not apply to graphic works, i.e. paintings, drawings, diagrams, maps, charts or plans, engravings, etchings, lithographs, woodcuts or similar works permanently situated or placed in a public place or in premises open to the public

Sources: Authors' own elaboration on Queen Mary (2007), Lobert et al. (2015) and national legislation.



**Table 15. Private copying: Exceptions (Article 5(2)(b))**

France	Germany	Ireland	Italy	Poland	UK
Copies are allowed for strictly private purposes and only for the private use of the person making it. This exception applies only to natural persons	Copies are allowed for domestic and personal purposes and to be strictly used in the private sphere. In this case, copies can be made also by third parties on behalf of the privileged person, absent any commercial gain. This exception applies only to natural persons	There is no general private copying exception	Copies of phonograms and videograms, for personal use and without any intent to make profit or any other direct or indirect commercial purpose, are allowed. This exception applies only to natural persons	Personal uses are allowed, without asking permission to the author and without paying remuneration	Personal copies of a copyrighted work (with the exclusion of computer programmes) are permitted. The work must be lawfully owned by the privileged person. Copies are made for the privileged person's private use and for ends which are neither directly nor indirectly commercial
The exception does not apply to file-sharing	Singular copies are allowed also for other 'own' uses beyond the private sphere (e.g. scientific purposes, 'own' archive, information about current events). In this case, limitations are restricted to non-commercial uses and apply also to legal entities and to entities making copies on behalf of the privileged person	Natural persons and certain establishments are allowed to record broadcasts for purposes of time shifting (later viewing)	Copies on paper or similar medium are covered by the reprographic exception, even when made for personal use	Personal uses includes single copies used by a circle of persons having personal relationships (e.g. consanguinity), affinity or social relationship	Format-shifting is explicitly allowed
	Private copying refers to both analogue and digital copies thus including reprographic copying	Natural persons are allowed to make copies of performances for private and domestic uses	Private copies cannot be made by third parties on behalf of the privileged person		Contract terms aiming at preventing or restricting the private copying exception are unenforceable
	The exception does not apply to file-sharing		The private copying exception can be overridden by contractual arrangements		Recording of broadcasts for purposes of time shifting (later viewing) is permitted. Recording must take place in domestic premises and copies cannot be used for any other purpose

Private copying is not allowed from an illegal source or if it is made by circumventing TPM

Private copying is not allowed from an illegal source

*Sources: Authors' own elaboration on Queen Mary (2007), WIPO (2013) and national legislation.*

**Table 16. Private copying: Compensation systems (Article 5(2)(b))**

France	Germany	Ireland	Italy	Poland	UK
A levy scheme for private copying is in force	A levy scheme for private copying is in force. It covers also copies for other 'own' uses beyond the private sphere	No levy scheme is in force	A levy scheme for private copying is in force	Levies for reproduction	No levy scheme is in force
Levies are applied to media and equipment with internal storage capacity, according to the capacity	Levies are applied to blank carriers and devices	Collective licensing agreements between right-holders and end-users can set fair remuneration for certain private uses	Levies are applied to blank carriers and devices enabling recording of audio and video	Levies are applied to blank carriers and devices	Collective licensing agreements between right-holders and end-users can set fair remuneration for certain private uses
Levies are paid by manufacturers, importers or intra-EU acquirers	Levies are paid by producers of devices, producers of data carriers, importers of devices and data carriers, dealers of devices and data carriers (above a certain threshold of transactions), producers, importers, and dealers of photocopying machines, certain operators of photocopying machines	Reprographic copies for research and private studies by universities and schools are covered by collective licensing agreements	Levies are paid by manufacturers and importers when they put blank carriers and devices on the market. The importer is: i) a company buying foreign products subject to levies and selling them to Italian distributors; or ii) a foreign company selling products directly to final users (e.g. via e-commerce). Fair remuneration is required also for reprographic copies to be paid by those who provide the means for copying (e.g. copy centres, libraries)	Levies are paid by manufacturers and importers	Collective licensing schemes are to a large extent regulated by law
Exports are exempted. The national collecting society ordered several foreign-based websites to stop selling to French consumers without levies and to report all deliveries to the French market	Exports are exempted. In cross-border sales: the German party is responsible, if the recipient is a commercial entity; the foreign party is responsible if the German recipient is a private consumer		Exporters can claim a refund for paid levies		

France	Germany	Ireland	Italy	Poland	UK
Levies are determined by a commission comprising: 12 representatives of right-holder organisations; 6 of manufacturers and importers; and 6 of consumer organisations	Levies are determined by national collecting societies after negotiating with associations of manufacturers and importers of blank carriers and devices. Parties are free to negotiate in relation to the amount of levies with caps for certain media		Levies are determined by a decree of the Minister of Culture and the National Heritage after hearing stakeholders represented in the Permanent Consulting Committee for Authors' Rights	Levies are determined by a decree of the Minister of Culture and the National Heritage	
Levies are collected by a national collecting society, appointed by law	Levies are collected by several national collecting societies, on the basis of the type of copied work (i.e. audio, video, text, picture)		Levies are collected by a national collecting society, appointed by law	Levies are collected by several national collecting societies, on the basis of the kind of right-holders (i.e. authors, performers, producers) and of the sector (i.e. audio and video)	
TPM and individual licensing scheme should be taken into account when determining levies	TPM should be taken into account when determining levies		TPM should be take into account	Levies do not apply to carriers or devices acquired for professional use	
Levies do not apply to carriers or devices acquired for professional use and which are not presumed to be used for private purposes. Professionals have the right to a refund, and they may apply for an exemption agreement	There are several exemptions for professional and industrial users		For professional uses, both a refund system and upfront exemptions are available		

Sources: Authors' own elaboration on Queen Mary (2007), WIPO (2013) and national legislation.

Table 17. Private copying: Distribution of revenues (Article 5(2)(b))

France	Germany	Ireland	Italy	Poland	UK
Three-step process: i) splitting the levies into four parts, i.e. audio, video, written works and visual artworks; ii) splitting each of the four parts, according to the law, among authors, performers and producers/publishers; iii) distributing the revenues to organisations representing different right-holders and in turn to right-holders according to contractual arrangements	Collecting societies transfer revenues to organisations representing different right-holders (these organisations are members of each collecting society). Each organisation distributes revenues to right-holders according to contractual arrangements	No levy scheme is in force	The national collecting society distributes revenues to audio and video authors, producers and performers. Distribution schemes are set by law	Collecting societies distribute revenues to relevant right-holders. Distribution schemes are set by law	No levy scheme is in force
According to the law, for 'audio' the levies are split as follows: 50% authors; 25% performers; 25% phonogram producers	There are no deductions for social or cultural purposes		According to the law, for 'audio' the levies are split as follows: 50% authors; 25% performers; 25% phonogram producers	According to the law, for 'audio' the levies are split as follows: 50% authors; 25% performers; 25% phonogram producers	
According to the law, for 'video' the levies are split as follows: 33% authors; 33% performers; 33% videogram producers			According to the law, for 'video' the levies are split as follows: 30% authors; 23% original producers of audiovisual works; 23% videogram producers; 23% performers	According to the law, for 'video' the levies are split as follows: 35% authors; 40% producers; 25% performers	
According to the law, for 'written works and visual artworks' the levies are split as follows: 50% authors; 50% publishers			Half of the video distribution scheme assigned to performers is dedicated by law to study and research activities as well as to the promotion, training and professional support for artists and performers	Deductions for social or cultural purposes are applied by collecting societies. These deductions are not determined by law, but determined within the statutes of each collecting society	

France	Germany	Ireland	Italy	Poland	UK
A social and/or cultural deduction (25%) is determined by law. Authors', producers' and performers' organisations are responsible for applying this deduction					

*Sources: Authors' own elaboration on Queen Mary (2007), WIPO (2013) and national legislation.*

**Table 18. Balance between technological protection measures and copyright exceptions and limitations (Article 6(4))**

France	Germany	Ireland	Italy	Poland	UK
Safeguard is provided for: private copying; illustration of teaching; benefit of disabled persons; exceptions for libraries	Obligations to provide means for circumvention apply to limitations in relation to: public security and judicial administration; disabled persons; collection for the use in schools and for illustration of teaching; broadcasts for educational purposes in schools; making available for research and private study; reproductions made by broadcasters	Right-holders are entitled to claim licence fees for any use, thus narrowing down the scope of any safeguard measures	Right-holders are obliged to remove TPM on request of the competent authorities for public security purposes	Not implemented	Remedies against TPM have to be provided for certain specifically designated acts. In particular, against the application of any technology, device or component that has the effect of preventing a copyright work from being copied (in whole or in part) or restricting the number of copies which may be made
A special authority is competent to rule any conflict between exceptions and limitations and TPM	Safeguard is provided also for private copying for other 'own' uses beyond the private sphere (e.g. scientific purposes, 'own' archive, information about current events). No safeguard is provided for private copying for personal domestic uses	Beneficiaries of exceptions and limitations have access to a dispute resolution mechanism before courts	Right-holders are obliged to adopt 'proper solutions' including the provisions of means to gain access on specific request of certain beneficiaries or after the conclusion of specific collective agreements with users associations		Remedies should be based on voluntary measures or agreements between parties
	The provision is limited to users having lawful access to works	The recourse by beneficiaries to self-help is still controversial	Safeguard is provided for: private use on paper or similar media; reprography within publicly accessible libraries, museums and archives; reproduction, quotation and communication to the public for purposes of review, teaching and scientific research; benefit of disabled persons		Remedies do not apply to work made available to the public by interactive services
The provision does not apply to works made available on demand			The provision can be limited to users having lawful access to works		The provision is limited to users having lawful access to works

			The provision does not apply to works made available on demand		Absent any voluntary measure or agreement between parties, beneficiaries must serve a notice of complaint to the Secretary of State who may in turn direct an order (statutory duty) to the right-holders
			The access can be dependent upon payment of fair compensation		
			If negotiations among stakeholders and end-users fail, a mandatory dispute resolution will be conducted before the Permanent Copyright Consultation Committee and only afterwards normal courts will be entitled to rule		
			Safeguard is provided also for the private copying exception that covers only copies of phonograms and videograms. General contractual agreements between right-holders and users may override safeguard measures		

Sources: Authors' own elaboration on Queen Mary (2007), Mazziotti (2008) and national legislation.



## **Annex II**

**Legal Aspects of Copyright:  
The added value and options for further  
harmonisation and efficiency of the EU copyright  
regime, including the projected impact  
on other policy areas**

**Briefing paper by Milieu Ltd**

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## **LINGUISTIC VERSIONS**

Original: EN

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## List of abbreviations

<b>BAU</b>	Business-as-usual scenario
<b>CJEU</b>	Court of Justice of the European Union
<b>Charter</b>	Charter of Fundamental Rights of the European Union
<b>CoNE</b>	Costs of Non Europe
<b>CMOs</b>	Collective Management Organisations
<b>Collective Rights Management Directive</b>	Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal
<b>Database Directive</b>	Directive 96/9/EC on the legal protection of databases
<b>Enforcement Directive</b>	Directive 2004/48/EC on the enforcement of intellectual property rights
<b>EC</b>	European Community
<b>EP</b>	European Parliament
<b>EU</b>	European Union
<b>Infosoc Directive</b>	Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society
<b>Orphan Works Directive</b>	Directive 2012/28/EU on certain permitted uses of orphan works
<b>Rental &amp; lending rights Directive</b>	Directive 2006/115/EC on rental right and lending right and on certain rights related to copyright in the field of intellectual property
<b>Resale Right Directive</b>	Directive 2001/84/EC on the resale right for the benefit of the author of an original work of art
<b>Satellite and Cable Directive</b>	Council Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission
<b>SMEs</b>	Small and Medium Enterprises
<b>Software Directive</b>	Directive 2009/24/EC on the legal protection of computer programs
<b>TDM</b>	Text and Data Mining
<b>Term of Protection Directive</b>	Directive 2011/77/EU on the term of protection of copyright and certain related rights
<b>TEU</b>	Treaty on the European Union
<b>TFEU</b>	Treaty on the Functioning of the European Union

## Executive summary

The European Parliament commissioned Milieu Ltd to prepare a briefing paper analysing the potential benefits of future action to modernise the INFOSOC Directive and the wider European Union (EU) legal framework related to Copyright, focusing on the legal aspects of EU copyright, comprising an analysis of options for reform as regards the legal form and degree of harmonisation, the projected impacts on the efficiency of the EU copyright regime, as well as on other affected policy areas.

Copyright legislation aims at protecting the interests of authors of artistic and literary works, as well as other types of work such as computer programs, by protecting the expression of ideas. Copyright provides a number of moral and economic rights for the authors, performers, producers and broadcasters, such as the right to reproduction, the right to communication to the public and the right to distribution.

The development of the EU copyright legal framework has been driven by the need to remove barriers to the internal market, mainly on the basis of Article 114 TFEU, rather than the establishment of a holistic EU copyright regime. Today, the legislation included within the EU copyright framework comprises 10 Directives, including the INFOSOC Directive.

The Court of Justice of the European Union further defined the core concepts of EU copyright law, adding an important body of jurisprudence to the EU *acquis* in this field. The result is a fragmented harmonisation of the copyright protection.

The INFOSOC Directive aimed to align EU legislation with international law and to ensure copyright protection in light of all the new technological developments. However, the Directive only partially harmonised some rights, including a list of optional exceptions and limitations which allow Member States to retain differences in implementation. In addition, the Directive has not been able to adapt to all the new technological developments since its adoption. The Directive's effectiveness, efficiency, coherence and relevance are thus considered as fairly low.

The result is a fragmented EU copyright *acquis* with a number of gaps and inconsistencies exist in the EU framework. The gaps affect the legal certainty, coherence and effectiveness of the legislation. They can also cause barriers to cross-border trade of copyrighted goods and services. In assessing the INFOSOC Directive, four main categories of gaps can be identified: 1) gaps related to the exclusive rights of copyright holders and other stakeholders (concerning harmonised and non-harmonised elements of the legislation); 2) gaps associated with exceptions and limitations; 3) gaps linked to the concepts of authorship and ownership; and 4) gaps resulting from the relationship between the INFOSOC Directive and related Directives.

This paper also presents an indicative assessment of the gaps related to 12 rights, which are partially harmonised at EU level, two of which are not harmonised (those concern the moral rights of paternity and integrity). Gaps relating to five of the rights can be

considered as major, while gaps related to the remaining seven rights can be assessed as minor. Major gaps may impact the internal market and therefore require attention from the EU legislation, while minor gaps do not point to key issues in practice but remain relevant should the EU legislator wish to establish a holistic copyright legal framework.

This briefing paper considers four legislative options for modernising the EU copyright legal framework. The four options have improving legislative coherence as a common objective to a varying extent.

1. **Codification in a narrow sense.** This option would involve replacing existing Directives with one single act. It would not alter their substance or imply a change in policy: overlapping provisions would be deleted, terms and definitions harmonised and errors corrected. Its advantage is to increase legal certainty by regrouping the legislation in one single act and to address some inconsistency. However, the harmonisation would be limited and substantial gaps would not be addressed by this option.
2. **Recasting.** This option implies a more ambitious legislative reform through the amendments of existing directives, which are replaced by a single text. It has the advantage of incorporating substantive amendments in a single text together with the unchanged provisions of existing legislation. This option is limited by the inability to address gaps of non-harmonised matters.
3. **Further harmonisation of selected issues.** This option implies the adoption of a new instrument to harmonise issues/areas which have not been previously regulated at EU level. This option cannot, however, address gaps and inconsistencies in the existing legal framework and potentially could add further inconsistencies since it adds yet another instrument to the framework.
4. **The creation of a single EU title** based on Article 118 TFEU. The option would result in the establishment of a pan-European copyright title that would supersede national copyright regimes. It could conceivably achieve full harmonisation. The creation of a single EU title would most likely involve a long and complex process to ensure the establishment of a comprehensive EU copyright regime.

The options for reform listed above can also be combined for more effectiveness. For example, options 2 and 3 could be combined in order to address gaps in the existing legislation and the non-harmonised issues. The legal basis for the above legislative options can be Article 114 TFEU as for previous legislative developments. The Lisbon Treaty has introduced a new legal basis in Article 118 TFEU for the creation of European intellectual property rights, which could be relied upon for the option 4.

In terms of cost and benefit analysis of the legislative options, the briefing paper provides a preliminary qualitative rather than quantitative assessment as a result of the lack of data to rely on. The actual impacts of addressing the existing gaps and fragmentation would depend on the specific approach to various issues taken in each of these options and on the degree of the changes. The main benefits include limiting legal uncertainty and clarity, lowering compliance and transaction costs, increasing the access to diverse works of European culture and increasing the competitiveness of the copyright-intensive

European industries. These benefits are likely to affect a broad range of the stakeholders. Furthermore, the authors and performers would benefit from a better remuneration level.

Most stakeholders, including the EU society as a whole, are likely to benefit from harmonisation of the EU copyright. Member State level intermediaries is the only group of the stakeholders which could be expected to incur losses due to less need for their services. Furthermore, some of the mainstream artists might lose part of their profits due to higher visibility and international demand for works of artists from different Member States, which might be expected once the process of obtaining multi-territorial licences is facilitated. The role of the collective management organisations (CMOs) and their regional hubs could be expected to grow.

The scale of the benefits would be higher for the options which offer higher level of harmonisation or the creation of a single EU title. However, these options may also imply higher costs and also some resistance at Member State level due to reluctance to partly give up national sovereignty in the field of copyright.

While the creation of a Single European Title would allow for a more extensive harmonisation of copyright, it will be a difficult exercise and imply extensive legislative efforts. Therefore, the way forward may include as a first step harmonisation of the existing legislation or of additional selected issues (options 2 and 3), or even codification if prior amendments are made (option 1). Such first step could pave the way to and facilitate a later creation of a Single European Title.

## Chapter 1 - Introduction

With the adoption of Directive 2001/29/EC on the harmonisation of certain aspects of Copyright and related rights in the information society (INFOSOC Directive)<sup>313</sup>, the European legislator initiated the harmonisation of certain aspects of Member States' copyright legislation. This took place in consistency with international norms<sup>314</sup> and with the aim of adapting the legislation to reflect ongoing technical developments. However, as studies show<sup>315</sup>, the INFOSOC Directive primarily contributed to affirming and legitimising the forms of cultural expressions already in place at the time of adoption, rather than to promoting new innovative business models.

The recent widespread use of Internet-based services (streaming, downloading), digitalisation technologies and expansion of other online business models, present a significant opportunity for the European economy. At the same time, it creates new challenges, such as a possible need for regulation of user-generated content or of the use of hyperlinks online. Online markets in the EU largely remain governed at national level. As a result, it is not yet possible for Europeans to buy any copyright protected works or services electronically under a unified scheme at the EU digital single market level.

In 'A Single Market for Intellectual Property Rights'<sup>316</sup>, the Commission identified the creation of a European Copyright Code as an approach that could allow for a far-reaching overhaul of the EU copyright framework and contribute to the development of the Digital Single Market. The European Parliament (EP) considered that the introduction of a single European Copyright Title would be an effective 'legal mean to remedy the lack of harmonisation resulting from Directive 2001/29/EC'<sup>317</sup>. In its Work Programme for 2015<sup>318</sup>, the Commission announced that it would make legislative proposals before the end of the year to harmonise national copyright regimes and allow for wider online access to copyrighted works across the EU.

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<sup>313</sup> Directive 2001/29/EC on the harmonisation of certain aspects of Copyright and related rights in the information society (OJ L 167, 22.6.2001).

<sup>314</sup> WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty.

<sup>315</sup> Guibault, L., Westkamp, G., Rieber-Mohn, T., 'Study on the implementation and effect in member States' Laws of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society', Institute for Information Law, University of Amsterdam, the Netherlands, February 2007, p. 59.; Similar: European Commission, COM (2011) 287, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the 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, p.6.

<sup>316</sup> Ibid., COM (2011) 287.

<sup>317</sup> European Parliament, (2014/2256(INI)), [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](#), Rapporteur: Julia Reda, 15 January 2015.

<sup>318</sup> European Commission, COM(2014) 910 final, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Commission Work Programme 2015.

In this context, the EP commissioned Milieu Ltd to prepare a briefing paper analysing the potential benefits of future action to modernise the INFOSOC Directive and the wider EU legal framework related to Copyright. Within the same context, the EP also commissioned CEPS to carry out a study evaluating the implementation, application and effects of the existing INFOSOC Directive and of its related instruments making up the EU Framework on Copyright (the Study)<sup>319</sup> and a briefing paper on the Internal Market aspects of EU Copyright. Finally, the EP commissioned VVA Consulting the preparation of a briefing paper on The Industry and Industrial Relations aspects of Copyright. The findings from the Study feed into parts of the analysis made in this briefing paper, in particular regarding the costs and benefits assessment.

This briefing paper will start by summarising the main gaps in the current EU Copyright framework. A number of options for modernising the Copyright framework will then be explored, as well as their respective merits. In the final section, the paper will present a cost benefit analysis of each of the options before drawing conclusions.

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<sup>319</sup> Centre for European Policy Studies and Economisti Associati (2015), Study on the implementation, application and effects of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (Infosoc Directive) and of its related instruments, published by the European Parliament.



## Chapter 2 - State of Play of the EU Copyright Framework

### Key findings

- Copyright protection at international and/or EU level includes about 12 key moral and economic rights for various stakeholders.
- The EU copyright legal framework has developed over three decades based on internal market imperatives. As a result, the framework is fragmented across 10 Directives and there is no holistic approach to copyright protection at EU level.
- The INFOSOC Directive harmonises some key rights of authors with the aim of creating an EU legal framework to foster the development of the information society in Europe.

### 1. Key copyright concepts/rights

Copyright legislation aims at protecting the interests of authors of creations such as artistic and literary works, which include computer programs, by protecting the expression of ideas – not the ideas themselves. Copyright provides a number of rights for its holders. Those rights are usually differentiated between moral and economic rights. Moral rights are personal to the author and based on the idea that the author has a personal interest in the work which goes beyond pecuniary gain<sup>320</sup>. Economic rights provide the owner with financial rewards from the use of his/her works by others<sup>321</sup>. The table below provides an overview of the main rights as recognised by international law<sup>322</sup> and/or the EU copyright framework.

<sup>320</sup> Mira, T., *Moral Rights: Principles, Practice and New Technology*, Oxford, 2011.

<sup>321</sup> See WIPO, Frequently Asked Questions: Copyright, available at [http://www.wipo.int/copyright/en/faq\\_copyright.html](http://www.wipo.int/copyright/en/faq_copyright.html).

<sup>322</sup> Berne Convention of 9 September 1886 for the Protection of Literary and Artistic Works.

**Table 19: Key Rights**

Key rights	Definition	Stakeholders <sup>323</sup>
1. Right to paternity	The right to claim authorship of the work <sup>324</sup> .	- authors
2. Right of integrity	The right to object to any distortion, mutilation or other modification of, or other derogatory action in relation to the work, which would be prejudicial to his honour or reputation <sup>325</sup> .	- authors
3. Right of reproduction	The right of authorising the reproduction of these works, in any manner or form <sup>326</sup> .	- authors - performers - producers of phonograms/films - broadcasting organisations
4. Right of communication to the public/making available to the public	The right of authorising: (i) the public performance of their works, including such public performance by any means or process; (ii) any communication to the public of the performance of their works <sup>327</sup> .	- authors - performers - producers of phonograms/films - broadcasting organisations
5. Right of distribution	The right to authorise or prohibit any form of distribution to the public by sale or otherwise <sup>328</sup> .	- authors - performers - producers of phonograms /films - broadcasting organisations
6. Right of fixation	The right to authorise or prohibit the fixation (recording) of their performances <sup>329</sup> .	- performers - films and broadcasting organisations
7. Right of rental and/or lending	The right to authorise or prohibit the rental and lending of originals and copies of copyright works <sup>330</sup> .	- authors - performers - producers of phonograms /films - broadcasting organisations

<sup>323</sup> A joint project between the European Patent Office and the Office for Harmonization in the Internal Market, Intellectual property rights intensive industries: contribution to economic performance and employment in the European Union, Industry-Level Analysis Report, September 2013, p.22.

<sup>324</sup> Article 6 bis of the Berne Convention of 9 September 1886 for the Protection of Literary and Artistic Works.

<sup>325</sup> Ibid.

<sup>326</sup> Article 9 of the Berne Convention of 9 September 1886 for the Protection of Literary and Artistic Works; Article 2 of the INFOSOC Directive; Article 4 of the Software Directive.

<sup>327</sup> Article 11 of the Berne Convention of 9 September 1886 for the Protection of Literary and Artistic Works; Article 8 of the Rental and Lending Rights Directive; Article 3 of the INFOSOC Directive.

<sup>328</sup> Article 4 of the INFOSOC Directive; Article 9 of the Rental and Lending Rights Directive; Article 4 of the Software Directive.

<sup>329</sup> Article 7 of the Rental and Lending Rights Directive.

<sup>330</sup> Article 1 of the Rental and Lending Rights Directive.

8. Fair compensation <sup>331</sup>	The right holders have a right to receive fair compensation when exceptions or limitations apply to their reproduction right <sup>332</sup> .	- authors - performers -
9. Right of resale (droit de suite)	The author, or after his/her death the persons or institutions authorised by national legislation, with respect to original works of art and original manuscripts of writers and composers, enjoy the inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work <sup>333</sup> .	- authors -
10. Right of broadcasting	The right of authorising: (i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images; (ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organisation other than the original one; (iii) public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work <sup>334</sup> .	- performers - producers of phonograms /films - broadcasting organisations
11. Right of adaptation	The right of authorising adaptations, arrangements and other alterations of their works <sup>335</sup> .	- authors
12. Right of translation	The right of making and of authorising the translation of their works throughout the term of protection of their rights in the original works <sup>336</sup> .	- authors

Aside from granting certain rights, copyright law provides for a number of exceptions and limitations, which exclude certain works from copyright protection, or allow the use of the work for a fair compensation or, in some cases, free of charge (e.g. for the purpose of illustration for teaching or scientific research).

In 1886, the first international instrument on copyright law was adopted – the Berne Convention for the Protection of Literary and Artistic Works, which has now 168 State

<sup>331</sup> The status of the right to fair compensation as a right on its own is disputed. Fair compensation is a trade off for an exception to other exclusive rights that allows a user to use the work – rather than a ‘right’ in the traditional sense. However, due to its importance, we included in the key rights.

<sup>332</sup> Article 5(2) of the INFOSOC Directive.

<sup>333</sup> Article 14 ter of the Berne Convention of 9 September 1886 for the Protection of Literary and Artistic Works; the Resale Rights Directive.

<sup>334</sup> Article 11 bis of the Berne Convention of 9 September 1886 for the Protection of Literary and Artistic Works; Article 8 of the Rental and Lending Rights Directive.

<sup>335</sup> Article 12 of the Berne Convention of 9 September 1886 for the Protection of Literary and Artistic Works; Article 4 of the Software Directive.

<sup>336</sup> Article 8 of the Berne Convention of 9 September 1886 for the Protection of Literary and Artistic Works; Article 4 of the Software Directive.

Parties. It recognised the requirement of equal treatment, by which authors enjoy, in countries of the Union other than the country of origin, the same rights as nationals. It also established a number of minimum standards. It took another century for European copyright law to develop.

## 2. Overview of EU action

### 2.1. Background

The Treaty of Rome did not originally foresee a specific EU competence to regulate copyright law. The only mention of intellectual property was found in Article 36 of the Treaty of Rome, which allows for exceptions to the free movement of goods and services notably for the protection of industrial and commercial property.

Copyright protection, being territorial and exclusive in nature, clashes with EU free movement of goods and services and affects competition<sup>337</sup>. Indeed, copyright grants the rights' owner with exclusive control of the work, and they can restrict access to the work and therefore enact a number of market barriers for consumers (e.g. geo-blocking) and discouraging competition with a restriction of multiple suppliers of goods, services and technologies. An example of such a clash between competition, free movement and copyright can be found in software programs. The interoperability of computer programs – their ability to communicate with other systems – is crucial for innovation and competition. The need to protect access to source code (through copyright) and the need for innovation (through competition) can therefore be at odds<sup>338</sup>. The Software Directive has been a first EU attempt to balance the interests of the rights owners and the need for interoperability.

The 1990s marked the start of the process of harmonisation of the copyright legislation with a view to fostering the cross-border trade of copyrighted goods and services by reducing barriers<sup>339</sup>. As a result, EU copyright law has been driven by internal market imperatives, rather than the establishment of a holistic EU copyright regime. Today, the legislation included within the EU copyright framework comprises the:

Software Directive<sup>340</sup>

Rental and lending rights Directive<sup>341</sup>

Satellite and Cable Directive<sup>342</sup>

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<sup>337</sup> Lucas-Schloetter, A., 'Is there a concept of European copyright law? History, evolution, policies and politics and *teh acquis communautaire*', in *EU Copyright Law A Commentary*, Ed. Stamatoudi, I. and Torremans, P., Elgar Commentaries series, 2014, p.8. <http://www.elgar.com/shop/eep/preview/book/isbn/9781781952436/>

<sup>338</sup> van Rooijen, A., *The software interface between copyright and competition law*, Kluwer, 2010.

<sup>339</sup> Ramalho, A., 'Conceptualising the European Union's Competence in Copyright – What Can the EU Do?', *International Review of Intellectual Property and Competition Law*, 2014, p.179.

<sup>340</sup> Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs replacing Directive 91/250/EEC, (OJ L 111, 5.5.2009).

<sup>341</sup> Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property replacing Directive 92/100/EEC, (OJ L 376, 27.12. 2006).

Term of Protection Directive<sup>343</sup>

Database Directive<sup>344</sup>

Resale Right Directive<sup>345</sup>

Infosoc Directive<sup>346</sup>

Enforcement Directive<sup>347</sup>

Orphan Works Directive<sup>348</sup>

Collective Rights Management Directive<sup>349</sup>

The Directives are supplemented by an important body of jurisprudence from the Court of Justice of the European Union (CJEU) which has further defined the core concepts of EU copyright law. Finally, the Charter of Fundamental Rights of the European Union recognises copyright as a fundamental right by ascertaining that intellectual property rights must be protected<sup>350</sup>. No further indication is provided by the Charter as to how such a right interacts with other fundamental rights such as the right to education and the right to freedom of expression<sup>351</sup>.

The result of the above framework is a fragmented harmonisation of the copyright protection across the 10 Directives and the case-law.

## 2.2. Legal bases

Copyright law has largely developed on the basis of Article 114 TFEU. This provision allows the EU to adopt measures for the harmonisation of national legislation which have the establishment and functioning of the internal market as their object. The harmonisation measures should, therefore, aim at removing barriers to the free

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<sup>342</sup> Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, (OJ L 248, 6.10.1993).

<sup>343</sup> Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights, (OJ L 265, 11.10.2011).

<sup>344</sup> Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, (OJ L 77, 27.3. 1996).

<sup>345</sup> Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art, (OJ L 272, 13.10.2001).

<sup>346</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, (OJ L 167, 22.6.2001).

<sup>347</sup> Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, (OJ L 157, 30.3.2004).

<sup>348</sup> Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, (OJ L 299, 27.10.2012).

<sup>349</sup> Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, (OJ L 84, 20.3.2014).

<sup>350</sup> Article 17(2) of the Charter of Fundamental Rights of the European Union.

<sup>351</sup> Torremans, P., 'Article 17(2)', in *The EU Charter of Fundamental Rights: A Commentary*, Eds. Peers, S., Hervey, T., Kenner, J., Ward, A., Bloomsbury Publishing, 2014, p.504.

movement of goods and services. Acts adopted under Article 114 TFEU follow the ordinary legislative procedure.

The Lisbon Treaty introduced a new competence to act on intellectual property rights with Article 118 TFEU. Under this provision, the EU could conceivably establish a European copyright system providing uniform protection throughout the EU, acting in accordance with the ordinary legislative procedure. Article 118 TFEU has already been used as a basis to adopt the Regulations establishing the unitary patent protection<sup>352</sup> and for the revision of the Trademark Regulation<sup>353</sup>, which is currently waiting for the Council first reading position<sup>354</sup>. The establishment of an EU copyright regime, however, would present additional difficulties as compared to patents and trademarks. Indeed, copyright presents the particularity that it is acquired by the act of creation, as soon as a record of the work can prove the ownership. It does not require a registration. As a result, a European copyright system would coexist with difficulty with national copyright systems because the author of the work cannot easily opt for a protection (national or European) as its work is automatically protected under the applicable national law where the work is published<sup>355</sup>. In addition, it could add further marked fragmentation and extra burdens for rights clearance. An EU copyright regime would need to replace national copyright systems unless its ambition is to establish a new registration system at EU level<sup>356</sup>.

The Berne Convention prohibits mandatory registration systems and has established the principle of formality-free protection<sup>357</sup>. Therefore, such possibility is not included in the options laid down in Section 4.II. However, it allows national voluntary registration systems (see Chapter 4, section I.4).

Other legal bases can be envisaged on copyright related legislation if the adopted rules relates to other areas of internal market competence such as the freedom of establishment. For instance, the Collective Management of Copyright Directive relied on Articles 50(1), 53(1) and 62 TFEU.

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<sup>352</sup> 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); Council Regulation (EU) No 1260/2012 of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements, (OJ L 361, 31.12.2012).

<sup>353</sup> Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 207/2009 on the Community trade mark, COM/2013/0161 final; Proposal for a Directive of the European Parliament and of the Council to approximate the laws of the Member States relating to trade marks (Recast), COM/2013/0162 final.

<sup>354</sup> Proposal for a Directive to approximate the laws of the Member States relating to trade marks (Recast), procedure file 2013/0089(COD).

<sup>355</sup> Article 5 of the Berne Convention of 9 September 1886 for the Protection of Literary and Artistic Works.

<sup>356</sup> Mazziotti, G., *EU Digital Copyright Law and the End-User*, Springer, 2008, p.53.

<sup>357</sup> Article 5(2) of the Berne Convention of 9 September 1886 for the Protection of Literary and Artistic Works.

### 3. Key elements of the INFOSOC Directive

The INFOSOC Directive was adopted in 2001 with the view to adapting the existing legislation on copyright and related rights in order 'to respond adequately to economic realities such as new forms of exploitation' and 'to foster the development of the information society in Europe'<sup>358</sup>. With this aim, the Directive proposed further harmonisation of national copyright legal frameworks in order to reduce legal uncertainty and to align EU legislation with international law<sup>359</sup>.

The Directive partially harmonises a number of the authors' rights and neighbouring rights, including:

The right to reproduction

The right of communication to the public/making available to the public

The distribution right

Fair compensation

The INFOSOC Directive establishes a list of optional exceptions and limitations to the right to reproduction and the right of communication to the public/making available to the public. For example, Member States may provide for exceptions or limitations to the reproduction right for acts of reproduction made by publicly accessible libraries, educational establishments or museums, or for the reproductions of broadcasts made by social institutions pursuing non-commercial purposes, such as hospitals or prisons<sup>360</sup>.

The INFOSOC Directive's main achievement has been to align EU legislation with international law and partially harmonise some rights. However, the Directive has not been able to ensure copyright protection in light of all the new technological developments and the level of fragmentation remains high as a result of a lack of strong harmonisation and allowing Member States to implement exceptions and limitations differently. An evaluation of the Directive assessed its effectiveness and efficiency as very low (scoring 1 out of 5 points – 1 being the lowest), and its coherence and relevance fairly low (by scoring 2 out of 5)<sup>361</sup>.

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<sup>358</sup> Recitals 2 and 5 of the INFOSOC Directive.

<sup>359</sup> Recitals 15 of the INFOSOC Directive.

<sup>360</sup> Article 5 of the INFOSOC Directive.

<sup>361</sup> Centre for European Policy Studies and Economisti Associati (2015), Study on the implementation, application and effects of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (Infosoc Directive) and of its related instruments, published by the European Parliament.

## Chapter 3 – Mapping of gaps

### Key findings

- The gaps result both from harmonised and non-harmonised elements.
- The scope of the exclusive rights lacks clarity and certainty and has given rise to a large body of case-law from the CJEU. For example, it is not clear whether online broadcasting falls within the right of communication to the public.
- One of the main gaps relate to the fact that the INFOSOC Directive allows Member States to opt for some exceptions and limitations, resulting in a wide degree of implementation of the Directive from country to country.
- The gaps in the EU copyright framework also concerns other EU Directives.
- Inconsistencies exist between the INFOSOC Directive and other legal instruments.
- All the rights are not fully harmonised. Gaps relating to five of the rights can be considered as major, while gaps related to the remaining seven rights can be assessed as minor.
- Major gaps may impact the internal market and therefore require attention from the EU legislation, while minor gaps would need to be addressed in order to ensure a holistic copyright legal framework.

The existing EU copyright legal framework can be seen as a first attempt to harmonise copyright standards at EU level to support the emergence of an EU copyright system. As mentioned above, the EU copyright framework developed on the basis of internal market imperatives to remove barriers to free movements of goods and service as they arise rather than establishing an EU copyright law in holistically manner regulating at all the areas of copyright law comprehensively. In addition, the relevant Directives, each covering a different aspect of copyright law, were negotiated and adopted years apart. As a result, a number of gaps exist in the EU framework and full harmonisation has not been achieved. This section aims at providing a concise overview of those gaps, which are further expanded on in the 'Study'.

Four main categories of gaps in the EU copyright legal framework can be identified. These affect the effectiveness of the legislation and can cause barriers to cross-border trade of copyrighted goods and services. Some of the gaps relate to harmonised elements of the legislation, while other gaps result from the lack of harmonisation at EU level of specific subject-matter.



## 1. Gap 1: Exclusive rights

### 1.1. Scope of exclusive rights harmonised by the INFOSOC Directive

The INFOSOC Directive harmonises the rights of reproduction, communication to the public/making available, and distribution. However, there is a **lack of clarity** with regard to both the **boundaries** between the harmonised rights and the **scope** of each one of them.

Regarding the former, new acts of content exploitation and media convergence cause difficulties when assessing which exclusive right is at stake in a given case. An example of such a case is **online broadcasting**<sup>362</sup>.

Online broadcasters nowadays hardly qualify under the limited definition of satellite or cable broadcaster of the Satellite and Cable Directive. The question is therefore whether they fall under the right of communication to the public/making available right of the INFOSOC Directive. The CJEU considered that live online broadcaster does not fall under the right and, confirmed that there is only partial harmonisation in respect of broadcasting and communication to the public<sup>363</sup>.

In relation to the scope of the rights, challenges arise in terms of the scope of each right regarding these new types of exploitation. For example, issues have recently emerged about whether the act of putting up a weblink to a protected work that is available on another webpage qualifies as an **act of communication to the public**<sup>364</sup>. The CJEU has developed additional four criteria to assess whether an act of communication constitutes a communication to the public: 1) the user must make an act of communication; 2) the public must be a fairly large number of people; 3) whether or not the communication is of profit-making nature; 4) the work must be accessible to a new public<sup>365</sup>. Those criteria would merit further clarification and recognition in the legislation.

<sup>362</sup> van Eechoud, M., et al., *Harmonising European Copyright Law. The Challenges of Better Lawmaking*, Kluwer Law International, Alphen aan den Rijn, 2009, pp. 67-94, 126-127.

<sup>363</sup> In case C More Entertainment, where the CJEU deemed that live online broadcasting does not come under the making available right since it does not allow the public to access the broadcast from a place and at a time individually chosen by them. Judgment of 26 March 2015 in Case C-279/13, *C More Entertainment AB v Linus Sandberg*, paragraphs 29-36.

<sup>364</sup> Representing different sides of the discussion, see The European Copyright Society, 'Opinion on the reference to the CJEU in C-466/12 Svensson' (2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2220326](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2220326) versus ALAI, 'Opinion on the right of making available and communication to the public', 2013, available at <http://www.alai.org/en/resolutions-and-positions.html>. The Court of Justice has meantime ruled on this issue (see chiefly Judgment of 13 February 2014 in Case C-466/12 *Nils Svensson and Others v Retriever Sverige AB*, ECR 2014 and Order of the Court of 21 October 2014 *BestWater International GmbH v Michael Mebes and Stefan Potsch* in Case C-348/13), but the question is still to be settled in legislation.

<sup>365</sup> Guibault, L., and Quintais, J. P., 'Copyright, technology and the exploitation of audiovisual works in the EU', in *The influence of new technologies on copyright*, IRIS plus, 2014, pp. 10-14, available at <http://www.ivir.nl/publicaties/download/1488>.

Other gaps can be found regarding the precise scope of each right – such as, the different definitions for the exhaustion of the distribution right throughout the Directives (namely, the differences between the Software Directive and the INFOSOC Directive, both in legislation proper and stemming from decisions of the CJEU)<sup>366</sup>.

## 1.2. Non-harmonised rights

Other rights were left outside of the EU harmonised framework. It is the case, notably, of the **right of adaptation** – which is harmonised only for computer programs and databases. Problems regarding the lack of harmonisation of the right of adaptation have been highlighted recently in the CJEU's decision in case C-419/13 - *All Posters*<sup>367</sup>, and mainly concern the distinction between this right and the right of reproduction. This lack of harmonisation stems from the fact that the right to adaptation is handled differently from one Member State to another, that the right is considered linked to moral rights and that it requires a common understanding of what constitutes a work of authorship<sup>368</sup>.

**Moral rights** such as the right to paternity or right to integrity are not covered by EU law<sup>369</sup>. One of the reasons for this gap is that Member States differ in their approach to moral rights. Some Member States have strong protection of moral rights (e.g. France, Germany), while others recognise limited moral rights for authors (e.g. the UK)<sup>370</sup>.

## 2. Gap 2: Exceptions and limitations

The INFOSOC Directive contains a closed list of **optional exceptions** for Member States to choose from<sup>371</sup>. Member States are free to decide which options to implement and how to implement them, which leads to the 'homing' tendency of Member States to preserve their existing formulations<sup>372</sup>. Indeed, in practice Member States differ in their implementation of the exceptions, leading to further fragmentation of copyright law

<sup>366</sup> Judgment of 3 July 2012 *UsedSoft GmbH v Oracle International Corp* in Cases C-128/11 (ECR 2012) and Judgment of 23 January 2014 *Nintendo Co. Ltd and Others v PC Box Srl and 9Net Srl* in Case C-355/12 (ECR 2014).

<sup>367</sup> Judgment of 22 January 2015 in Case C-419/13 *Art & Allposters International BV v Stichting Pictoright*.

<sup>368</sup> van Eechoud, M., et al., 2009, *Harmonising European Copyright Law. The Challenges of Better Lawmaking*, Kluwer Law International, Alphen aan den Rijn, p.84.

<sup>369</sup> Article 6 bis of the Berne Convention of 9 September 1886 for the Protection of Literary and Artistic Works.

<sup>370</sup> Sirvinskaite, I., 'Toward Copyright 'Europeanification': European Union Moral Rights', *Journal of International Entertainment & Media Law*, 2010/2011, Vol. 3 Issue 2, p263, available at [http://www.swlaw.edu/pdfs/jimel/3\\_2\\_sirvinskaite.pdf](http://www.swlaw.edu/pdfs/jimel/3_2_sirvinskaite.pdf).

<sup>371</sup> Article 5 (2), (3) and (5) of the INFOSOC Directive.

<sup>372</sup> IVIR, 'The Recasting of Copyright & Related Rights for the Knowledge Economy', 2006, available at [http://ec.europa.eu/internal\\_market/copyright/docs/studies/etd2005imd195recast\\_report\\_2006.pdf](http://ec.europa.eu/internal_market/copyright/docs/studies/etd2005imd195recast_report_2006.pdf), p. 66-67; IVIR, 'Study on the Implementation and Effect in Member States' Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society', 2007, available at [http://ec.europa.eu/internal\\_market/copyright/docs/studies/infosoc-study\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/studies/infosoc-study_en.pdf), p. 63.

within the EU. For example, while copies are allowed for private use in France and Germany, no private copying exception has been adopted in Ireland. In addition, in countries where private copying is allowed, the conditions surrounding its application differ widely as well<sup>373</sup>.

In addition, the closed character of the list fails to a certain extent to accommodate new uses and, therefore, falls short of reflecting current realities<sup>374</sup>. For example, it is unclear if and to what extent text and data mining can be covered by the current research exception<sup>375</sup>, which, additionally, is not implemented evenly throughout the Member States, including some which have not implemented the exception at all (such as The Netherlands and Spain)<sup>376</sup>. As a result, considerable barriers exist to cross-border research, due to the wide range of national law requirements that could apply<sup>377</sup>.

Article 1 (2) of the INFOSOC Directive leaves intact a number of **limitations** contained in previous Directives, which may lead to further incompatibilities and gaps. For instance, the Computer Programs and the Database Directives have rules on the mandatory nature of some exceptions, which cannot be overridden; by contrast, the INFOSOC Directive does not<sup>378</sup> (see also section IV below). This is even more problematic if one considers the mixed nature of some works, such as videogames, which contain features that can come under both the Software Directive and the INFOSOC Directive.

Another issue which requires further clarification is the one of fair compensation. The INFOSOC Directive attaches a **right to fair compensation** to three exceptions<sup>379</sup>. The conditions surrounding this right remain unclear despite having been the subject of a certain number of decisions from the CJEU<sup>380</sup>. In addition, the conditions for application of fair compensation, which is dependent upon the harm caused to the right holder,

<sup>373</sup> See Annex A on National implementation of selected copyright exceptions and limitations in a sample of Member States of Centre for European Policy Studies and Economisti Associati (2015), Study on the implementation, application and effects of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (Infosoc Directive) and of its related instruments, published by the European Parliament.

<sup>374</sup> IVIR, 'The Recasting of Copyright & Related Rights for the Knowledge Economy', 2006, p. 66.

<sup>375</sup> Article 5 (3)(a) of the INFOSOC Directive.

<sup>376</sup> Report from the Expert Group, Standardisation in the area of innovation and technological development, notably in the field of Text and Data Mining, published by the European Commission 2014, p.51, available at [http://ec.europa.eu/research/innovation-union/pdf/TDM-report\\_from\\_the\\_expert\\_group-042014.pdf](http://ec.europa.eu/research/innovation-union/pdf/TDM-report_from_the_expert_group-042014.pdf).

<sup>377</sup> De Wolf & Partners, 'Study on the Application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society (The "Infosoc Directive")', European Commission, 2013, p. 403, available at

[http://ec.europa.eu/internal\\_market/copyright/docs/studies/131216\\_study\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/studies/131216_study_en.pdf).

<sup>378</sup> IVIR, 'The Recasting of Copyright & Related Rights for the Knowledge Economy', 2006, p. 64-67.

<sup>379</sup> Article 5 (2) (a), (b) and (e), and allows Member States a more extensive use of such right (Recital 36).

<sup>380</sup> Judgment of 10 April 2014 *ACI Adam BV and Others v Stichting de ThuisKopie and Stichting Onderhandeligen ThuisKopie vergoeding* in case C-435/12; Judgment of 11 July 2013 *Amazon.com International Sales Inc. and Others v Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte Gesellschaft mbH* in case C-521/11 (ECR 2013); Judgment of 9 February 2012 *Martin Luksan v Petrus van der Let* in C-277/10 (ECR 2012); C-467/08 *Padawan SL v Sociedad General de Autores y Editores de España (SGAE)* [2010] ECR I-10055.

differ from the conditions for granting equitable remuneration (a concept that predates the one of 'fair compensation' and that can be found, inter alia, in the Rental and Lending Rights Directive). In this scenario, it is not clear when a legislator could choose one or the other, apart from the three mandatory exceptions mentioned above<sup>381</sup>.

Also regarding exceptions and limitations, there is no guidance on the implementation of the relationship between Technological Protection Measures (TPMs) and exceptions. The INFOSOC Directive requires Member States to ensure that users benefit from certain limitations with respect to works protected by TPMs<sup>382</sup>. Member States have followed different solutions when implementing the Directive, revealing that there is no clear harmonisation in this area. In some Member States, interest groups and other third parties may claim the application of the limitation, while in others, only individuals may do so<sup>383</sup>.

### 3. Gap 3: Authorship and ownership

The concepts and scope of authorship and ownership are not (horizontally) harmonised<sup>384</sup>. This gap can have a negative impact on harmonised rules, such as the calculation of the term of protection for works of joint authorship and collective works – which is dependent on the respective qualification of the work<sup>385</sup>. In other words, the same work will be qualified as either a work of joint authorship or a collective work, depending on the Member State, the term of protection of which is calculated differently. Similarly, the definition of ownership, and, therefore, the identity of the right holder, has an impact on the localisation of the making available right. It could lead to a situation of fragmentation of rights where several people hold different rights to a work being made available to the public depending on where the copyright protection is sought<sup>386</sup>. The need to harmonise authorship and ownership has also been stressed by a few commentators<sup>387</sup>.

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<sup>381</sup> IVIR, 'The Recasting of Copyright & Related Rights for the Knowledge Economy', 2006, p. 70-71.

<sup>382</sup> Article 6(4) of the INFOSOC Directive.

<sup>383</sup> On the issue of TPMs and the gaps resulting from article 6, see IVIR, 'Study on the Implementation and Effect in Member States' Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society', 2007, p. 132, 166 and Part II.

<sup>384</sup> E.g., there is a minimum harmonisation of authorship of a cinematographic or audiovisual work – Article 1 paragraph 5 of the Satellite and Cable Directive, Article 2 paragraph 1 of the Term of Protection Directive (2006) and Article 2 paragraph 2 of the Rental and Lending Rights Directive (2006) mandate that the principal director of a cinematographic or audiovisual work be considered at least as one of its authors. However, as noted in the Report on the question of authorship of cinematographic or audiovisual works (2002) at 8-10, even here there are still differences among Member States regarding who is to be considered as co-author.

<sup>385</sup> Angelopoulos, C., 'The Myth of European Term Harmonisation: 27 Public Domains for the 27 Member States', 2012, *International Review of Intellectual Property and Competition Law*, p. 567.

<sup>386</sup> De Wolf & Partners, 'Study on the Application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society (The "Infosoc Directive")', European Commission, 2013, p. 82.

<sup>387</sup> Quaedvlieg, A., 'Authorship and Ownership: Authors, Entrepreneurs and Rights', in Synodinou, E.D. (ed.), *Codification of European Copyright Law. Challenges and Perspectives*, Kluwer

#### 4. Gap 4: The INFOSOC Directive in the wider legal framework

A more encompassing and transversal gap is the relationship between the INFOSOC Directive and other legal instruments. Media convergence and the inconsistencies between the different regimes for exceptions found in several Directives, mentioned above, can in this context be seen as consequences of the uncertainty surrounding the place of the INFOSOC Directive in the wider legal framework.

Whilst Articles 1 and 11 of the INFOSOC Directive address its relationship with other Directives, some doubts remain as to the interplay. The CJEU has stressed the nature of *lex specialis* of the Software Directive vis-à-vis the INFOSOC Directive<sup>388</sup>, but it is not clear whether this line of thought applies to other Directives (and if so, which ones). In case such a generalisation is followed, it is unclear how the CJEU can extend the criterion of originality found in ‘specialised’ Directives – such as the Software Directive and the Database Directive – to all works within the scope of the INFOSOC Directive – as it did in case C-5/08 *Infopaq*<sup>389</sup>.

Several other **inconsistencies** ensue from this gap. This is the case for third party liability for infringement of the rights established by the INFOSOC Directive, which remains largely unharmonised. The only exception is **third party intermediary liability** for temporary acts of reproduction<sup>390</sup>. Further harmonisation has only materialised to a limited degree by way of the E-commerce Directive<sup>391</sup>’s safe harbours and the Enforcement Directive<sup>392</sup>’s requirements for injunctions against intermediaries<sup>393</sup>. Outside of this limited harmonised framework, third party liability for infringement of copyright is governed by national liability rules, which are greatly divergent from one Member State to another. This scenario has consequences for an array of information society business (e.g., search engines) that seek legal certainty when conducting their activity throughout Europe<sup>394</sup>.

Another example concerns **multi territorial licensing**. The Collective Rights Management Directive introduced rules on multi-territorial licensing of online rights in musical works, which include the rights of reproduction and communication to the public harmonised

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Law International, 2012; Walter, M., and von Lewinski, S., *European Copyright Law A commentary*, Oxford University Press, 2010, pp. 1468-1471.

<sup>388</sup> Judgment of 3 July 2012 *UsedSoft GmbH v Oracle International Corp* in Cases C-128/11 (ECR 2012); Judgment of 23 January 2014 *Nintendo Co. Ltd and Others v PC Box Srl and 9Net Srl* in Case C-355/12 (ECR 2014).

<sup>389</sup> Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECR I-06569.

<sup>390</sup> Article 5(1)(a) of the INFOSOC Directive.

<sup>391</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178, 17.7.2000.

<sup>392</sup> Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ L 157, 30.4.2004.

<sup>393</sup> Calling for harmonisation in this area and putting forth extensive arguments, Angelopoulos, C., ‘Beyond the safe harbours: harmonising substantive intermediary liability for copyright infringement in Europe’, *Intellectual Property Quarterly*, 2013, p. 253, also available at <http://www.ivir.nl/publicaties/download/1087>.

<sup>394</sup> *Ibid.*

by the INFOSOC Directive<sup>395</sup>. Other rights and other works (e.g., satellite transmission, online rights in e-books) are not covered, and neither are the related rights - which also need to be cleared for a great majority of musical works, leading, therefore, to a fragmented regime<sup>396</sup>. Due to technological evolutions, the Satellite and Cable Directive provisions are gradually becoming redundant where most broadcasting acts fall under the general regime of the INFOSOC Directive<sup>397</sup>. This created issues of whether some acts fall indeed under the INFOSOC Directive or not, as mentioned above. In addition, 'the problems of multi-territorial rights clearance that the SatCab initiative intended to alleviate persist'<sup>398</sup>.

## 5. Summary overview of the harmonisation gaps

In order to classify an issue as a gap under this research paper, a methodological approach has been defined based on two main criteria:

- 1) the right is only partially harmonised in the EU legislation, either because the harmonised right only applies to certain copyrighted works or because certain aspects of the right are not regulated or lack clarity;
- 2) the right is absent from the EU legal framework.

For the purposes of this paper, it is also assessed whether the gap is minor or major. This distinction between minor and major gaps serves as an indication as to whether the gaps have consequences in practice, in particular with regard to the functioning of the internal market and the digitalisation of the market.

- **Minor:** The existence of legal gaps presupposes that the EU copyright legal framework is incomplete. However, if in the absence of a legal norm the matter can be dealt with through interpretation and no evidence points to practical difficulties in applying the right, this will be qualified as a minor gap.
- **Major:** If a legal gap causes problems in practice, e.g. the implementation of copyright protection is adversely affected or it constitutes a barrier to the free movement of goods and services, this will be considered as a major gap.

The constraints of this briefing paper do not allow for extensive research or stakeholder consultations. Therefore, the results should be seen as indicative rather than definite.

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<sup>395</sup> Recital 37 of Directive 2014/26/EU.

<sup>396</sup> Drexler, J., et al., 'Comments of the Max Planck Institute for Intellectual Property and Competition Law on the Proposal for a Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market, *International Review of Intellectual Property and Competition Law*, 2013, pp. 322, 342-343.

<sup>397</sup> In the Netherlands, the cable distribution television does no longer fall within the definition of the Satellite and Cable Directive. Guibault, L., and Quintais, J.P., 'Copyright, technology and the exploitation of audiovisual works in the EU', in *The influence of new technologies on copyright*, IRIS plus, 2014, p. 23.

<sup>398</sup> Hugenholtz, P.B., 'SatCab Revisited: The Past, Present and Future of the Satellite and Cable Directive', in *Convergence, Copyrights and Transfrontier Television*, IRIS Plus, 2009-8, p. 17, available at <http://www.ivir.nl/publicaties/download/924>.

Table 20: overview of harmonisation gaps – rights

Rights	Harmonised		Gap	
	Fully	Partially	Minor	Major
1. Right to paternity	/	/	✓	
2. Right of integrity	/	/	✓	
3. Right of reproduction		✓ <sup>399</sup>		✓
4. Right of communication to the public/making available to the public		✓ <sup>400</sup>		✓
5. Right of distribution		✓ <sup>401</sup>		✓
6. Right of fixation		✓ <sup>402</sup>	✓	
7. Right of rental and/or lending		✓ <sup>403</sup>	✓	
8. Right to fair compensation		✓ <sup>404</sup>		✓
9. Right of resale (droit de suite)		✓ <sup>405</sup>	✓	
10. Right of broadcasting		✓ <sup>406</sup>		✓
11. Right of adaptation		✓ <sup>407</sup>	✓	
12. Right of translation		✓ <sup>408</sup>	✓	

The **moral rights**, including the rights to paternity and integrity, aim at protecting the immaterial interests of the authors. Those are not harmonised at EU level, where the focus has been on harmonising economic rights. Since they arguably do not immediately relate to internal market integration, but rather to cultural and property rights, the competence of the EU to regulate moral rights has not been as firmly established<sup>409</sup>. The rights to paternity and integrity have achieved some level of harmonisation in Europe via the application of the Berne Convention. Opinions differ as to the importance of harmonising moral rights at EU level. Some fear that an harmonisation exercise would

<sup>399</sup> Article 4(b) of the Software Directive, Article 5(1) of the Database Directive and Article 2(a) of the INFOSOC Directive.

<sup>400</sup> Article 3(1) of the INFOSOC Directive.

<sup>401</sup> Article 4 of the INFOSOC Directive, Article 5 of the Database Directive, Article 9 of the Rental and Lending Rights Directive and Article 4 of the Software Directive.

<sup>402</sup> Article 7 of the Rental and Lending Rights Directive.

<sup>403</sup> Articles 5(2) and 3 of the Rental and Lending Rights Directive and Article 4 of the Software Directive.

<sup>404</sup> Article 5(2) of the INFOSOC Directive.

<sup>405</sup> The Resale Rights Directive.

<sup>406</sup> Article 2 of the Satellite and Cable Directive and Article 7 of the INFOSOC Directive.

<sup>407</sup> Article 4(b) of the Software Directive and Article 5(b) of the Database Directive.

<sup>408</sup> Article 4(b) of the Software Directive and Article 5(b) of the Database Directive.

<sup>409</sup> van Echoud, M., et al., *Harmonising European Copyright Law. The Challenges of Better Lawmaking*, Kluwer Law International, Alphen aan den Rijn, 2009, p.68.

lead to lessening the strong protection afforded by some Member States to authors<sup>410</sup>. The increase in cross-border exploitation of works thanks to new technologies begets, however, the need to a coherent and balanced EU copyright framework, including the harmonisation of moral rights<sup>411</sup>. For the purpose of this paper, the gap is, however, assessed as minor since no evidence points to strong implications in practice of the lack of harmonisation<sup>412</sup>.

A general **right to reproduction** has been recognised at EU level by the INFOSOC Directive. The harmonisation is flawed by a number of substantial gaps. First, the EU legal framework does not provide a definition of what constitutes reproduction<sup>413</sup>. In addition, the definition of the reproduction right is rather broad and subject to interpretation. For example, it has been uncertain whether the act of caching, which can store data for long period of time, fall under the right to reproduction and in particular its exception<sup>414</sup>. The CJEU clarified that acts of caching fall within the right to reproduction exception for temporary acts of reproduction<sup>415</sup>. In addition, the lack of definition of what constitutes reproduction at EU level has the potential to create an overlap between the reproduction right and the right to adaptation<sup>416</sup> and between the reproduction right and communication to the public<sup>417</sup>. Secondly, as mentioned above, the right to reproduction suffers from a number of optional exceptions and limitations, which results in Member States disparities as to the implementation of this right. Due to the importance of the right to reproduction and the issues of market fragmentation due difference of implementation of this right at Member State level, this gap is assessed as major.

The **right of communication to the public/making available to the public** is only partially harmonised at EU level as confirmed by the CJEU<sup>418</sup>, which has developed a four criteria to interpret the right (see above section I.1). The fragmentation of the exclusive rights of making available to the public result in the fact that a cross-border

<sup>410</sup> Salokannel, M., and Strowel, A., 'Study contract concerning moral rights in the context of the exploitation of works through digital technology', published by the European Commission, 2000, available at

[http://ec.europa.eu/internal\\_market/copyright/docs/studies/etd1999b53000e28\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/studies/etd1999b53000e28_en.pdf), p.225.

<sup>411</sup> Sirvinskaite, I., 'Toward Copyright 'Europeanification': European Union Moral Rights', *Journal of International Entertainment & Media Law*, 2010/2011, Vol. 3 Issue 2.

<sup>412</sup> European Commission, SEC(2004) 995, Commission Staff Working Paper on the review of the EC legal framework in the field of copyright and related rights, p.16.

<sup>413</sup> Dreier, T., and Hugenholtz, P. B., *Concise European Copyright Law*, Kluwer, 2006, p. 321.

<sup>414</sup> van Eechoud, M., et al., *Harmonising European Copyright Law. The Challenges of Better Lawmaking*, Kluwer Law International, 2009, p.86.

<sup>415</sup> According to the CJEU, 'an act can be held to be 'transient' within the meaning of the second condition laid down in Article 5(1) of Directive 2001/29 only if its duration is limited to what is necessary for the proper completion of the technological process in question, it being understood that that process must be automated so that it deletes that act automatically, without human intervention, once its function of enabling the completion of such a process has come to an end'. Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECRI-06569, paragraph 63.

<sup>416</sup> Bently, L., and Sherman, B., *Intellectual Property Law*, Oxford University Press, 2014, p. 215.

<sup>417</sup> IVIR, 'The Recasting of copyright & related rights for the knowledge economy', 2006, available at [http://ec.europa.eu/internal\\_market/copyright/docs/studies/etd2005imd195recast\\_report\\_2006.pdf](http://ec.europa.eu/internal_market/copyright/docs/studies/etd2005imd195recast_report_2006.pdf), p.55.

<sup>418</sup> Judgment of 26 March 2015 in Case C-279/13 *C More Entertainment AB v Linus Sandberg*, paragraphs 29-31.



exploitation of a copyrighted work would still require the consent of various right holders<sup>419</sup>. The fragmentation of the right can be assessed as a major gap as it has an impact on the integration of the internal market.

The **right to distribution** is regulated, among others, by the INFOSOC Directive and the Software Directive. Both Directives have differences in how they define the distribution right. In particular, regarding the principle of exhaustion, where, in case of softwares, the right is exhausted by the first sale of a copy, while in the INFOSOC Directive the occurs with the first sale or ownership transfer of that object. Such inconsistency becomes problematic concerning digital works. The INFOSOC Directive confines the exhaustion principle to the distribution of physical media embodying copyright works and not the digital copies, which are therefore regulated at national level. As a result, the online market is still fragmented where end-users face access restriction due to copyright territoriality<sup>420</sup>. The gap in harmonisation is thus assessed as major.

The **right of fixation** lacks harmonisation at EU level as the requirements for fixation are not spelled out in the EU Directives. The right is only referred to in the Rental and Lending Rights Directive in relation to performers and broadcasting organisations. The gap is considered minor as harmonisation is not absolutely needed as in practice the requirements of fixation are not so important because the work must merely be fixed in some ways as to enable the author to claim for copyright<sup>421</sup>.

While the Rental and Lending Rights Directive aims at the full harmonisation of the **right of rental and lending**, it introduced a number of exceptions, including the possibility for Member States to derogate from the exclusive public lending right, provided the authors receive a remuneration for such lending. The Member States are free to determine the conditions for the remuneration and have also the option to exempt certain establishments from remuneration altogether. The lending right is, therefore, not fully harmonised. In addition, it is unclear whether some types of works are covered by the Directive's lending right, such as software lending<sup>422</sup>. The Rental and Lending Rights Directive is not fit for new technological developments since it does not appear to cover e-lending. Due to a lack of any legal authorisation for libraries to offer e-lending, this is done through licensing agreements with publishers and e-books platforms dedicated to libraries' users<sup>423</sup>. The impact of this gap is for now still minor as public libraries e-books

<sup>419</sup> Depreeuw, S., and Hubin, J-B. (De Wolf & Partners), 'Study on the making available right and its relationship with the reproduction right in cross-border digital transmissions', published by the European Commission, 2014, available at [http://ec.europa.eu/internal\\_market/copyright/docs/studies/141219-study\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/studies/141219-study_en.pdf), p. 105.

<sup>420</sup> Centre for European Policy Studies and Economisti Associati (2015), Study on the implementation, application and effects of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (Infosoc Directive) and of its related instruments, published by the European Parliament, 2015.

<sup>421</sup> Derclaye, E., *Research Handbook on the Future of EU Copyright*, Edward Elgar Publishing, 2009, p.4.

<sup>422</sup> IVIR, 'The Recasting of copyright & related rights for the knowledge economy', 2006, available at [http://ec.europa.eu/internal\\_market/copyright/docs/studies/etd2005imd195recast\\_report\\_2006.pdf](http://ec.europa.eu/internal_market/copyright/docs/studies/etd2005imd195recast_report_2006.pdf), p.49.

<sup>423</sup> Dussollier, S., 'A manifesto for an e-lending limitation in copyright', 2014, available at <http://www.jipitec.eu/issues/jipitec-5-3-2014/4096>.

lending offer is currently relatively small in Europe. This may, however, drastically change in the years to come<sup>424</sup>. All in all, the gaps in relation to the right of rental and lending can be considered being minor as currently no strong implications have been identified in practice since either international rules apply or solutions, such as licensing agreements, mediate the gaps. Nevertheless, in the future such gap may become more problematic.

The **right to fair compensation** is a right that, arguably, does not stand independently as it stems from granting exceptions to the right of reproduction. The conditions to apply fair compensation lack clarity and the implementation of the right is fragmented since it is regulated at national level. In addition, the conditions of fair compensation differ to those of equitable remuneration found in the Rental and Lending Rights Directive. Remuneration is, however, of importance as it represents for a number of artists and performers the main or sole guarantee of remuneration<sup>425</sup>. Due to the importance of this right and the fragmented nature of its implementation, the gap can be assessed as major.

The **resale right** is a right to remuneration for the resale of art works. The Resale Directive does not fully harmonise all the aspects of the resale right (*droit de suite*). It harmonises only the aspects related to the internal market<sup>426</sup>. However, no indication points to strong practical implications of this partial harmonisation. The harmonisation does not appear to have had an important impact on the EU art market. The main issue of the implementation of the Directive seems to relate to the quality of the administration of the resale right, which varies across the EU, bringing burden and costs to art market professionals and artists alike<sup>427</sup>. The gap is therefore assessed as minor.

The **right of broadcasting** is only partially harmonised as confirmed by the CJEU<sup>428</sup>. The CJEU deemed, for example, that live online broadcasting does not fall under the EU legislation and therefore can be regulated at Member States level<sup>429</sup>. Such gap can be considered major due to the increasing importance of live online broadcastings. In addition, broadcasting rights remain largely characterised by market fragmentation where territoriality persists, not solely due to national copyrights, but also through a combination of encryption technology and territorial licensing<sup>430</sup>. Broadcasting in Europe remains very much ingrained in national culture, language and tradition with little

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<sup>424</sup> IDATE Consulting, Study on the commercial offer of ebooks for public libraries, Study for the French Ministry of Culture and Communication, 2013, available at [www.culturecommunication.gouv.fr/Disciplines-et-secteurs/Livre-et-lecture/Actualites/Etude-IDATE-sur-les-livres-numeriques-en-bibliotheque](http://www.culturecommunication.gouv.fr/Disciplines-et-secteurs/Livre-et-lecture/Actualites/Etude-IDATE-sur-les-livres-numeriques-en-bibliotheque).

<sup>425</sup> IVIR, 'The Recasting of copyright & related rights for the knowledge economy', 2006, available at [http://ec.europa.eu/internal\\_market/copyright/docs/studies/etd2005imd195recast\\_report\\_2006.pdf](http://ec.europa.eu/internal_market/copyright/docs/studies/etd2005imd195recast_report_2006.pdf), p.121.

<sup>426</sup> Dreier, T., and Hugenholtz, P. B., *Concise European Copyright Law*, Kluwer, 2006, p. 405.

<sup>427</sup> European Commission COM(2001) 878, [Report on the Implementation and Effect of the Resale Right Directive \(2001/84/EC\)](#), p.10

<sup>428</sup> Judgment of 26 March 2015 in Case C-279/13 *C More Entertainment AB v Linus Sandberg*, paragraphs 29-31.

<sup>429</sup> *Ibid.*, paragraphs 29-36.

<sup>430</sup> Hugenholtz, P. B., 'SatCab Revisited: The Past, Present and Future of the Satellite and Cable Directive', in *Convergence, Copyrights and Transfrontier Television*, IRIS plus, issue 2009-8, pp. 10-11.

appetite for an European licence since the market or the broadcaster's public service mandate is territorially limited at national level<sup>431</sup>. As a result of the gradual irrelevance of the Satellite and Cable Directive due to new technological developments, broadcasting falls more and more under the provisions of the INFOSOC Directive, in particular the making available and reproduction rights. With the increase in digital broadcasting offering and new business models such as on-demand services or webcasting, the gap in harmonisation is becoming problematic due to the uncertainty of whether they fall under the broadcasting right or making available right<sup>432</sup> and the complexity of rights clearance, which may discourage broadcasters to provide some types of services<sup>433</sup>. The gap may, therefore, be considered as major.

The **right of adaptation** is only harmonised for computer programs and databases and only to the extent the right is covered by the Berne Convention<sup>434</sup>. As a result, 'if a protected work is transformed in such a way that it is no longer a reproduction, the question of liability falls to national law'<sup>435</sup>.

The **right of translation** gives the right holder the exclusive right of making and of authorizing the translation of their works into another language. Similarly to the right of adaptation, the EU legal framework only refers to the right of translation in the Software Directive and the Database Directive, without further defining the scope and terms of application of the right. The right is, therefore, only harmonised to the extent it is covered by the Berne Convention<sup>436</sup>. Both the right of translation and the right of adaptation are linked to the issue of original ownership and authorship and have moral rights implications as they relate to derivative works. Those aspects are in general not addressed by the EU legal framework<sup>437</sup>. One of the reasons has been the focus on economic rights as being more pertinent to the internal market integration. The absence of harmonisation of both rights is still considered as a gap because their harmonisation is needed to establish a coherent EU copyright framework, albeit the gap may be considered as minor.

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<sup>431</sup> Hugenholtz, P. B., 'SatCab Revisited: The Past, Present and Future of the Satellite and Cable Directive', in *Convergence, Copyrights and Transfrontier Television*, IRIS plus, issue 2009-8, pp. 10-11.

<sup>432</sup> EBU, 'Copyright White Paper Modern copyright for digital media Legal analysis and EBU proposals', 2010, available at [http://www3.ebu.ch/files/live/sites/ebu/files/Knowledge/Media%20Law/Position%20Papers/20100301\\_EBU%20Copyright%20White%20Paper.pdf](http://www3.ebu.ch/files/live/sites/ebu/files/Knowledge/Media%20Law/Position%20Papers/20100301_EBU%20Copyright%20White%20Paper.pdf), p.6.

<sup>433</sup> IVIR, 'The Recasting of Copyright & Related Rights for the Knowledge Economy', 2006, pp. II and 19-20.

<sup>434</sup> Dreier, T., and Hugenholtz, P. B., *Concise European Copyright Law*, Kluwer, 2006, p. 40.

<sup>435</sup> Bently, L., and Sherman, B., *Intellectual Property Law*, Oxford University Press, 2014, p. 145.

<sup>436</sup> Dreier, T., and Hugenholtz, P. B., *Concise European Copyright Law*, Kluwer, 2006, p. 40.

<sup>437</sup> van Echoud, M., et al., *Harmonising European Copyright Law. The Challenges of Better Lawmaking*, Kluwer Law International, 2009, p.65.

## Chapter 4 – List of options

### Key findings

- Four main options for legislative reform have been identified: 1) codification in a narrow sense, 2) recasting, 3) further harmonisation of selected issues, and 4) the creation of a single EU copyright title.
- A combination of options is possible.
- Depending on the option chosen or on the combination thereof, the legal instruments that could be used include a Directive or Regulation, which can be combined with non-legally binding instruments.
- All options apart from codification in a narrow sense are likely to have an impact on other areas, namely the EU Cultural and Social policy, EU Industrial and Employment policy, EU eCommerce and Telecoms policy, and EU Consumer policy.

The European Parliament has requested an assessment of the merits of reforming the EU Copyright legal framework, in particular a review of the merits and possible extent of the codification of the *acquis*, including the introduction a single EU copyright title.

In its ‘Digital Agenda for Europe’<sup>438</sup>, the Commission identified a number of concrete actions that could contribute to the development of the Digital Single Market<sup>439</sup>. Progress has already been made (such as the adoption of the Collective Rights Management Directive<sup>440</sup>). However, additional actions are still needed to ensure that EU copyright meets the requirements of the Digital Single Market. The European Parliament<sup>441</sup> and the Commission<sup>442</sup> have acknowledged the need for ‘modifying copyright rules to reflect new technologies and to make them simpler and clearer’, while considering the introduction of a single European Copyright Title.

<sup>438</sup> European Commission, COM(2010)245, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions A Digital Agenda for Europe.

<sup>439</sup> European Commission, COM (2011) 287, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the 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](#); European Commission, COM(2012)789, [Communication from the Commission On content in the Digital Single Market](#).

<sup>440</sup> The Collective Rights Management Directive.

<sup>441</sup> European Parliament, ‘[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\(INI\)\)](#)’, 2015.

<sup>442</sup> European Commission, COM(2014) 910 final, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the committee of the regions Commission, ‘[Work Programme 2015. A New Start](#)’.

## 1. Options for legislative reform

This section will review the possible legal options for further harmonisation of the copyright framework.

Four options for legislative reform are considered and analysed below<sup>443</sup> in order of their harmonisation potential. Other non-legislative options exist beyond legislative reform, which could also partly achieve the modernisation of the EU copyright framework. Such options could be recommendations, interpretative communications or opinions. Within the scope of this paper, we limit our analysis to the below options which either offer the most added value or constitute the most feasible way forward.

1. **Codification** in a narrow sense. This would involve replacing existing Directives with one single act. It would not alter their substance or imply a change in policy: overlapping provisions would be deleted, terms and definitions harmonised and errors corrected<sup>444</sup>. This option will not involve substantial harmonisation unless the existing Directives are amended before undergoing the codification process.
2. **Recasting**. More ambitiously, recasting implies replacing existing Directives with one single act, while amending existing directives. It incorporates substantive amendments in a single text and the unchanged provisions of existing legislation<sup>445</sup>.
3. **Further harmonisation of selected issues**. This option implies the adoption of a new instrument (most likely a directive) to harmonise issues/areas which have not been previously regulated at EU level.
4. The **creation of a single EU title**. The option would result in the establishment of a pan-European copyright title that would supersede national copyright regimes.

The relative merits of each option are considered below.

### 1.1. Codification

Codification is a process which replaces the existing legislation by a single act<sup>446</sup>. The Interinstitutional Agreement on Better Law-Making defines the process of ‘codification’ at European level as the ‘procedure whereby the acts to be codified are repealed and replaced by a single act containing no substantive change to those acts’<sup>447</sup>. Since the

<sup>443</sup> Options relating to soft law (i.e., non-binding instruments) are not considered as main solutions here due to their non-mandatory nature, which may hamper their effectiveness.

<sup>444</sup> European Commission COM (2003) 71 final, [Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on Updating and Simplifying the Community Acquis](#), p.12.

<sup>445</sup> Ibid, pp. 12-13. See also the Interinstitutional agreement on a More Structured Use of the Recasting Technique, (OJ C 77, 28.3.2002) point 2.

<sup>446</sup> The [Interinstitutional Agreement on better law-making](#), 28 October 2011.

<sup>447</sup> Point 1 of the [Interinstitutional Agreement of 20 December 1994 - Accelerated working method for official codification of legislative acts \(96/C 102/02\)](#), OJ C 102, 4.4.1996; Kramer, X., de Rooij, M., Lazić, V., Blauwhoff, R., and Frohn, L., [A European Framework for private international law: current gaps and future perspectives](#), published by the European Parliament, 2012, pp.79, 15, 10; Bozeat, N., (GHK), [The perspective of having a European Code on Private International Law](#), published by the

codification process entails no substantive changes, **any changes in substance of the legislation must be done through amendments of the directives prior to regrouping of the various parts of the legislation to be codified**. Without such prior amendments, codification would be limited to a technical procedure without bringing any meaningful harmonisation.

The codification process can be initiated through a proposal of the Commission, which then follow the full legislative process through an accelerated process<sup>448</sup>.

The codification of existing Directives has already been broached by the Commission as one of the alternatives for the overhaul of copyright at EU level, as a way to 'help to clarify the relationship between the various exclusive rights enjoyed by rights holders and the scope of the exceptions and limitations to those rights'<sup>449</sup>. Codifying the existing Directives in one single act would do away with conceptual overlaps (e.g., between the exclusive rights) and contradictions in terminology (e.g., regarding the beneficiaries of exceptions) that do not further harmonisation aims or the protection of interests of the relevant stakeholders. Codification could, therefore, partly address gaps 1 and 2 (see Chapter 3).

Codification could also address gap 4 by integrating the INFOSOC and the other directives in one single instrument, so as to remove doubts regarding the place of the former in the wider copyright framework.

By providing secure legal texts that are easier to understand, codification brings about legal certainty. Codification would also have the advantage of reforming EU copyright following a step-by-step approach – as opposed to a radical overhaul, the impact of which could be more unpredictable. In this scenario, codification could be a first logical step to reforming EU copyright given the complexity of the existing system of multiple instruments and rulings which have emerged to deal with problems and developments ad hoc, one of which could then be followed by any of the options mentioned below to fully address remaining gaps.

However, because it amounts merely to a textual exercise rather than to a substantive change, codification is not the appropriate option to deal with established gaps that relate to non-harmonised fields (such as the right of adaptation or the rules on authorship and ownership), or to correct existing clear shortcomings of the legislation (e.g. regarding the optional character of exceptions). For the same reason, codification alone has limitations as this would not clarify the relationship of the INFOSOC Directive with other, non-copyright related, Directives (such as the E-commerce Directive).

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European Parliament, 2013; Europa, '[Interinstitutional Agreement on better law-making](#)', 28 October 2011.

<sup>448</sup> Points 5 and 7 of the [Interinstitutional Agreement of 20 December 1994 - Accelerated working method for official codification of legislative acts \(96/C 102/02\)](#), OJ C 102, 4.4.1996.

<sup>449</sup> European Commission, COM (2011) 287, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the 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, p.11.

The extent of harmonisation codification may bring would depend on whether prior amendments are made to the existing Directives and the amplitude of those amendments, since codification in itself can only lead to minor harmonisation. However, amending the existing Directives prior to codifying could demand high legislative efforts if each Directive is amended separately; each undergoing a full legislative procedure. It could be envisaged that a single Directive amends several existing Directives before the codification process (which involves a separate, yet accelerated, legislative procedure). In this case, the process would be akin to recasting.

## 1.2. Recasting

Recasting resembles codification in the sense it entails replacing existing Directives into one single act. It presents additional advantages in comparison to codification, as it gives the opportunity to modify substantive provisions of the legal framework in the process of recasting. Therefore, it can be seen as a more effective process. Codification with prior amendments to existing Directives would imply at least two separate legislative procedures (at least one for amending the Directives and another one to codify the texts into one single act). On the other hand, recasting would entail going through only one legislative procedure where the amendments are made while the various texts are integrated into a single act. The legislative procedure used will depend on the legal basis used (if Article 114 TFEU, it would be the ordinary legislative procedure).

This option allows for correcting imbalances, i.e., verified gaps, shortcomings and inconsistencies derived from existing legislation. Recasting the EU copyright legal framework caters for the clarification of certain key concepts that remain undefined, thus increasing the harmonising effect of Directives. This could be done, *inter alia*, by integrating the CJEU case law where relevant, which would have the added benefit of aligning legislation with the case law of the Court. One example is the currently undefined concepts of fair compensation and remuneration, which have to some extent been clarified by the CJEU<sup>450</sup>. The advances made by the CJEU – e.g., the determination that the word ‘equitable’ in ‘equitable remuneration’ refers to the economic value of the use<sup>451</sup> – could be incorporated in the recasting act.

Recasting would thus address the gaps in a more comprehensive fashion. Apart from clarifying some undefined concepts and/or integrating the CJEU’s case law, recasting could also involve the amendment of existing provisions – such as the ones relating to exceptions, their optional character, and their relationship with technological protection measures. In addition, and similarly to codification, recasting could remove doubts

<sup>450</sup> E.g., Case C-245/00 *Stichting ter Exploitatie van Naburige Rechten (SENA) v Nederlandse Omroep Stichting (NOS)* [2003] ECR 2003 I-01251; Case C-192/04 *Lagardère Active Broadcast v Société pour la perception de la rémunération équitable (SPRE) and Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL)* [2005] ECR 2005 I-07199; Case C-467/08 *Padawan SL v Sociedad General de Autores y Editores de España (SGAE)* [2010] ECR I-10055; case C-271/10 *Vereniging van Educatieve en Wetenschappelijke Auteurs (VEWA) v Belgische Staat* [2011] ECR 2011 I-05815.

<sup>451</sup> Case C-245/00 *Stichting ter Exploitatie van Naburige Rechten (SENA) v Nederlandse Omroep Stichting (NOS)* [2003] ECR 2003 I-01251, para. 35.

regarding the relationship of the INFOSOC Directive with other copyright Directives, as it would integrate them all into one single act.

However, recasting would not cover legislative intervention in non-harmonised fields, such as the right of adaptation or the rules on authorship and ownership, or where further regulation is needed taking into account neighbouring areas, such as third party liability.

### **1.3. Further harmonisation of selected issues**

This option refers to the adoption of a new instrument to harmonise selected issues/ areas not been previously regulated at EU level. Further harmonisation could focus on non-harmonised aspects, such as the right of adaptation, the rules on authorship and ownership, or third party liability.

Opting for the harmonisation of non-harmonised subject-matter is by now a widely used technique in the field of copyright, making it easier to avoid known pitfalls and to learn from past mistakes (e.g., the use of new and undefined concepts).

Further harmonisation of selected issues can be done with the adoption of a new act (more likely a Directive) which will extend the level of harmonisation of the EU copyright framework by harmonising new areas. In this sense, this option would increase the level of harmonisation of copyright law at EU level, more so than options 1 and 2. As for option 2, the legislative procedure used will depend on the legal basis used.

As a stand-alone option, further 'selective' harmonisation in certain areas presents the disadvantage of adding yet another Directive to the already crowded legal framework, which does not provide further clarification of the legal status of the INFOSOC Directive in relation to the wider legal framework, nor would it address the gaps this approach might create.

However, this option could be combined with option 1 or 2, thereby addressing some remaining gaps. For instance, further harmonisation could be combined with a substantial amendment of existing regimes (such as the provisions regarding exceptions) and a clarification of current rules (such as the ones relating to the scope of exclusive rights).

### **1.4. Creation of a single EU title**

This option envisages the creation of a uniform copyright protection throughout the EU. We can envisage two ways forward in the creation of such title. The first one would be to create an EU title that would replace national copyright systems and, therefore, reach full harmonisation and uniformity across the EU. Another way forward would be the creation of an optional single EU title, which would coexist with national system by establishing an EU voluntary registration system.



### 1.4.1. Single EU title replacing national copyright systems

The harmonisation of national copyright laws has not tackled the issue of territoriality, as each Member State still has its own copyright regime – although parts of national copyright laws have been approximated by several Directives in the field of copyright, including the INFOSOC Directive. Territoriality is arguably one of the main causes for most gaps in harmonisation, as it leads to market fragmentation, thereby not fostering internal market goals<sup>452</sup>.

The effort to develop a modern European copyright system is strongly linked to the Europe 2020 Strategy framework. Copyright and the digital environment are the driving forces for bringing knowledge, competition and innovation into the European economy and they contribute to sustainable job creation<sup>453</sup>. A modern, integrated copyright regime could also enable the development of related sectors, such as e-commerce or digital industries.

A single EU copyright title would have an EU-wide effect, and it could replace divergent national rules. It would, therefore, also require a single regime for exclusive rights and exceptions. Similarly to options 2 and 3, this option would also have the potential to address gaps 1 and 2. It could, in one step, clarify the scope of exclusive rights, including catering for new acts of exploitation (gap 1); regulate the right of adaptation (gap 1); establish a new system of exceptions, including the related issues of fair compensation/remuneration and the interplay between exceptions and technological protection measures (gap 2). The EU title could also establish authorship and ownership rules (gap 3). Since this option would imply a single instrument, it could also address gap 4 by replacing previous Directives, eliminating inconsistencies between them, enabling a cohesive system for licensing, and clarifying liability rules for third party infringement.

This option has the advantages of enhancing legal security and transparency to the benefit of both right holders and consumers, and reducing transaction and enforcement costs<sup>454</sup>. Creating a single EU title can also be combined with the previous options. The EU copyright title would not have to regulate every aspect of the copyright field, but could instead focus on a limited number of key elements (such as core exclusive rights and exceptions)<sup>455</sup>.

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<sup>452</sup> Van Eechoud, M., et al., *op. cit.*, p. 307 *et seq.*

<sup>453</sup> In 2010, the creative industries (including, inter alia, publishing activities, video and television programme production, sound recording, broadcasting) accounted for 3% of the EU employment (around 6.7 million jobs) and globally the contribution of these industries reached 5.4% of GDP; (source: European Commission website: [http://europa.eu/rapid/press-release\\_MEMO-14-79\\_en.htm?locale=en#footnote-1](http://europa.eu/rapid/press-release_MEMO-14-79_en.htm?locale=en#footnote-1); 'Copyright + creativity= jobs and economic growth', WIPO studies on the economic contribution of the copyright industries, WIPO 2012).

<sup>454</sup> Opinion of the European Copyright Society (2014), available at [www.ivir.nl/syscontent/pdfs/78.pdf](http://www.ivir.nl/syscontent/pdfs/78.pdf).

<sup>455</sup> Gotzen, F., 'The European Legislator's strategy in the field of copyright harmonization' in Synodinou, T.E. (ed) *Codification of European copyright law. Challenges and perspectives*, Kluwer Law International, 2012.

However, the creation of a pan-European copyright title would constitute a new form of right in the legal order, with subsequent problems of interpretation. The new title would have to substitute national copyrights to be truly effective, as, unlike trademarks or designs, copyright cannot be subject to mandatory registration (see chapter 2, section II.2).

#### **1.4.2. Optional Single EU title coexisting with national systems**

A diametrically opposed solution would be to leave intact national copyrights and their divergent regimes, merely adding another layer of rights to the legal order<sup>456</sup>. The substitution of national copyrights by a single EU title could cause potential clashes with article 345 TFEU, which forbids the Treaties from prejudicing national rules governing the system of property ownership. Albeit, in practice, right owners would not forfeit their property as much as having it substituted by another (more encompassing, at least geographically) property title.

Nevertheless, the substitution of national property rights by an EU-wide one has been done in the past in the field of designations of origin/geographical indications, and this was confirmed to be admissible by the CJEU<sup>457</sup>.

The coexistence of the single EU copyright title with national copyrights would be materialised through the establishment of a voluntary EU registration system as allowed by the Berne Convention (see above section II.2). The concept of a voluntary EU registration has been concretised already for orphan works: a publicly accessible online database is currently being set up by the Office for Harmonisation of the Internal Market (OHIM)<sup>458</sup>. The idea of an EU copyright registration system was put forward in the Commission public consultation on the review of the EU copyright rules held between 5 December 2013 and 5 March 2014. Most of the end users/consumers, institutional users and intermediaries/service providers, as well as some Member States, who participated in the consultation supported the creation of a voluntary registration system at EU level. According to them, a registration system would allow for the collection of data about right-ownership and the length of copyright protection of registered works. This in turn would enable authors of the works to be identified more easily and allow for transparency. On the other hand, most of authors, performers, publishers, producers and broadcasters and collective management organisations (CMOs) who participated in the consultation were against the idea of a registration system, citing the potential administrative burden, and costs and concerns of its efficiency as reasons<sup>459</sup>.

Authors would be able to opt either for national or EU protection of their work, with the advantage of EU protection to be afforded across the EU uniformly. However, it can be

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<sup>456</sup> On the problems of coexistence of national copyrights and a single EU title, see Hilty, R., 'Reflections on a European Copyright codification', in Synodinou, T.E. (ed), *Codification of European Copyright Law. Challenges and perspectives*, Kluwer Law International, pp 360–361; Van Eechoud, M., et al., *op. cit.*, 317-318.

<sup>457</sup> Case C-478/07 B. *Budvar v Rudolf Ammersin* [2009] ECR 2009 I-07721, para. 110-114.

<sup>458</sup> On the basis of Article 3.6 of the Orphan Works Directive.

<sup>459</sup> European Commission, DG Internal Market and Services, July 2014, [Report on the responses to the Public Consultation on the Review of the EU Copyright Rules](#), pp. 23-24.

argued that not substituting national copyrights would undermine the goal of Article 118 TFEU of having uniform protection throughout the EU. On the other hand, a EU title could have the effect of pushing forward the harmonisation of national copyrights laws.

In conclusion, removing national copyrights is very likely to meet with the resistance of a number of key Member States with strong legal traditions in the field of copyright, particularly given that they would lose some of their competence and discretion over policy making in the field<sup>460</sup>. This option would most likely involve a long and difficult legislative process, where countries with divergent views to copyrights would need to agree on an uniform approach, since its adoption requires unanimity at the Council. The complexity of having to address many gaps and inconsistencies to ensure the establishment of a comprehensive and coherent EU copyright regime will further add to the difficulty of the process. The creation of a single EU title could therefore be envisaged in the long term, once EU copyright law has already reached a higher level of harmonisation (through the prior use of option(s) 1, 2 or/and 3).

## 2. Method and instruments

In terms of the instruments for implementing the options:

- Options 1 to 3 could be embodied in a Directive, which would still leave Member States room for manoeuvre as regards implementation, while addressing the gaps as they appear in their specific national systems.
- In the case of option 2, or of a combination of options 2 and 3, a Directive could be combined with an interpretative guidance on certain matters (e.g. scope of exclusive rights), in order to strengthen the harmonisation effect<sup>461</sup>. Moreover, since copyright harmonisation has so far mostly been done through Directives, there is an acquired know-how on the use of this instrument.
- Option 4 could take the form of a Directive or Regulation.

While the choice of a Directive presents the advantage to allow Member States the flexibility to implement the legislation, and thus facilitate political consensus for its adoption, it brings the risk that national disparities are likely to persist, since Member States implement Directives differently, as it has happened already (e.g. with exceptions). One way to offset this is to make more use of mutual recognition clauses in harmonising Directives such as what has been done in the Orphan Works Directive. The Directive states that a work or phonogram which is considered an orphan work in a Member State should be considered an orphan work in all Member States. The mutual recognition mechanism has the ability to achieve a high harmonising effect (as long as it is applied and enforced), in the sense that it facilitates the free movement of goods and services, without questioning national cultures and traditions. Mutual recognition implies that national rules remain unaltered, but Member States are obliged to recognise each other's

<sup>460</sup> Kur, A. and Dreier, T., *European Intellectual Property Law. Text, Cases and Materials*, Edward Elgar, 2013.

<sup>461</sup> IVIR, 'The Recasting of copyright & related rights for the knowledge economy', 2006, p.216.

standards. It is less intrusive than a harmonised rule that must be implemented. It also avoids lengthy negotiations on sensitive issues – the principle has proved of great help in realising the single market where there is no consensus on harmonisation<sup>462</sup>. Possible objections to the use of mutual recognition commonly include the problem of encouraging a ‘race to the bottom’, since lower standards of protection would then be as acceptable as higher standards. However, this risk is mitigated where isolated rules of mutual recognition are combined with harmonising norms, and in any case, it has been noted that, in practice, instances of a race to the bottom are rare<sup>463</sup>.

Alternatively, all options above could be made effective by means of a Regulation. A regulation would have the advantage of being immediately applicable and binding in all Member States. It reduces the regulatory freedom of Member States, but enhances legal certainty. On the other hand, where several options are combined – for example, having an EU title that only covers some features of the copyright regime, whilst remaining features are codified/recast, issues of interplay between Regulations and Directives could arise. This is because Regulations are directly applicable, while, in the case of Directives, existing national provisions would be the result of national implementation (and therefore different from one Member State to another).

Both a Directive or a Regulation could be combined with non- legally binding instruments, such as recommendations or communications/opinions. The latter could address issues in need of clarification, such as the scope of exclusive rights, or even minor gaps and inconsistencies. Because they do not have a binding effect, recommendations and similar instruments cannot, in theory, achieve a high harmonising effect, or properly address harmonisation gaps as a stand-alone method. However, the Commission Recommendation 2005/737/EC of 18 October 2005 on collective cross-border management of copyright and related rights is reported to have produced an impact on licensing practices and to have been endorsed by several stakeholders<sup>464</sup>. This might mean that in practice non-binding instruments might produce a more harmonising effect than expected.

### 3. Legal bases

Article 114 TFEU, which has been the main legal basis used so far to harmonise copyright rules, can be used for options 1 to 3. The CJEU has interpreted Article 114 to mean that, for a measure to be validly based thereon, it must have relating to the establishment and functioning of the internal market as a genuine goal. According to the Court, the internal market is a genuine goal if obstacles to free movement exist or are likely to occur, and the measure in question is designed to prevent them<sup>465</sup>. Article 114 TFEU is thus an adequate

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<sup>462</sup> Schmidt, S.K., ‘Mutual Recognition as a New Mode of Governance’, *Journal of European Public Policy*, 2007, p. 667.

<sup>463</sup> Schmidt, S.K., *op. cit.*, p. 677.

<sup>464</sup> European Commission, Monitoring of the 2005 Music Online Recommendation, 7.2.2008, available at [http://ec.europa.eu/internal\\_market/copyright/management/index\\_en.htm](http://ec.europa.eu/internal_market/copyright/management/index_en.htm)

<sup>465</sup> Case C-376/98 *Federal Republic of Germany v European Parliament and Council of the European Union (Tobacco Advertising I)* [2000] ECR 2000 I- 08419, para. 84; case C-380/03 *Federal Republic of Germany*

legal basis considering that all three options aim at establishing and enhancing the functioning of the internal market by approximating the laws of the Member States (or by strengthening existing approximation). Although the harmonisation of copyright has so far been carried out through Directives, Article 114 TFEU allows for the use of both Directives and Regulations.

Article 118 TFEU, foreseeing the creation of European intellectual property rights, on the other hand, would appear to be the correct legal basis for option 4. The use of this legal basis is also dependent on internal market considerations, as revealed by the obligation of measures to be passed 'in the context of the establishment and functioning of the internal market'<sup>466</sup>. As a result, the relevant case law on the validity of Article 114 TFEU as a legal basis should be applicable in the framework of Article 118 TFEU as well<sup>467</sup>. Article 118 TFEU also allows for the use of both Directives and Regulations, but, given that its goal is to provide uniform protection, a Regulation would probably be more adequate than a Directive, since the former is directly applicable within national legal orders without any need for separate national measures<sup>468</sup>.

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*v European Parliament and Council of the European Union (Tobacco Advertising II)* [2006] ECR 2006 I-11573, para. 41; Ramalho, A., 'Conceptualising the European Union's competence in copyright: what can the EU do?', *International Review of Intellectual Property and Competition Law*, 2014, 178, 181 *et seq.*

<sup>466</sup> This has also been confirmed by the CJEU: Judgment of 16 April 2013 in Joined cases C-274/11 & 295/11 *Kingdom of Spain and Italian Republic v Council of the European Union* (ECR 2013, para. 21).

<sup>467</sup> Ramalho, A., *op. cit.*, 185 *et seq.*

<sup>468</sup> *Ibid.*

**Table 21: overview of the merits of each legal option**

Legal Options	Possible legal bases	Possible harmonisation level	Possible achievements	Disadvantages
1. Codification	Article 114 TFEU	+	<ul style="list-style-type: none"> <li>- One single act</li> <li>- Clarification of terms</li> <li>- Address inconsistencies and overlaps</li> <li>- If substantive reforms have been introduced prior to codification, it will improve overall legal clarity and coherence.</li> </ul>	This option alone does not allow substantial changes to the legal framework, unless it is accompanied by prior amendments to the existing legal framework.
2. Recasting	Article 114 TFEU	++	<ul style="list-style-type: none"> <li>- Clarification of terms</li> <li>- Address inconsistencies and overlaps</li> <li>- Address gaps derived from existing legislation</li> </ul>	This option cannot address non-harmonised gaps.
3. Harmonisation of selected issues	Article 114 TFEU	++	<ul style="list-style-type: none"> <li>- Clarification of terms</li> <li>- Address inconsistencies and overlaps</li> <li>- Address gaps of non-harmonised issues</li> </ul>	This option may bring further inconsistencies and fragmentation since it would add another Directive to the copyright framework.
4. EU copyright title	Article 118 TFEU	+++	<ul style="list-style-type: none"> <li>- One single act</li> <li>- Clarification of terms</li> <li>- Address inconsistencies, overlaps and gaps</li> <li>- Full harmonisation</li> </ul>	This option may require lengthy negotiations and may lead to potentially high implementation costs. To ensure feasibility, further harmonisation of Member State laws would first be needed.

#### 4. Projected impact on other policy areas

Codification in the narrow sense would have a marginal impact on other policy areas, as it does not alter the substantive copyright rules. Addressing the gaps under the alternative 3 options could, however, have a more considerable impact.

Regarding the impact on EU cultural and social policy, establishing a mandatory regime for exceptions – which may be done under options 2, 3 or 4 – might erode the autonomy of the Member States in some related fields, such as culture and education, and might affect cultural diversity within the EU<sup>469</sup>. Furthering the regulation of licensing under those options might also impact on the fostering of cultural goals of collective management organisations and their culture-subsiding role<sup>470</sup>.

On the other hand, devising a strong system of exceptions under options 2, 3 and 4 might have an impact on the scope of exclusive rights, which in turn might affect the EU's industrial and employment policy, given that the protection of intellectual property rights is considered an important factor for promoting innovation and creativity and developing employment<sup>471</sup>. By contrast, enlarging the scope of exclusive rights to the detriment of exceptions might impact on the EU's Consumer policy – which is based on a high level of protection under Article 169 TFEU, to the extent that some users of copyright protected works are also consumers for the purposes of consumer law.

As regards EU E-Commerce and EU Telecoms policy, deepening EU regulation of third party liability rules under options 3 or 4 would have to take into account other regulatory disciplines and policies such as telecommunications and media, so that there is no disconnect between the regulatory structure of IT services and other media and copyright liability rules. For example, a strict liability regime could serve as a pressure point for envisaging more restrictive communications regulation.

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<sup>469</sup> Kur, A. and Dreier, T., *European Intellectual Property Law. Text, Cases and Materials*, Edward Elgar, 2013.

<sup>470</sup> Van Eechoud, M., et al, *op.cit.*, 310; Kur, A. and Dreier, T., *op. cit.*

<sup>471</sup> European Commission, COM (2011) 287, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the 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; Dhéret, C., et al, 'Towards an new industrial policy for Europe, EPC Issue Paper No 78, 2014, available at [http://epc.eu/pub\\_details.php?cat\\_id=2&pub\\_id=4995&year=2014](http://epc.eu/pub_details.php?cat_id=2&pub_id=4995&year=2014) , 20-21.

## Chapter 5 – Options costs and benefit assessment

### Key findings

- Addressing the gaps and fragmentation will affect various stakeholders differently depending on types of impact.
- Most stakeholders, including EU society as a whole, are likely to benefit from harmonisation to various extent; small-scale intermediaries acting primarily at Member State level can be expected to incur losses.
- The scale of the benefits of the legislative options is expected to be higher for the options which offer more thorough harmonisation, however these options may imply higher costs and some resistance at Member State level.
- Comprehensive quantitative evidence at this stage is lacking.

Intellectual property-based industries represent above average potential for growth and job creation. According to the European Competitiveness Report 2010, overall employment in creative industries increased by an average of 3.5% a year in the period 2000-2007 compared to 1% a year for the total EU economy. Empirical evidence also shows that the creative industries had a positive and significant effect on the growth rate of local GDP per capita<sup>472</sup>. Among the intellectual property rights dependent industries, copyright-intensive industries generate one of the lowest contributions to the EU economy, however it remains an important one. Indeed, copyright-intensive industries contribute to about 4.2% of EU GDP creation, with about 3.2% of all jobs in the EU, employing about 7 million workers directly and an additional 2.3 million indirectly<sup>473</sup>.

The gaps and fragmentation of the copyright regime impact on the free movement of goods and services across the EU and, therefore, have implications for Europe's growth, job creation and competitiveness. Licensing transactions are impaired by high costs, complexity and legal uncertainty for creators, users and consumers. Individual creators of copyright works do not always receive fair remuneration or compensation, which is essentially due to the market structure offering a better position to large corporations capable of purchasing multiple licences (aside from copyright infringement, chiefly perpetrated online). Due to the gaps and fragmentation of European copyright legislation, the circulation of cultural goods and services and the diversity of the works offered to European consumers remain below their potential and so is the competitiveness of the European creative industries. One of the examples of gaps and

<sup>472</sup> European Commission, DG Enterprise and Industry, SEC(2010) 1276, [European Competitiveness Report 2010, European Commission, Enterprise and Industry](#).

<sup>473</sup> Joint project between the European Patent Office and the Office for Harmonization in the Internal Market, '[Intellectual property rights intensive industries: contribution to economic performance and employment in the European Union Industry-Level Analysis Report](#)', September 2013, pp. 7-9.



fragmentation in the EU copyright regime is the issue of Text and Data Mining (TDM) presented in Box 1; it appears evident that European researchers are at a competitive disadvantage regarding access to copyright works as compared to researchers from other parts of the world.

**Box 1 Text and Data Mining – competitive advantage of American researchers**

At present, the use of TDM tools by researchers in Europe appears to be lower than in the United States and some other countries in the Americas and Asia. This reflects, among other factors, disadvantages created by the European legal framework with regard to TDM. There is a serious risk that, if steps are not taken to address these issues, Europe's relative competitive position as a research location will deteriorate further. Long-term results might include a loss of talent and a loss of investment to more favourable research locations.

Based upon assumptions in a range of studies, estimates have been made on the potential value of TDM to Europe's economy. Access to TDM increases the productivity of research because it increases research output with unchanged labour inputs. Applying the assumption that full access to TDM increases the productivity of research by 2 per cent, according to the Commission, it can be estimated that the real value of research output produced by the EU research budget would increase by €5.3 billion.

Many researchers call for a revision of copyright law, perhaps in the form of an exception for TDM along the lines proposed in the UK and Ireland and along with reform of EU database law.

Source: European Commission, [Standardisation in the area of innovation and technological development, notably in the field of Text and data mining](#), Report from the Expert Group, 2014.

One of the main objectives of introducing regulatory changes in the area of copyright would be to ensure a higher degree of horizontal harmonisation and coherence of various pieces of legislation. A higher level of harmonisation and coherence would provide more certainty for the market players and would enhance the functioning of the internal market by ensuring higher effectiveness and efficiency of the licencing processes. The changes would also be expected to improve the situation regarding fair remuneration for the authors and regarding circulation of the diverse works of culture across Europe. These would be unquestionable benefits of such regulatory changes.

According to the European Commission, a modern, integrated copyright regime can be expected to make a major contribution to growth, sustainable job creation and the competitiveness of our economy – which are essential to sustain the EU's recovery from the economic and financial crisis. It would enable the development of sectors such as e-commerce and digital industries which offer the greatest potential for future growth. It also has an essential role to play in the quality of daily life by fostering cultural diversity<sup>474</sup>.

<sup>474</sup> European Commission, COM(2011) 287 final, Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A single

In the light of these considerations, in this section the benefits and costs of each of the policy options identified in section 4 are investigated. All the options are assessed against the business-as-usual scenario (BAU) as described in sections 2 and 3.

## 1. Impacts on stakeholders distributed by criterion

The impacts of the options are investigated using the following criteria<sup>475</sup>:

- Improving internal market integration through better legal certainty and clarity
- Ensuring fair remuneration for the authors
- Facilitating cross-border access to diverse works of culture
- Improving the competitiveness of the EU creative industries
- Lowering transaction and administrative costs
- Impact on growth and jobs including SMEs

These aspects are assessed in qualitative rather than quantitative terms. The reason for this approach is that data relating to economic impacts in these sectors are scarce. This is related, on the one hand, to the intangible character of the goods in question (especially in relation to cultural works) and, on the other hand, to the requirements of business data protection. Information on the distribution of profits across the value chains in the specific sectors is not available.

The impacts of a higher degree of harmonisation of EU copyright legislation, which is the main objective of all the options considered, affect different stakeholders to a varying degree. The following groups of stakeholders can be distinguished<sup>476</sup>:

1. **Authors/performers:** writers, journalists, composers, actors, musicians, etc. and their representatives.
2. **Publishers/producers/broadcasters,** e.g. book, newspapers and scientific publishers; music publishers, music producers, film producers, game producers as well as public and private broadcasters and their representatives.
3. **Intermediaries/distributors/other service providers,** e.g. internet service providers, internet platforms, film distributors, telecom companies and their representatives.

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Market for Intellectual Property Rights. Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe.

<sup>475</sup> The first four criteria are based on the objectives of the InfoSoc Directive; the fifth criterion stems from the assessment of problems as identified in the CEPS study while the last one refers to the Europe 2020 strategy. See Centre for European Policy Studies and Economisti Associati (2015), Study on the implementation, application and effects of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (Infosoc Directive) and of its related instruments, published by the European Parliament.

<sup>476</sup> This division is based partly on the public consultations report: European Commission, Directorate General Internal Market and Services, July 2014, [Report on the responses to the Public Consultation on the Review of the EU Copyright Rules](#).

4. **Collective management organisations (CMOs):** organisations across different creative sectors and their European and international representatives.
5. **Institutional users:** these include institutions such as public libraries, museum, archives, film heritage institutions, universities and research centres as well as individual teachers and librarians and organisations representing them.
6. **End users/consumers:** individual citizens, internet users and consumer associations, as well as researchers and their representatives.
7. **EU society:** EU society as a whole.

The way various impacts affect the specific groups of stakeholders is roughly described below and then summarised in a table.

**Improving internal market integration through better legal certainty and clarity** is expected to have a positive impact on all the stakeholders. All the market players will avoid confusion and may save time which would otherwise be spent on looking for the right solutions related to uncertainty regarding copyrights.

**Ensuring fair remuneration/compensation** is primarily aimed to benefit the authors. Higher degree of harmonisation in this area would mean higher protection of authors against uncompensated use of their works, which under the existing legislation is possible due to gaps and inconsistencies. The legal changes can be expected to result in a transfer of value added from the stakeholders who currently benefit from the loopholes to the authors. Hence, publishers and intermediaries can be expected to lose some profits which will have to be shared to a greater extent, with the authors/performers. The users might have to pay more for the use of copyright works. The extent to which the users would have to pay higher costs for the use of the works depends on the cost-pass-through from providers of the works/services to the users.

**Facilitating cross-border access** to diverse works of culture would be expected to bring benefits to EU society as a whole, contributing to a better spread of information and in particular, cultural richness. The authors and performers who are at the moment less promoted internationally (Fat Tails performers<sup>477</sup>) would be expected to benefit here through more interest and, possibly, demand for their works. On the other hand, the authors and performers who are very popular and highly promoted according to the Power Law distribution<sup>478</sup> might lose part of their share of the market for the benefit of the international (European) authors and performers whose works will be made more accessible.

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<sup>477</sup> The Law of Fat Tails and a Power Law refers to the dynamics where the market features a very small number of extremely successful authors, 'absorbing' most of the market, and increasingly numerous cohorts of 'small' authors selling a limited number of copies. For explanation of the Law of Fat Tails and a Power Law see the section devoted to techno-economic analysis in Centre for European Policy Studies and Economisti Associati (2015), Study on the implementation, application and effects of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (Infosoc Directive) and of its related instruments, published by the European Parliament.

<sup>478</sup> Ibid.

**Improving the competitiveness of the EU creative industries** as compared to non-EU industries will be beneficial for all the stakeholders. Improved competitiveness would be expected to occur as a result of other impacts such as better integration of the market and lower transaction costs, which contribute to better functioning and efficiency of the market. Text and data mining is one of the dimensions of the competitiveness issues, with direct benefits accruing to the researchers and research organisations (constituting specific groups of institutional and end users) and indirect benefits accruing to the EU society as a whole.

**Lowering transaction and administrative costs** would be important for the publishers and users who would be expected to have to pay less for purchasing joint licences and would have to spend less time on arrangements related to ensuring copyright. It must be noted, however, that some intermediaries at Member State level would lose some share of the market or even drop out of the market, since their services might not be needed any more. Their functions might be taken over by CMOs which would benefit. The effect for EU society as a whole would be expected to be positive because of improved efficiency of the creative industries' market.

**Impact on growth and jobs** including SMEs would mostly affect authors, publishers and intermediaries as well as the CMOs. If cultural diversity is particularly fostered, then less internationally popular authors and performers will gain at the expense of more popular authors, who might lose part of their profits. With increased harmonisation at EU level, the CMOs sector might gain when compared to the intermediaries at Member State level. This would happen as a result of a consolidation trend which might be expected in the creative industries' sector as a result of a higher level of harmonisation – especially with the legislative options entailing high level of harmonisation and e.g. registration (even if not obligatory). The impact on EU society as a whole would result from the final outcome regarding the effects in the sector of the intermediaries versus CMOs and the effects regarding the changes in market share of more popular authors versus the less popular ones.

Table 4 below presents the assessment criteria in combination with the list of stakeholders, showing which groups of stakeholders would be primarily affected by specific impacts and in what way. The following codes apply:

- (+) positive impact
- (+/-) positive impact counterbalanced to some extent by negative impacts
- (0) no significant impact expected
- (-) negative impact
- (0/-) no significant impact or negative impact, depending on cost pass-through mechanism

**Table 22: Impacts of further harmonisation on the groups of stakeholders in accordance with the identified assessment criteria**

Criterion/ stakeholders	Authors Performers	Publishers Producers Broadcasters	Intermediaries Distributors	CMO	Institutional users	End users	EU Society as a whole
Improving internal market integration through better legal certainty and clarity	+	+	+	+	+	+	+
Ensuring fair remuneration for authors	+	0/-	0/-	0/-	0/-	0/-	0
Facilitating cross-border access to diverse works of culture	+/-	0	0	0	+	+	+
Improving the competitiveness of the EU creative industries	+	+	+	+	+	+	+
Lowering transaction and administrative costs	+	+	-	+	+	+	+
Impact on growth and jobs including SMEs	+/-	+	-	+	0	0	+/-

Based on this preliminary assessment, it can be seen that all the stakeholders would benefit from at least some of the impacts of further harmonisation. Authors/performers, publishers and CMOs are probably the ones who would benefit the most while Member State-level intermediaries would be the ones who might lose their current share of the market as a result of a better consolidation across the sectors within the EU. EU society as a whole would benefit from better internal market integration – such an integration would bring about lower transaction costs and lead to improved efficiency. Moreover, the diversity of content available to European consumers would improve, increasing cultural richness<sup>479</sup>. Better legal clarity and certainty would be expected to reduce the level of confusion and stress and contribute for all stakeholders to time savings due to the reduced need to search for legally sound solutions to copyright problems. Clearer rules would also be expected to result in a reduction of court cases related to copyright issues – this would provide savings in terms of financial resources and time to the potential parties of these litigations. Annex 1 provides more details related for the impacts of further harmonisation of copyright on stakeholders in different sectors (audio-visual, music and book publishing).

<sup>479</sup> This effect, however, depends primarily on consumers' preferences, and these diverge substantially among the different Member States.

## 2. Impacts of the legislative options

The impacts of the specific legislative options identified in Chapter 4 in terms of the criteria identified in the previous section would depend on the specific approach taken in each of these options and on the extent of the changes – therefore at this stage of the analysis, assessment of the options according to these criteria is not feasible. Instead, Table 5 below provides a very preliminary assessment of the advantages and disadvantages of the identified options as well as an indication of the main stakeholders affected.

**Table 23: Assessment of the legislative options**

Option	Main advantages	Main disadvantages	Stakeholders affected
<b>1. Codification</b>	Improved clarity and legal certainty	The gaps and inconsistencies identified in the existing legislation remain unaddressed	All the stakeholders benefit slightly from an improved legal clarity and certainty
<b>2. Recasting</b>	Improved clarity and legal certainty Addressing the gaps and inconsistencies in the harmonised areas (e.g. clarification of definitions)	The gaps and inconsistencies related to non-harmonised fields remain unaddressed	All the stakeholders benefit slightly (more than in option 1) from improved legal clarity and certainty
<b>3. Further harmonisation of selected issues</b>	Addressing the gaps and inconsistencies related to non-harmonised fields	The gaps and inconsistencies identified in the harmonisation areas remain unaddressed – unless combined with option 2	The benefits/losses for the particular stakeholders depend on the issues to be harmonised (see Table 4) All the stakeholders benefit from improved legal clarity and certainty (more than in option 2)
<b>4. Creation of a single EU title</b>	Addressing the issue of territoriality – harmonising the national rules Reducing transaction costs Reducing enforcement costs as compared to option 3	Introducing a new piece of legislation with subsequent problems of interpretation Possible resistance of some Member State against losing competence regarding some aspects of copyright	The benefits/losses for the particular stakeholders depend on the issues to be harmonised (see Table 4) All the stakeholders benefit from improved legal clarity and certainty (more than in option 3). Likely to favour large industry players over SMEs, as it implies an end to territorial licensing restrictions in the EU.

## Conclusions

With the view of assessing the potential added value of modernising the INFOSOC Directive and its related instruments, the briefing paper assessed the existing EU copyright legal framework, identified a number of gaps and legislative options to address those gaps, as well as analysed the costs and benefits of the legislative options.

### Categories of gaps

The result of the analysis showed a rather fragmented EU copyright *acquis*, as a result of the partial harmonisation of copyright and the fact that the instruments are ill fitted to a number of new technological developments, in particular the emergence of new copyrighted online content. Four main categories of gaps were identified in relation to the INFOSOC Directive specifically: 1) gaps related to the exclusive rights of copyright holders and other stakeholders (concerning harmonised and non-harmonised elements of the legislation); 2) gaps associated with exceptions and limitations; 3) gaps linked to the concepts of authorship and ownership; and 4) gaps resulting from the relationship between the INFOSOC Directive and related Directives.

The indicative assessment made of the gaps related to 12 rights, showed that gaps relating to five of the rights can be considered as major, while gaps relating to the remaining seven rights can be assessed as minor. Major gaps may impact the internal market and therefore require attention from the EU legislation, while minor gaps do not point to key issues in practice but remain relevant should the EU legislator wish to establish a holistic copyright legal framework.

### Benefits of addressing the gaps

The gaps affect the legal certainty, coherence and effectiveness of the legislation. They can also cause barriers to cross-border trade of copyrighted goods and services.

Addressing the existing gaps and fragmentation in the current EU copyright regime would bring a variety of benefits, including:

- Limiting legal uncertainty and clarity, which would lower the need for court litigations and lower the costs thereof;
- Limiting transaction costs, which would improve market efficiency;
- Lowering compliance costs for the users;
- Increasing the access to diverse works of European culture;
- Increasing the competitiveness of the copyright-intensive European industries;
- Ensuring fair remuneration for the authors.

### Costs and benefits of different options

Analysis of the costs and benefits of the legislative options at this stage is only preliminary and, due to a lack of data, relies on qualitative rather than quantitative assessment. The actual impacts related to addressing the existing gaps and fragmentation would depend on the specific approach to various issues taken in each of these options and on the degree of the changes. The scale of the benefits of the legislative options is expected to be higher for the options which offer more thorough harmonisation (such as further harmonisation of selected issues and creation of a single EU title). However, these options may imply higher costs and also some resistance at Member State level.

Due to the high level of fragmentation of the EU copyright acquis, the heavy body of case-law before the CJEU and the overall low efficiency, effectiveness and coherence of the INFOSOC Directive in light of the digitalisation of the market, the added value of modernising the INFOSOC Directive and its related instruments is considered as very high. The extent of the effectiveness and coherence achieved will depend on the option used for modernising the framework and the degree of harmonisation it achieves.

### Four legislative options

This briefing paper presents four legislative options for modernising the EU copyright legal framework.

**Option 1** is codification in a narrow sense. This option would increase legal certainty by regrouping the legislation in one single act and by addressing some inconsistency, deleting overlapping provisions, harmonising terms and definitions and correcting errors. Prior amendments would need to be made to the existing directives for this option to bring meaningful harmonisation, without which the harmonisation would be limited and substantial gaps would not be addressed.

**Option 2** (Recasting) has the advantage of incorporating substantive amendments in a single text together with the unchanged provisions of existing legislation. This option therefore presents more advantages than option 1, but remains limited by the inability to address gaps of non-harmonised matters.

**Option 3** (further harmonisation of selected issues) would enable the harmonisation of issues/areas which have not been previously regulated at EU level. This option cannot, however, address gaps and inconsistencies in the existing legal framework and potentially could add further inconsistencies since it adds yet another instrument to the framework.

The creation of a single EU title (**option 4**) could achieve full harmonisation and has the potential of addressing most of the gaps and inconsistencies. The creation of a single EU title would most likely encounter the resistance of certain Member States and stakeholders in addition to involving a long and complex process to ensure the establishment of a comprehensive EU copyright regime. While option 4 would



potentially ensure full consistency, such an option would, however, require a strong commitment of the EU legislator to carry out the complex task of creating an EU copyright title.

A last option would be to combine the above options for legislative reform. For example, combining option 2 with option 3 would offset the disadvantages of both options in that option 3 would allow the regulation of non-harmonised issues/areas, while option 2 would group all the instruments in a single text.

While the creation of a single EU title (option 4) would bring the highest level of harmonisation, removing national copyrights is very likely to meet with the resistance of a number of key Member States and would most likely involve a long and difficult legislative process, since its adoption requires unanimity at the Council. The creation of a single EU title could therefore be envisaged once EU copyright law has reached a higher level of harmonisation through the prior use of option(s) 1, 2 or/and 3.

#### *Benefits from harmonisation*

Most stakeholders, including EU society as a whole, are likely to benefit from a harmonisation of the EU copyright framework. Member State level intermediaries is the only group of stakeholders which can be expected to incur losses due to less need for their services. Furthermore, some of the mainstream artists might lose part of their profits due to higher visibility and international demand for works of artists from different Member States which might be expected, once obtaining multi-territorial licences has been facilitated. The role of CMOs and their regional hubs can be expected to grow; implementation of the Collective Rights Management Directive is aimed at improvement of their functioning.

## **Annex to the conclusions – Impacts of further harmonisation per sector<sup>480</sup>**

### Audiovisual sector

In the audiovisual sector, the main economic rights are vested with the producer, who is free to choose the optimal licensing scheme for exploiting his/her audio-visual works. Only for music works incorporated in films, the relevant rights (including so-called ‘public performance’ rights) have still to be cleared by dealing with the relevant CMOs.

Currently, film producers may directly license their works or rely on distributors playing the role of intermediaries between producers and commercial users. In addition, especially for foreign markets, sales agents can facilitate contractual agreements to transfer the rights from producers to territorial distributors. Online service providers have to acquire online rights (both the ‘making available’ right and the reproduction right) from the relevant right-holders. Whereas service providers may deal directly with producers or resort to sales agents or distributors, in many circumstances they clear rights by concluding agreements with aggregators (CMOs) that are companies holding the relevant rights for large catalogues of movies.

Further harmonisation of the EU copyright law in the audiovisual sector with a view to increasing access to diverse works of culture would probably lead to strengthening of the role of the aggregators (CMOs) both at MS level and EU level while reducing the number of sales agents and distributors. The role of pan-European catalogues of audio-visual works would be strengthened, stimulating demand for pan-European licences<sup>481</sup>. Consequently, cross-border access to the works of culture in this sector could be facilitated and savings on the transaction costs could be realised for the benefit of all the stakeholders.

### Music sector

In the music sector, there is an on-going process of facilitating the clearance of exploitation rights that has been initiated with the adoption of the Collective Rights Management Directive. At the moment the process of rights clearance in this sector is characterised with a high level of complexity. Online commercial users have to deal with different licensing procedures related to i) the territorial scope of their offer; ii) the repertoire they intend to provide. The fragmentation of copyright and related rights granted by traditional CMOs at MS level inflate transaction costs and create substantial

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<sup>480</sup> The description of the value chains and main problems included in this Annex is based on Centre for European Policy Studies and Economisti Associati (2015), Study on the implementation, application and effects of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (Infosoc Directive) and of its related instruments, published by the European Parliament.

<sup>481</sup> The question remains, however, if the demand for European audiovisual works would be sufficient for achieving a profitable distribution of such works across Europe.

obstacles to the provision of pan-European online music services. In addition, there is a lack of rules of contracts ensuring fair remuneration for artists across the EU.

The process of harmonisation of EU legislation, including full implementation of the Collective Rights Management Directive (enforcement deadline in April 2016) is likely to improve the functioning of the internal market regarding the effectiveness and efficiency of the process of licencing and distribution of royalties<sup>482</sup>. Consequently, the role of the CMOs and their regional hubs would be expected to increase at the expense of some intermediaries, which might become obsolete and simply drop out of the market. Simplification of copyright and exploitation rights procedures would bring efficiency gains to commercial customers. Pan-European licensing would become more accessible and more wide-spread, which would reduce the need for geo-blocking, bringing benefits to the customers who currently suffer from this phenomenon. Legislative and contractual certainty would increase, bringing benefits to all the stakeholders.

#### Book publishing sector

In the book publishing sector, licensing schemes are traditionally based on private negotiations between the authors and publishers. The outcomes of these negotiations are affected by national laws regulating the form and content of licensing agreements as well as rights and obligations of the parties and the termination of the contracts. Publishing contracts may vary in relation to three dimensions: i) the rights transferred; ii) the territorial scope of the rights transferred; and iii) the duration of the agreement. Territorial limitations are lawful but not frequent in this sector; authors may decide to reserve for themselves the right of translating and publishing the work in other languages.

The value chain in this sector is not overly complicated; on the contrary, there is a tendency among the publishers to take over such functions like distribution, advertising and sale. Thus, the transaction costs are typically not very high, especially in comparison with the music sector. The main problems of copyrights in the book publishing sector relate to a lack of harmonisation of contractual issues, which creates confusion and legal uncertainty, as well as unequal conditions for authors. Lack of contractual standards implies that some authors enter into contracts with publishers which deprive them of a fair share of sales' profits.

Another compelling issue in this sector is related to text and data mining, where competitive disadvantages to European researchers are observed when compared with the researchers from other parts of the World. Varying approaches to text and data mining create unequal conditions for work of the researchers across Europe.

A higher level of harmonisation of copyright in this sector could be expected to limit the confusion and legal uncertainty for all the stakeholders and improve the situation

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<sup>482</sup> Impact Assessment accompanying the Proposal for a Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licencing of rights in musical works for online uses in the internal market, COM(2012) 372 final.

regarding fair remuneration for the authors. The latter change might bring about benefits to the authors at the expense of some profits of the publishers. Harmonisation of text and data mining regulations would result in improving the competitive position of the European researchers and in ensuring more equal conditions for conducting research across Europe.

## **Annex III**

**Internal Market aspects of copyright:  
The added value and options for improving the  
functioning and efficiency of the Single Market  
in the field of copyright**

**Briefing paper by CEPS and Economisti Associati**

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## List of abbreviations

ARROW	Accessible Registries of Rights Information and Orphan Works
BEREC	Body of European Regulators of Electronic Communications
CEPS	Centre for European Policy Studies
CJEU	Court of Justice of the European Union
CMO	Collective Management Organisation
ERG	European Regulators Group
EU	European Union
GDP	Gross Domestic Product
InfoSoc	Information Society
IPRED	Directive on the enforcement of intellectual property rights
LCC	Linked Content Coalition
TFEU	Treaty on the Functioning of the European Union
TPM	Technological Protection Measure
TRIPS	The Agreement on Trade-Related Aspects of Intellectual Property Rights
UGC	User-Generated Content
UK	United Kingdom
US	United-States
VPN	Virtual Private Network
WIPO	World Intellectual Property Organization

## Executive summary

This briefing paper explores the **existing policy problem** and the **possible options for reforming the EU copyright framework** as provided by EU Directive 29/2001 on Copyright in the Information Society (InfoSoc Directive) and related legislation, with specific focus on the **need to strengthen the Internal Market for creative content**. We find two main policy problems: **the non-functioning of the Single Market**, and **the tension generated between the current system of exceptions and limitations and emerging uses of information in the online environment**.

This briefing paper finds that **there are many gaps in the existing legal framework**. Of these, some gaps could be filled if the existing *acquis* was clarified and made more consistent both in terms of interpretation and implementation. However, **the majority of existing gaps would require legislative intervention**. These gaps include the absence of a clear legal framework for the remuneration and compensation of authors and performers; *the existing* uncertainty as regards the responsibility of online intermediaries; the lack of clear rules on ‘geo-blocking’ practices; the uncertainty as regards the determination of the applicable law in case of copyright infringements occurring online; uncertainty on the applicability of the exhaustion principle to the making available of ‘download-to-own’ content on intangible media; and the lack of clear rules on access to justice and collection of evidence to be used in civil proceedings. As demonstrated by the ongoing debate on copyright reform at the EU level, all these are issues that only legislative interventions could contribute to remedying. Addressing these gaps efficiently might lead to very significant gains in macroeconomic terms. To be sure, related benefits largely overlap with the expected benefits of enjoying a Digital Single Market, which are estimated conservatively as representing at least 1% of GDP.

In our view, **options available for addressing these gaps range from more narrowly crafted legislative actions** (e.g. establishing a ‘black list’ of agreements that are incompatible with the Internal Market) **to comprehensive legislation** (e.g. intervention to clarify the definition of rights, simplify the right of online transmission, introduce the principle of ‘country of origin’ for the online transmission of categories of works, modernise and further harmonise copyright exceptions and limitations); and even more ambitious options that would create a new EU copyright Title, by exploiting the possibility granted by the new Article 118 TFEU.

With no prejudice to future impact assessment work that will focus on more specific policy options, our analysis suggests **that ‘more Europe’ would be needed in the field of copyright**, even if a complete overhaul of the existing system appears difficult in the short term. Addressing the Internal Market issue in copyright would, in this respect, also lead to addressing many of the shortcomings the current framework presents in related domains such as general legal issues, and also industrial policy issues. Our analysis also shows that **‘no action’ is not a viable option**, due to the existence of very important gaps and significant fragmentation across Member States in this policy domain, which in turn creates potential shortcomings for the welfare of EU citizens and businesses.



# The Internal Market aspects of EU copyright: the added value and options for improving the functioning and efficiency of the Single Market in the field of copyright

## Introduction

Since the diffusion of the Internet in the mid-1990s, governments around the world have sought to adapt copyright legislation to the new opportunities and challenges posed by the ‘network of networks’. **The gradual digitisation of information and the Internet’s end-to-end design have made the exchange of content (including copyrighted content) much easier for end-users, with both positive and negative consequences.** On the one hand, the new environment enables unprecedented communication, knowledge sharing and even creation of new content on the side of end-users; on the other hand, right-holders’ attempts to preserve control of their copyrighted works have been so far systematically frustrated. After the adoption of two World Intellectual Property Organisation (WIPO) Treaties in 1996<sup>483</sup>, the European Union (EU) has launched a far-reaching policy debate on the need for new copyright legislation, which culminated in the adoption, in 2001, of the Information Society (InfoSoc) Directive<sup>484</sup>. The InfoSoc Directive, rather than completely harmonising the copyright framework in the EU Member States, introduced a number of common definitions; streamlined the approach to technical protection measures (TPMs) and the treatment of their circumvention; and introduced a closed number of exceptions and limitations, which Member States had the option of implementing at national level. However, the **InfoSoc Directive**, as discussed in our companion ex post evaluation Study, **appears today as having been largely ineffective and inefficient; increasingly outdated if one considers the evolution of markets and technologies; and far from coherent not only in terms of internal consistency, but also with respect to other important domains of legislation**, such as the e-commerce Directive, and even more important, fundamental rights such as the “right to privacy” and the “freedom to run a business”.

EU institutions already started to recognise this problem a few years ago, and even more so since the launch of the Digital Agenda within the Europe 2020 strategy<sup>485</sup>. A Communication on the “Single Market for Intellectual Property Rights” was adopted in 2011 and set out *inter alia* an ambitious programme for copyright reform<sup>486</sup>. Since

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<sup>483</sup> WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty, adopted in Geneva in December 20, 1996, available at: <http://www.wipo.int/treaties>.

<sup>484</sup> See Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

<sup>485</sup> See “Digital Agenda for Europe”, launched in May 2010 as part of the broader Europe 2020 Strategy. In particular, the Digital Agenda aims among others at creating a Digital Single Market by: i) removing all barriers that might hamper the free flow of online services and entertainment across Member States’ borders; ii) fostering a European market for online content; iii) establishing a single area for online payments; and iv) protecting EU consumers in cyberspace.

<sup>486</sup> See European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A

then, the most tangible results have been the adoption of the 2012 Directive on Orphan Works<sup>487</sup> and the Directive on Collective Rights Management, eventually adopted in February 2014<sup>488</sup>.

**Today, copyright reform is considered one of the top priorities for the EU and has been given a prominent role in the new Digital Single Market strategy presented by the European Commission in May 2015<sup>489</sup>. In the new strategy, the Commission announced that it will adopt legislative proposals before the end of 2015 to “reduce the differences between national copyright regimes” and “allow for wider online access to works by users across the EU, including through further harmonisation measures”<sup>490</sup>. As a result, it is possible to state that **the Internal Market dimension will be central to the ongoing modernisation efforts.****

In this briefing paper, we will outline possible policy options for the reform of the InfoSoc Directive and related legislation, with specific attention to Internal Market issues. Section 2 defines the existing policy problems and identifies the underlying drivers as well as the affected parties. Section 3 presents possible policy options. Finally, Section 4 discusses the policy objectives to be achieved and provides an assessment of the expected impacts of alternative policy options.

## 2. The policy problem

The main challenge that the existing EU copyright framework poses to the proper functioning of the Internal Market for creative works, especially in a borderless environment such as the Internet, is related to the **principle of territoriality. In spite of the significant and comprehensive harmonisation measures that have been enacted in the EU since the early 1990s, each Member State preserves a distinctive copyright system, which applies exclusively within its own borders.** A distinctive national

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*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.*

<sup>487</sup> See Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, OJ L 299/5, 27 October 2012 (hereinafter Directive 2012/28/EU).

<sup>488</sup> See Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, OJ L 84/72, 20 March 2014 (hereinafter Directive 2014/26/EU).

<sup>489</sup> See European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Digital Single Market Strategy for Europe*, COM(2015)192 final.

<sup>490</sup> The Commission also envisages that the proposals will include: i) portability of legally acquired content; ii) ensuring cross-border access to legally purchased online services while respecting the value of rights in the audiovisual sector; iii) greater legal certainty for the cross-border use of content for specific purposes (e.g. research, education, text and data mining, etc.) through harmonised exceptions; iv) clarifying the rules on the activities of intermediaries in relation to copyright-protected; and v) modernising enforcement of intellectual property rights, focusing on commercial-scale infringements (the 'follow the money' approach) as well as its cross-border applicability.

dimension is still found in crucial aspects of the legal framework such as the definition of the rights granted to authors, performers and content producers, as well as the exceptions and limitations to such rights and the measures (e.g. injunctions) through which copyright can be enforced, also in web-based environments.

Stating that the territoriality of copyright hampers the Internal Market does not mean that removing the existing fragmentation would lead to the harmonisation of content available across the EU28: individual creators, content licensors and commercial exploiters would still be encouraged, in many circumstances, to adopt a ‘country-by-country’ approach in their respective businesses on the grounds of Europe’s cultural diversity and linguistic specificities. Moreover, an unequal penetration of Internet broadband services and varying levels of *per capita* income from one Member State to another create different conditions of access to online content services and inevitably cause market distortions.

In other words, the nature and magnitude of the policy problem should be carefully assessed: the subject matter of this briefing paper is not the removal of national specificities; rather, we focus on the elimination of those barriers to the Internal Market that frustrate the legitimate interest of European citizens in respect of the free flow of information and content across borders. Below, we thus focus on two outstanding problems: the non-functioning of the Internal Market (Section 2.1) and the growing tensions created by the current system of optional exceptions and limitations introduced by the InfoSoc Directive in 2001 (Section 2.2).

## 2.1. Problem #1: the ‘non-functioning’ of the Internal Market for online copyrighted content

As widely recognised by EU institutions, **the online distribution of audiovisual content in the EU is dominated by territorial licensing agreements that partition the Internal Market along national borders.**<sup>491</sup> **Such a territorial fragmentation persists also in the music sector**<sup>492</sup> **in spite of a significant attempt of the EU Commission to discourage**<sup>493</sup> **and, at a later stage, outlaw the firmly territorial segmentation** of online music rights management in the Internal Market caused by the so-called mutual representation

<sup>491</sup> See *inter alia* Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Single Market Strategy for Europe, COM(2015)192 final; European Commission, Antitrust: Commission sends Statement of Objections on cross-border provision of pay-TV services available in UK and Ireland, Press releases, 23 July 2015, Brussels; and KEA and MINES Paris Tech (2010), Multi-Territory Licensing of Audiovisual Works in the European Union, European Commission.

<sup>492</sup> For a discussion on the difficulties in the supply of multi-territorial licenses and the aggregation of the repertoire of musical works see Section 3.2. of Impact Assessment of the 2014 Directive on collective rights management (European Commission (2012), Impact Assessment Accompanying the Document Proposal for a Directive of the European Parliament and of the Council on Collective Management of Copyright and Related Rights and Multi-territorial Licensing of Rights in Musical Works for Online Uses in the Internal Market, SWD(2012)2014 final).

<sup>493</sup> See Commission Recommendation on collective cross-border management of copyright and related rights for legitimate online music services of 18 October 2005, OJ L 276, 21.10.2005, pp. 54-57.

agreements concluded by national collecting societies.<sup>494</sup> The recently adopted EU Directive on collective rights management (Directive 2014/26/EU; hereinafter Collective Rights Management Directive) certainly improves the previous legislative framework and clarifies the conditions under which collecting societies and other entities can license music rights for digital uses. The Directive also facilitates the aggregation of national music repertoires, and the creation of licensing ‘hubs’ by groups of collecting societies or mono-repertoire licensing agencies, allowing commercial users to obtain multi-territorial or pan-European licenses for aggregated repertoires. However, it is still unclear whether these multi-territorial licenses will effectively develop, and whether the replacement of country-by-country licenses giving access to *all* music repertoires with EU-wide (or multi-territorial) licenses concerning *specific* repertoires will result in lower transaction costs for commercial users of digital music.

Against this background, territorial licensing schemes exert a twofold impact on the functioning of the Internal Market for online copyrighted works:

- First, they **limit the cross-border portability of copyrighted works**. In other words, consumers who lawfully subscribe to online services in a certain Member State (e.g. to stream music or audiovisual content) are often unable to access the same service when moving, even temporarily, to another one.<sup>495</sup>
- Second, they **limit cross-border trade**. Consumers living in a certain Member State are not able to subscribe to online services providing copyrighted content in another Member State. This situation generates two main effects: not only some consumers are unable to access copyrighted content that is instead available to other consumers in the EU,<sup>496</sup> but even when the same service is provided in several EU Member

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<sup>494</sup> See Commission Decision Relating to a Proceeding Under Article 81 of the EC Treaty and Article 53 of the EEA Agreement, C(2008) 3435 final, 16 July 2008. Interestingly, a much later judgment of the General Court of the European Union (see T-442/08 *CISAC v. Commission*, and all related/joined cases, 12 April 2013) annulled the Commission’s decision in respect of the finding of the concerted practice which caused the above-mentioned territorial fragmentation.

<sup>495</sup> To better understand the current situation, it should be borne in mind that certain service providers that operate in more than one Member State allow for cross-border portability in geographic areas covered by their services. This is for instance the case of Spotify, which ensures full portability to premium users across 25 EU countries (Croatia, Romania, and Slovenia are still excluded). In such a context, cross-border portability is not due to an EU copyright framework that facilitates the creation a digital single market. Rather, full portability is the result of the business ability of some international companies that are able to meet a pan-European demand by acquiring licenses in more than one Member State, thus bypassing the obstacles posed by territorial licensing. In fact Spotify ensures portability in 60 countries worldwide.

<sup>496</sup> For instance, in the Impact Assessment of the 2014 Directive on collective rights management, the European Commission reported that the availability of online music services largely varied between EU countries: in 11 Member States less than five services were available in 2012; in seven Member States, between five and nine; only in nine Member States were more than ten services accessible. See European Commission (2012), Impact Assessment Accompanying the Document Proposal for a Directive of the European Parliament and of the Council on Collective Management of Copyright and Related Rights and Multi-territorial Licensing of Rights in Musical Works for Online Uses in the Internal Market, SWD(2012)2014 final). In line with the example provided in note 495, consumers from Croatia, Romania and Slovenia are currently not able to subscribe Spotify.

States, consumers are often able to access only their ‘national’ offer, at local conditions and prices.<sup>497</sup>

### 2.1.1. Who is affected?

**Limited cross-border portability and accessibility significantly harm EU consumers.** According to a study carried out by Plum Consulting (2012) for the European Commission, portability issues may affect up to 4.7 million Europeans per day including short-term migrants and travellers. As for accessibility, cross-border demand of copyrighted content in the audiovisual sector is usually generated by people living away from their ‘country of origin’ (long-term migrant populations) as well as by people with foreign language skills or interests. In the EU, these groups comprise approximately 121 million citizens. About 13 million long-term migrants based in EU countries are estimated to generate a demand for subscription-based cross-border audiovisual services in the area of €760 million to €1,610 million per year. There is potential additional demand from around 108 million Europeans who are proficient in or learning another language. Nonetheless, costs to provide such services, especially given the current system of exclusive territorial sales of copyright content, leave this potential demand to a large extent untapped (Plum Consulting, 2012). **Besides consumers, also content creators, right-holders and commercial users might be damaged by this situation insofar as transaction costs hamper the exploitation of cross-border business opportunities.** This of course does not extend to all those cases in which territorial licensing schemes are the result of deliberate commercial decisions, based on the legitimate need to adapt content and related commercial offers to national specificities.

### 2.1.2. Main drivers of the identified policy problem

The current EU copyright framework plays a dual role in the fragmentation of the Internal Market for online copyrighted content. On the one hand, it facilitates territorial licensing and the partitioning of the EU market along national borders. On the other hand, it creates cost barriers to the development of pan-European offerings.

As regards territorial licensing, **the combined effect of the principle of territoriality<sup>498</sup> and the application of the principle of exhaustion only to the realm of tangible goods makes the online exploitation of copyright and related rights in intangible works on a**

<sup>497</sup> For instance, Apple iTunes covers all Member States but consumers can purchase contents only from their national store and content availability varies between national web-stores. Local versions of YouTube are available in some EU countries and provide tailored content not accessible by consumers located in another Member State. Xbox Live filters content based on the consumer’s location (Plum Consulting, 2012). When it comes to Spotify, although the premium service is fully portable, consumers can lawfully subscribe only their national service and this is reflected in price discrimination across EU: the monthly price for a premium account in Euro ranges from 4.99€ in Bulgaria to 9.99€ in Belgium, Finland, France, Germany, Ireland, Italy, Luxembourg, the Netherlands, and Spain, going up to 9.99£ in the UK.

<sup>498</sup> By way of example, Article 2(a) of the InfoSoc Directive does not provide the author of a musical work with a reproduction right that immediately covers all the territory of the EU. The author is in fact entitled to 28 separate national reproduction rights, each of which covers the territory of a single Member State. As a result, a right-holder can separately exercise each of these 28 rights on a strictly territorial basis.

**national basis perfectly legitimate.**<sup>499</sup> In fact, under the legislative framework created by the InfoSoc Directive, the online delivery of intangible works is regarded as a supply of services. First, by relying on the territoriality principle the copyright holder can license his/her work on a country-by-country basis.<sup>500</sup> Second, by relying on the inapplicability of the exhaustion principle to online services, the copyright holder can legitimately prevent both *non-licensed* parties from giving access to the same copyrighted work in any territory and *licensed parties* from offering the same work in a territory outside the scope of their license.<sup>501</sup> Against this background, commercial users that are granted territorial exclusivity can also resort to geo-blocking practices (i.e. technological measures preventing online consumers from accessing online content based on geographic location) to avoid copyright infringement as well as breach of territorial licensing agreements. In this respect, geo-blocking measures may also protect consumers from copyright infringements resulting from exploiting online content in territories not covered by the license they have purchased.<sup>502</sup>

As mentioned above, **the current EU copyright framework poses obstacles to the Internal Market for online copyrighted content by increasing transaction costs for the clearance of online exploitation rights on a pan-European basis.** In particular, online commercial users might be required to negotiate licenses with a wide range of stakeholders located in various Member States rather than clearing all the required rights for all the territories of the EU in a single transaction (so-called 'one-stop shop' effect). Difficulties are exacerbated since the transmission of copyrighted content through digital networks involves two different rights: i) the reproduction right; and ii) the making available right. As a result, any single act of exploitation requires the clearing of two autonomous and independent rights, which might raise transaction costs and make clearance more complex and burdensome, especially in sectors where rights are held by different entities.

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<sup>499</sup> Article 4 of the InfoSoc Directive confines the scope of the exhaustion principle to the distribution right, which concerns only physical media embodying copyrighted works.

<sup>500</sup> As discussed in our companion Study on ex post evaluation of the InfoSoc Directive and related legislation (see Section II.2.2), right-holders and service providers may autonomously decide to partition the Internal Market on the grounds of commercial motivations, irrespectively of obstacles that national copyright systems may raise for multi-territorial licenses. It is worth stressing that while territorial licensing practices reflect lawful commercial strategies, competition policy issues may still arise, especially when licensing agreements are based on absolute territoriality exclusivity (cf. C-403/08, *Football Association Premier League Ltd and Others v. QC Leisure and Others* (2012)).

<sup>501</sup> At any rate, the interplay between the existing limitation to the scope of the principle of exhaustion and Article 20(2) of the 'Services Directive' (Directive 2006/123/EC), which aims at "limiting discriminatory provisions relating to the nationality or place of residence of the recipient", should be further investigated.

<sup>502</sup> It is worth stressing that geo-blocking measures are adopted also in e-commerce of non-copyrighted goods or services to discriminate among consumers located in different Member States or territories. Nonetheless, whereas for non-copyrighted goods or services geo-blocking reflects only commercial motivations, for copyrighted services this measure may also reflect the territorial scope of copyright and related rights.

This problem is perceived, in particular, in the music sector, where the application of different types of rights (i.e. the reproduction and public performance rights) and the existence of multiple right-holders (i.e. authors or co-authors and music publishers, performers and record producers) oblige online commercial users to conduct numerous parallel negotiations before launching an online music service in a given Member State or in a region of Europe. Moreover, it should be considered that, even though from 2005 onwards the market for online music rights has changed and has become more transnational, the scope of the licenses granted to commercial users by collecting societies (or their regional licensing ‘hubs’) and the specialised agencies set up by music publishers is still limited, either by *territory* or by *repertoire*.<sup>503</sup> This inflates transaction costs and creates substantial obstacles to the provision of pan-European online music services as well as other online services requiring the clearance of music copyright and related rights, such as audiovisual services. According to a study drafted by KEA & Vrije Universiteit Brussel (2012), commercial users operating in more than one Member State and providing more than one million titles face transaction costs up to €260,000 per year and need about six employees to deal with licensing issues; in particular, the identification of relevant right-holders may require up to six months and negotiations to clear rights may last up to two years. In principle, in both the audiovisual and book publishing sector, transaction costs generated by the current EU copyright framework are lower than in the music sector as the majority of relevant exploitation rights are in the hands of a single entity, respectively the film producer and the book publisher. Nonetheless, transactional obstacles to the online provision of copyrighted content still exist.

## **2.2. Problem #2: tension between the system of copyright exceptions and limitations and emerging uses of information in the online environment**

As mentioned above, the InfoSoc Directive introduced a closed number of exceptions and limitations, which enables uses of copyrighted works for certain purposes and to a certain extent without the authorisation of right-holders. Under the current system, the implementation of such exceptions and limitations remains optional for Member States, with one exception (transient and incidental copies; see Box 1). This has not only led to fragmentation due to the availability of some exceptions in certain Member States and not in others; disparities have gradually magnified since one Member State decided to adopt an exception that was not included in the original closed list (i.e. the UK on “text and data mining”). In addition, national courts have provided divergent interpretations of some of the exceptions, despite the attempts made over time by the Court of Justice of the European Union (CJEU) to foster convergence in interpretation.

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<sup>503</sup> Please note that the Collective Rights Management Directive, which will have to be transposed by April 2016, aims *inter alia* at reducing fragmentation and facilitating the aggregation of music repertoires in the clearance of online rights (see Section 3.1).

**Box 1. Exceptions and limitations in the InfoSoc Directive**

Article 5(1) of the InfoSoc Directive provides the only mandatory copyright limitation which exempts transient and incidental copies, i.e. those reproductions that are part of a technological process and carried out to enable either efficient communication in a network between third parties by an intermediary or lawful uses of a copyrighted work.

Article 5(2) and 5(3) provide a list of exceptions and limitations which is: i) exhaustive, i.e. no additional exceptions or limitations can be enacted at national level; and ii) non-mandatory, i.e. Member States are free to choose whether implementing or not any of the listed exceptions and limitations.

Finally, Article 5(5) introduces into the EU copyright framework the so-called 'three-step test' according to which exceptions and limitations: i) can be applied only to certain special cases; ii) cannot be in conflict with a normal exploitation of the copyrighted work; and iii) cannot unreasonably prejudice the legitimate interests of right-holders.

It is worth stressing that not all exceptions and limitations have a clear Internal Market dimension and that their cross-border impacts need to be assessed on a case-by-case basis and taking into account technological developments. In light of the analysis carried out in Section II.2.3 of our companion ex post evaluation Study, obstacles to the functioning of the Internal Market for online copyrighted content are most likely to stem from the current diverging implementation of:

- The exception for the purpose of teaching or scientific research (Article 5(3)(a));
- The exception for the purpose of reporting of current events (Article 5(3)(c));
- The limitations for quotations (Article 5(3)(d));
- The parody exception (Article 5(3)(k));
- The 'freedom of panorama' exception (Article 5(3)(h)).

Concerning the exceptions having an impact on the Internal Market, a number of problems have been identified:

- First, **the list of exceptions and limitations available to Member States is closed and exhaustive and, to some extent, technologically non-neutral**. As a result, exceptions and limitations are not able to keep pace with technological developments and new market needs. This is, for instance, apparent for mass digitisation projects or e-lending, for text and data mining and for news aggregation.
- Second, **the ample discretion available to Member States in implementing exceptions and limitations** and striking the balance between exceptions and



limitations on the one hand, and TPMs<sup>504</sup> on the other, **leads to a situation in which some uses are possible in certain Member States and not in others.**

- Third, the **InfoSoc Directive left Member States free to introduce levy schemes to compensate right-holders for some uses allowed by exceptions and limitations.** In particular, it explicitly requires fair remuneration for the reprography exception as well as for private copying.<sup>505</sup> Diverging levy schemes at national level generate three major problems affecting the functioning of the Internal Market:
  - **Double payments** in cross-border transactions of already levied products, which inflate costs for producers, importers, exporters and consumers;
  - **Uncertainty** in terms of media and devices covered as well as the amount to be paid, which increases business risks to serve new markets or sell new products;
  - **Undue payments** by professional users, which generate additional business costs for such users in some Member States.

### 2.2.1. Who is affected?

**Diverging and outdated implementation and interpretation of exceptions and limitations affect both actual and potential beneficiaries as well as some commercial users engaging in certain activities.** A non-exhaustive list of stakeholders involved would include: i) consumers engaging in exempted uses; ii) creators of so-called user-generated content (UGC) or, more generally, digital derivative works; iii) libraries, educational establishments, archives, and museums and patrons of these institutions; iv) teachers, teacher-practitioners, professors, researchers, universities and other education establishments providing distance learning services; v) media services and private individuals (e.g. bloggers) engaging in news reporting activities on the Internet; vi) commercial users producing and/or distributing derivative works; vii) producers, importers and/or exporters of levied media and equipment; viii) commercial users producing and/or distributing digital copyrighted content on tangible media protected by TPMs (e.g. DVD, CD).

### 2.2.2. Main drivers of the identified policy problem

The main drivers of the problem identified include the following:

- **The wording adopted in the InfoSoc Directive is too general and left significant discretion to Member States.** Our analysis of a sample of Member States (France, Germany, Ireland, Italy, Poland, and the UK) portrays a widely fragmented picture,

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<sup>504</sup> It is worth stressing that, contrary to the expectations when the InfoSoc Directive was enacted, TPMs turned out not to be a predominant mode of protecting online content. Nonetheless, TPMs are still central in the electronic publishing sector as well as in the distribution of digital copyrighted content on digital media (e.g. DVD, Blu-Ray).

<sup>505</sup> Fair remuneration is also a requirement for reproductions of broadcasts made by social institutions such as hospitals and prisons.

exacerbated by divergent interpretations of some exceptions in national courts.<sup>506</sup> Only the national implementation of the mandatory exception for transient and incidental copies (Article 5(1)) carefully reflected the text of the InfoSoc Directive.

- **The principle of territoriality applies also to exceptions and limitations**, hence their effects are not occurring across borders. This means that an act exempted in a certain Member State can still require authorisation in another Member State.<sup>507</sup>
- **Article 6 of the InfoSoc Directive introduces an unlimited prohibition of acts of circumvention of TPMs**: this means that uses enabled by existing exceptions and limitations might still be precluded by TPMs adopted by right-holders. This leads to a situation in which right-holders are free to shape the scope of their rights irrespective of any limitation imposed by law, especially for online services to which the safeguard provision introduced by Article 6(4) does not apply.
- **The list of exceptions and limitations provided in the InfoSoc Directive leads to a limited adaptability to technological developments**. This problem chiefly affects emerging uses such as online news aggregation, text and data mining, mass digitisation projects, e-lending and off-premises access to library collections, e-learning services, online journalism, and posting pictures on social networks and non-profit online platforms such as Wikipedia (see the ‘freedom of panorama’ exception).

### 3. Policy options

This Section identifies and takes into consideration **distinct policy options** that could help the EU to achieve a higher degree of market integration and ensure a smooth, cross-border dissemination of copyrighted works on an EU-wide basis.

#### 3.1. ‘Zero’ option (no new policy action)

**Under this option, no further policy intervention would be introduced.** The assessment of this option thus entails a forward-looking analysis of how the situation would evolve in the absence of further policy intervention. This, in the case at hand, implies that both the impact of recent legislation that has not fully produced its effects, and the impact of future technological developments are taken into account. This also entails the consideration of past rulings of the CJEU on crucial aspects of copyright, such as originality, the scope of the exclusive rights of reproduction, communication to the public

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<sup>506</sup> See companion Study on ex post evaluation of the InfoSoc Directive and related legislation.

<sup>507</sup> The CJEU has clarified that Member States should ensure a balance between their legal tradition and the proper functioning of the Internal Market, without undermining the objectives of market integration pursued by the InfoSoc Directive. See Case C-435/12 *ACI Adam BV and Others v. Stichting de Thuiscope and Stichting Onderhandeligen* (2014). As of today, the only cross-border exception within the EU copyright framework is represented by the ‘mutual recognition of orphan work status’ under Article 4 of the Directive 2012/28/EU on certain permitted uses of orphan works.

and distribution and copyright exceptions and limitations;<sup>508</sup> the need to secure the enforcement of constitutional principles enshrined in the Charter of Fundamental Rights (especially when it comes to copyright enforcement measures) and in the Treaty on the Functioning of the European Union (TFEU), in particular the provisions on free movement of goods and services and competition law. In this respect, the *Premier League* judgment has shown the potential and the limits of judicial interpretation of the existing law provisions for the attainment of a more integrated market for creative works. In this case the CJEU was asked to review the compatibility with EU law of a licensing agreement between the organiser of football matches and a Greek broadcaster under which a regime of absolute territorial exclusivity was created for such a commercial user to broadcast football matches from the UK just on the Greek territory to the benefit of Greek residents/customers.<sup>509</sup>

It is important to assess the extent to which the implementation of the two most recent pieces of legislation adopted in this domain, *i.e.* the Orphan Works Directive and Collective Rights Management Directive, might well improve the functioning of the Internal Market in the field of copyright and whose impact will have to be assessed in the near future:

- **The Orphan Works Directive has a rather limited/specific scope of application**, which concerns certain uses of works whose right-holders are unknown and/or cannot be located and whose orphan status is certified, after a diligent search, by public sector institutions acting for the pursuit of their institutional missions. **The fact that orphan works can be used only for non-commercial purposes significantly constrains the application of this mandatory and cross-border copyright exception.** Another limit of the Directive is that **it does not apply to photographs**, which constitute a high portion of the orphan works held by public libraries, museums, archives and broadcasters.
- **The Collective Rights Management Directive is expected to improve the functioning of collecting societies in Europe**, through the transposition, by April 2016, of a detailed and pervasive (harmonised) set of provisions aiming at imposing higher standards of efficiency and transparency to such institutions and obliging them to modernise their licensing activities. In addition, the Directive seeks to facilitate the aggregation of music repertoires in the clearance of online rights, with the creation of ‘hubs’ and one-stop shops for commercial users of such works.

Finally, for what concerns technological evolutions, it is important to take into account at least two relevant aspects:

- *The ongoing diffusion of access-based services such as on-demand streaming* in the music and audiovisual sector (e.g. Spotify, Apple Music, and Netflix) seems to be

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<sup>508</sup> Such rulings have gone beyond mere interpretation and clarification of existing provisions by setting out new standards and unitary concepts whose creation was justified on the grounds of the harmonisation purposes of all EU copyright Directives. If EU policy- and lawmakers decided not to undertake any legislative action, such a court-led law making process would continue anyway, at a pace that has proven to be increasingly fast and with largely unpredictable results.

<sup>509</sup> See C-403/08 *Football Association Premier League Ltd and Others v. QC Leisure and Others*, 2012.

exerting a significant impact on the market and, at the same time, reducing the incentive to engage in illegal downloading.

- *The increasing diffusion of virtual private networks (VPNs)* enables users to increasingly bypass territorial restrictions created by licensing schemes designed on a purely country-by-country basis (i.e. geo-blocking).<sup>510</sup>

### 3.2. Option 1: a ‘Soft law’ approach

An alternative option could entail that EU institutions, and in particular the European Commission, rely on soft law initiatives in order to set out better/common standards in the implementation of existing EU law provisions and to foster the development of industry-led solutions to Internal Market-related problems that have emerged in certain areas of copyright. Non-legislative initiatives were already developed with regard to collective rights management,<sup>511</sup> copyright levies<sup>512</sup> and new licensing schemes in areas such as user-generated content (envisaging licenses for small-scale users) and text and data mining.<sup>513</sup> It should be recalled, however, that none of the above-mentioned initiatives has brought significant improvements.<sup>514</sup> That said, even though these initiatives have not proven to be effective, they could be explored further for certain aspects of copyright where a higher degree of harmonisation is either allowed under existing rules or required by the new unitary standards and notions coming from the case law of the CJEU. This could be done in two ways:

- *By offering more guidance on provisions of the InfoSoc Directive* (and of the related legislative acts) whose broader and unitary interpretation at national level could significantly reduce or remove barriers to cross-border uses. Such provisions include:
  - *Copyright exceptions and limitations such as quotations and parody* for which the CJEU, in spite of their optional character, found that these provisions should necessarily be interpreted in a uniform way across the EU, in order to preserve the harmonisation purposes of copyright directives. A

<sup>510</sup> A virtual private network (VPN) extends a private network across a public network, such as the Internet. It enables a computer or network-enabled device to send and receive data across shared or public networks as if it were directly connected to the private network, while benefiting from the functionality, security and management policies of the private network. Use of a VPN thus bypasses territorial restrictions by allowing users to connect directly to servers located in countries in which copyrighted content is available. VPNs are widely available, easy to use, and often, free of charge.

<sup>511</sup> See Commission Recommendation on *collective cross-border management of copyright and related rights for legitimate online music services* of 18 October 2005, OJ L 276, 21.10.2005.

<sup>512</sup> See Vitorino, A. (2013), *Recommendations Resulting from the Mediation on Private Copying and Reprographic Levies*, available at:

[http://ec.europa.eu/internal\\_market/copyright/docs/levy\\_reform/130131\\_levies-vitorino-recommendations\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/levy_reform/130131_levies-vitorino-recommendations_en.pdf).

<sup>513</sup> See License for Europe, Structured stakeholder dialogue 2013, available at:

<http://ec.europa.eu/licences-for-europe-dialogue/en>.

<sup>514</sup> In particular, the failure of the 2005 Recommendation to achieve the expected objectives with regard to the diffusion of pan-European licenses for music works persuaded the European Commission that a legislative action (which resulted in Directive 2014/26/EU) should have been taken.

uniform notion for these exceptions would be ensured by the removal of all those national law requirements that narrow the scope of these provisions and end up making them inapplicable to new digital uses.

- *Exceptions and limitations that have been transposed in national legal systems in a way that makes their scope limited to non-digital settings, in the main:* copying by libraries, archives and museums for purposes of preservation and archiving; copying aimed at enabling both on-site and remote consultation as well as e-lending; uses for purposes of illustration for teaching and scientific research; temporary copying aimed at mining text and data after having accessed such materials lawfully. National lawmakers could modify all of these exceptions slightly in order to enable the same uses in both analogue and digital settings. The enforcement of the so-called ‘three-step test’<sup>515</sup> would ensure that a broader scope of these exceptions would not prejudice the interests of copyright-holders in an unreasonable way.
  - *Exceptions of reprography and private copying,* for which Member States could be encouraged to adopt ideas, criteria and methods of implementation of levy systems incorporated into the recommendations issued by the Commission’s mediator Antonio Vitorino in 2013 or suggested by the CJEU in its judgments.<sup>516</sup>
- *By providing guidance on the interplay between copyright law and competition law.* A Commission recommendation could incorporate a number of best licensing practices that would help copyright holders, especially in the audiovisual sector, identify the conditions under which they are entitled to exploit their intellectual property at national level, while taking advantage of the remuneration opportunities associated with a particular territory, without infringing Article 101 TFEU and the principle of free movement.
  - *By further promoting initiatives aimed at ensuring that rights data and metadata are effectively made available by their respective holders to commercial and non-commercial users and, more generally, to the public.* Identification systems and repertoire databases such as the Global Repertoire Database,<sup>517</sup> the Linked Content Coalition<sup>518</sup> and Accessible Registries of Rights Information and Orphan Works<sup>519</sup>

<sup>515</sup> See Box 1.

<sup>516</sup> These measures include among others (i) the application of levies only in the country of destination of levied products in case of cross-border transactions; (ii) a simplification of the methods of calculation and collection of levies, with a shift of the liability to pay them from the manufacturer (or importer) level to the retailer level and a drastic simplification of the applied tariffs (which would give retailers the possibility of reasonably handling the new above-mentioned task). These changes would solve the problem of products that are levied twice (in both the countries of manufacture/import and of destination) and of the subsequent reimbursements, (cf. C-467/08, *Padawan SL v. SGAE*, 2010; C-462/09, *Stichting de ThuisKopie v. Opus Supplies Deutschland*, 2011; and C-521/11, *Amazon v. Austro Mechana*, 2013).

<sup>517</sup> The ‘Global Repertoire Database’ is an attempt to create a single global and authoritative source of multi-territory information about the ownership or control of the musical repertoires.

<sup>518</sup> Linked Content Coalition (LCC) is a non-profit global consortium of standards bodies and registries, for more details, see: <http://linkedcontentcoalition.org>.

<sup>519</sup> The Accessible Registries of Rights Information and Orphan Works towards Europeana (ARROW) is a platform aimed at facilitating the management of rights and keep track records of diligent searches, see: <http://www.arrow-net.eu/>.

are expected to simplify, modernise and improve the conditions of licensing in the online market. The European Commission might consider continuing to support such initiatives, which also aim at setting out standardised rights expression languages in those sectors where digital right management systems are still used and relied on by content producers. One additional possibility would be to make the grant of further subsidies conditional on the definition and preventive approval of ownership regimes over rights management data and databases and on the related licensing policies by all consortium/project participants (i.e. associations of rights holders, collecting societies, online intermediaries, technology companies, etc.).

### **3.3. Option 2: legislative intervention**

#### **3.3.1. Option 2a: 'light-handed regulation', aimed at specifying licensing agreements and territorial restrictions that are incompatible with the free movement of goods and services (so-called 'black list')**

Under this option, a new legal provision would specify the types of licensing agreements and territorial restrictions that should be regarded as incompatible with the free movement of goods and services. This provision might be shaped so as to ensure a higher degree of legal certainty for copyright-holders and commercial users of creative works, with the introduction of a safety mechanism enabling rights-holders to show that territorial licenses are the only way to achieve appropriate remuneration. Such intervention would preserve the principle that, under certain circumstances, the protection of intellectual property at national level and the related remuneration opportunities associated with a particular territory might constitute a legitimate exception to free movement, as contemplated by Article 36 TFEU.

#### **3.3.2. Option 2b: 'comprehensive legislative reform'**

A broader reform of EU copyright law might consist of several measures/variants aimed at consolidating the existing framework and ensuring more consistency and uniformity, especially for its cross-border application. This option would entail the following interventions:

*A Better/Clearer definition of exclusive rights.* Even though CJEU case law has shed light on the scope of the exclusive rights granted by the InfoSoc Directive, there are still unclear aspects of such rights when they are applied in digital settings. These include current uncertainties on the applicability of exceptions to text and data mining, on the treatment of hyperlinking as a form of communication to an extended audience (a 'new public'), and on the application of the exhaustion principle to the online distribution of

copyrighted works, following recent CJEU decisions in landmark cases such as *Bestwater*, *Svensson* and *UsedSoft*.<sup>520</sup>

***Simplification of the right of online transmission.*** Although the InfoSoc Directive already provides for a right of making content available to the public specifically conceived to cover web-based interactive exploitation (Article 3.2), this right has not been conceived as an independent right of online transmission. This means that, given that the category of ‘online rights’ is not codified under EU law, online exploitations of protected works trigger the simultaneous application of both the rights of reproduction and making content available. Such a simultaneous application, which occurs irrespective of whether a commercial use entails the creation of permanent copies (i.e. download) or just streaming, increases transaction costs dramatically whenever these rights belong to distinct rights-holders, as happens often in the music business. Options in this respect include i) the creation of a single right of online transmission, or at least ii) simplifying licensing to make the bundling of the aforementioned rights indispensable for each license to be valid. This obligation would guarantee that each license granted by a copyright-holder enables a concrete and autonomous type of digital use.

***Introduction under EU copyright law of a principle of ‘country of origin’ (or country of upload) for online transmissions of categories of works*** for which the problem of territorial exclusivity is particularly evident. Considering that the availability of audiovisual works on the Internet is much lower than that of music, this measure could be confined to the realm of films and other audiovisual works (e.g. TV series).<sup>521</sup> Such a remedy would extend and adapt to online content a principle that has already been implemented under EU law for the determination of the applicable law to satellite broadcasts and digital TV services. This policy option aims at making online transmissions of copyrighted works subject to one single national law instead of making them subject to the laws of all EU countries where the transmission can be accessed, in accordance with the principle of territoriality and with the accessibility criterion recently developed by the CJEU for the identification of the law applicable to online infringements. This provision should not deprive the parties of the possibility of agreeing by contract on the territorial scope of the licence, which would allow them to calculate license fees on the basis of the audiences and territories reached by online deliveries.

***Modernisation and further harmonisation of copyright exceptions and limitations.*** As already mentioned, the adaptation of exceptions to the digital environment and their application in a technology-neutral manner is significantly restricted by the exhaustive character of the exceptions provided under Article 5 of the InfoSoc Directive. In addition, as emphasized by the CJEU in recent judgments, the so-called ‘three-step test’, which is incorporated into international treaties and, as a result, has a binding force for the EU,

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<sup>520</sup> See C-348/13, *Bestwater International GmbH v. Michael Mebes* (2014); C-466/12, *Svensson v. Retriever Sverige AB* (2014); C-128/11, *UsedSoft GmbH v. Oracle International Corp.* (2012).

<sup>521</sup> Such a decision would need to take the existing online music licensing schemes into consideration in order to assess their efficiency and desirability. Moreover, EU policy makers should also evaluate the impact of the 2014 Directive on Collective Rights Management on the transaction costs that commercial users of online music have to bear in order to launch pan-European or multi-territorial online music services.

makes the applicability of exceptions in digital settings more difficult or impossible.<sup>522</sup> This means that if EU lawmakers, as suggested below, decided to undertake legislative initiatives aimed at expanding the scope of copyright exceptions, they would either need to consider a re-negotiation and amendment of the international copyright treaties or propose a broader interpretation of the test at international level. To further harmonise and modernise copyright exceptions, the following initiatives could be envisaged:

*Making a core set of exceptions having an impact on cross-border uses mandatory for Member States* in order to preserve values such as freedom of expression and information, online media freedom, teaching and research purposes. Such exceptions might include uses such as text and data mining for non-commercial purposes, quotations for purposes of research and teaching, copies and transmissions of works for the purposes of e-lending, e-learning, and enabling freedom of panorama.

*Mandating that exceptions enabling transformative or productive uses of copyright materials or encouraging research and innovation cannot be overridden through contract under national law*, in the same way as for exceptions provided under sector-specific legislation on the legal protection of computer programmes. Similarly, *TPMs could be shaped as not having the effect of restricting the exercise of such exceptions and limitations*.

*Injecting flexibility into the current system of exceptions*. Courts might be allowed to freely estimate whether a certain usage should be considered 'fair' by relying on a mixed system where unauthorised uses of copyrighted materials could be permitted by analogy, i.e. when they are similar but not identical to the ones expressly intended by the law.

*Creating additional exceptions in order to ensure a nuanced and balanced legal treatment at EU level of technology-enabled uses for which exceptions and licensing schemes could become complementary*. Exceptions might apply to non-profit uses, whereas licensing schemes could be developed for uses that are directly or indirectly commercial. Confining the scope of a certain copyright exception to the realm of non-profit uses is a criterion that EU law has already embraced under the InfoSoc Directive (cf. Article 5) and, more recently, under the Orphan Works Directive (cf. Article 6). Following the same criterion with regard to future exceptions permitting certain technology-enabled uses might be a suitable policy option.

*Creating an additional exception to the right of reproduction to enable text and data mining uses*. In this case, the amended version of the InfoSoc Directive would need to be coordinated with that of Directive 96/9/EC on the legal protection of databases, where the extraction and reutilisation of data from non-original databases (i.e. mere aggregation of data) is currently restricted by an exclusive *sui generis* right.

*Clarifying and streamlining exceptions for reprography and private copying*. In those Member States where the exception applies, several measures could help reduce the

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<sup>522</sup> The three-step test embodied into Article 9.2 of the Berne Convention and Article 13 of the TRIPS Agreement provides that exceptions and limitations may be provided just in certain special cases in a way that does not affect the normal exploitation of the copyright work and does not unreasonably undermine the interests of the rights holders.



impact of copyright levies on the free movement of levied products within the EU. Among other options, it would be important to: i) adopt a uniform concept of harm caused by unauthorized private copying to right-holders across the EU; ii) clarify that copies falling within the scope of application of private copying and levy systems cannot be validly licensed by right-holders and that licensing schemes should be used as an alternative to levies before their phasing-out (to avoid that consumers end up paying twice for the same copy); iii) clarify that only equipment and media that are deemed to be used by individuals acting for non-professional ends can be subject to the levy scheme;<sup>523</sup> iv) prescribe that permission to make private copies is subject to the condition that copies come from a lawful source (i.e. a lawfully acquired copy of the work); v) ensure that levies are applied (only) in the country of destination of levied products in case of cross-border transactions; vi) shift the liability to pay the levy from the manufacturer (or importer) level to the retailer level in order to avoid the problem of products that are levied twice and that of subsequent reimbursements; vii) radically simplify the tariffs applied in order enable retailers to handle this new task in conjunction with the task of providing a customer receipt where the levy is visible for the consumer.

### **3.4.Option 3: unitary copyright title and a European copyright Code**

This option entails the **unification of legislation through a uniformly applicable regulation across the EU**. This option would fall in line with the unification of intellectual property rights legislation that emerged at EU level after the entry into force of the Lisbon Treaty (Article 118 TFEU). However, contrary to the case of patents, trademarks and industrial designs for copyright, which subsists independently of registration and for whose recognition international agreements provide a ‘no formalities’ principle, the co-existence of unitary and national titles would be more problematic and, as briefly explained below, would depend mostly on where the EU can legitimately create a registration system for copyrighted works. Accordingly, we distinguish between two sub-options.

#### **3.4.1.Option 3a: ‘complete unification’**

For a complete unification of copyright law and for the creation of a genuinely pan-European system of copyright entitlements, the EU would need to adopt a regulation that would replace national legislation in this field. This means that national copyright systems would be dismantled by the regulation, with a subsequent loss for Member States of the prerogatives they still enjoy under the current system of EU copyright Directives and territorial (i.e. country-by-country) protection. This new EU regulation would need to deal with all aspects of copyright law, such as:

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<sup>523</sup> As held by the CJEU in *Padawan v. SGAE*, this means that private copying levies cannot be applied with respect to equipment and media not made available to private users and clearly reserved for uses other than private copying (i.e. professional uses).

- **The definition of rights:** on this front, EU lawmakers might easily draw on the *acquis communautaire* regarding the subject matter of exclusive rights, as harmonised by the InfoSoc Directive and the case law of the CJEU.
- **The definition of the right to authorise the alteration, modification and translation of original works:** no formal harmonisation measure has been adopted so far in the EU, even though the CJEU has started focusing on exceptions such as parody, which presuppose the limitation of such an exclusive right; unification might also be facilitated by the circumstance in which this category of right is internationally harmonised by the Berne Convention and the related international agreements.
- **The definition of protected subject matter:** on this issue, an EU regulation might merely codify the EU standard of the ‘author’s own intellectual creation’ for all types of copyrighted works.
- **Authorship:** different concepts of authorship still apply in the various EU Member States, especially with regard to certain types of works (e.g. films) for which different categories of creators are regarded as ‘authors’.
- **Ownership:** ownership regimes, especially in the context of employment relationships where the employer might automatically acquire the economic rights of exploitation of a creative work, still vary considerably from a Member State to another.
- **Moral rights:** it is the area of copyright law where the ‘distance’ at national level is more evident.
- **Terms of protection:** these terms are all harmonised by copyright directives.
- **Exceptions and limitations:** harmonisation has so far only been achieved to a very limited extent, and this option should entail more specific provisions aimed at removing existing national disparities.
- **Copyright contract law:** significant differences still apply, also with regard to the formalities which are required for copyright titles to be validly transferred from original right-holders to subsequent copyright-holders (e.g. publishers).
- **Enforcement law and practice:** there is significant disparity between Member States as regards the types, conditions and effects of such measures; the principle of territoriality of copyright inevitably limits the effect of these measures (e.g. injunctions) to the national level.

#### **3.4.2. Option 3b: ‘optional EU copyright registration system’**

An alternative legislative initiative might be developed through the adoption of an EU regulation, the aim of which could be the introduction of an EU-wide copyright Code (i.e. a set of rules similar to the one sketched in the previous Section) and an **optional registration system that would run on top of national copyright systems and titles and would apply specifically to registered works**. Such a system might become appealing for copyright holders wishing to effectively exploit their works on a pan-European basis and take advantage of unified and simplified rules, including access to EU-wide enforcement measures (which would work as an incentive for prospective right-holders

under this new regime).<sup>524</sup> The optional registration system might prove to be compatible with the aforementioned ‘no formalities’ principle under international copyright law insofar as registration of copyright works were required for the sole purpose of choosing the desired layer of protection, and not as a formality for the protection to subsist. In case of co-authorship, if authors did not agree with each other on the desired level of copyright protection, registration would not be possible, in a way that the new joint work would be protected, by default, only under national law.

## 4. Assessing the added value of alternative policy options: selected assessment questions

In this Section, we offer insights on the possible impacts that would be associated with the alternative policy options listed in Section 3 above. Section 4.1 below explains the main assessment criteria, which include effectiveness, efficiency and coherence. This Section clarifies which benefits and costs are most likely to be relevant for the ex-ante impact assessment of the proposed options. Section 4.2 applies specific assessment questions selected by the European Parliament to the alternative options and provides an impact matrix.

### 4.1. Methodological framework

We base our comparison of the alternative policy options on three main criteria: effectiveness, efficiency and coherence.

- **Effectiveness** relates to the extent to which the proposed options achieved the intended general, specific and operational objectives.
- **Efficiency** refers to the overall impact of the proposed options on social welfare. It implies an evaluation of both the expected costs and the expected benefits of each option.
- **Coherence** refers both to how the internal components of the EU copyright framework operate together (so-called ‘internal’ coherence) and to the consistency of the proposed options with other EU legislation (so-called ‘external’ coherence).

#### 4.1.1. Effectiveness: policy objectives

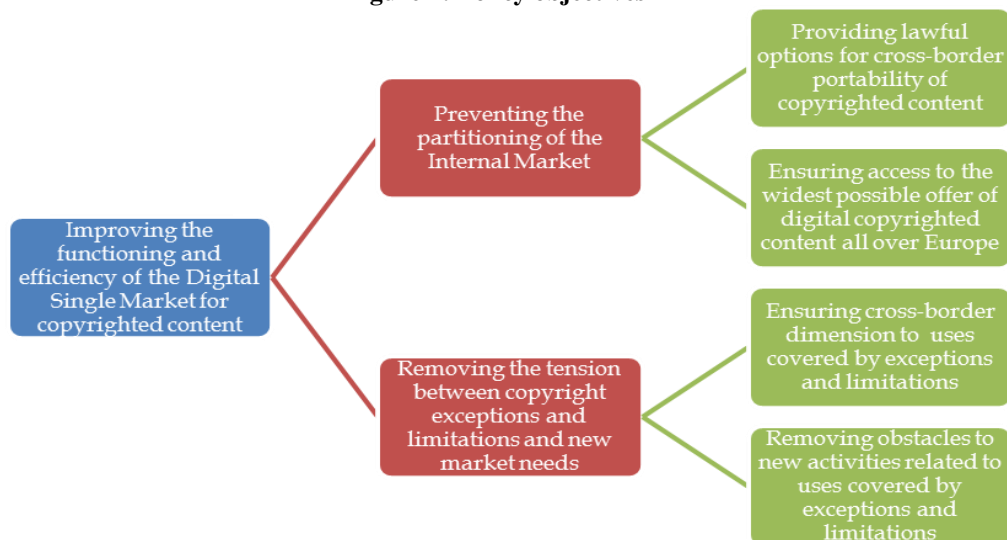
Any intervention aiming to address the policy problems would need to be based on consistent general, specific and operational objectives. These policy objectives are summarised in Figure 7 below. Our assessment of the options’ relative effectiveness will be based on these intended objectives. In addition, the ancillary objective of removing

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<sup>524</sup> Please note that an ‘optional EU copyright registration system’ was envisaged in the Green Paper on the online distribution of audiovisual works (European Commission (2011), Green Paper on the Online Distribution of Audiovisual Works in the European Union: Opportunities and Challenges towards a Digital Single Market, COM(2011)427final). While 225 respondents took part in the related public consultation, which gathered *inter alia* the views on the introduction of an optional unitary EU Copyright Title, the results of the consultation have not been published yet.

obstacles to the free movement of media and devices subject to copyright levies will be taken into account.

**Figure 7: Policy objectives**



Notes: General objectives in blue; specific objectives in red; operational objectives in green.

Source: Authors' own elaboration.

#### 4.1.2. Efficiency: relevant costs and benefits

Although a fully-fledged cost-benefit analysis of the proposed options falls outside the scope of the present analysis, it is very important to identify the categories of costs and benefits that such options are likely to generate. This, in turn, makes it easier to evaluate the possible distributional impacts of each option, i.e. the impact broken down per category of stakeholder. We base our analysis on the taxonomy of costs and benefits provided in Renda *et al.* (2014),<sup>525</sup> now fully embedded in the toolkit attached to the new better regulation guidelines of the European Commission.<sup>526</sup>

##### 4.1.2.1. Possible benefits

Expected benefits of the selected options include the following:

- **Increased content availability.** A legal system that provides efficient incentives to authors can lead to increased production of content; likewise, better rules for online copyright and a more effective enforcement can incentivise the dissemination of content on the Internet, whereas such dissemination is clearly discouraged by the absence of suitable remedies in case of a violation of copyright rules. Increased content production and dissemination is coupled with increased content

<sup>525</sup> See Renda *et al.* (2014), *Assessing the costs and benefits of Regulation*, a CEPS-Economisti Associati Study, for the European Commission, available at [http://ec.europa.eu/smart-regulation/impact/commission\\_guidelines/docs/131210\\_cba\\_study\\_sg\\_final.pdf](http://ec.europa.eu/smart-regulation/impact/commission_guidelines/docs/131210_cba_study_sg_final.pdf).

<sup>526</sup> See the website of the European Commission on the guidelines for Better Regulation, at: [http://ec.europa.eu/smart-regulation/guidelines/tool\\_51\\_en.htm](http://ec.europa.eu/smart-regulation/guidelines/tool_51_en.htm).

- consumption by the users, which can in turn lead to the greater production of user-generated content.
- *Cost savings, enhanced producer and consumer surplus.* To the extent that policy options can solve allocative inefficiencies, reduce transaction costs and administrative burdens, this can benefit society as a whole. In this respect, eliminating the need to negotiate licenses for different rights and for different countries can certainly lead to benefits for specific categories of industry players and for consumers in general. The above-mentioned policy options do not envisage a scenario where right-holders such as the EU’s comparatively small independent film producers would be obliged to license their rights on an EU-wide basis. Especially under option 3b, these right-holders would be free to decide whether or not to exploit their works on a national or multi-territorial basis. In addition to that, it should be considered that EU-wide licenses would have to reflect the value of the audiences reached by cross-border online transmissions, in a way that a lesser number of licences would not necessarily entail a lower income for right-holders.
  - *Benefits in specific fields (e.g. research) or activities (e.g. text and data mining).* Reform in the domain of exceptions and limitations can benefit specific sectors, such as research and education; it can also benefit specific cross-sectoral activities, as in the case of text and data mining. In both cases, societal benefits can be generated.
  - *Development of pan-European services.* This is a more specific, EU-related benefit that can be considered a stand-alone benefit for a policy oriented at contributing to the achievement of the Digital Single Market. Policies aimed at tackling EU market segmentation stemming from territorial licensing agreements and ‘geo-blocking’ must be appraised also in light of this possible benefit.
  - *Increased legal certainty.* As illustrated in the previous Sections, there are several areas of copyright legislation that, due to gaps, fragmentation or technological evolution, are today characterised by significant uncertainty. Removing sources of uncertainty could in turn incentivise further content availability and welfare-enhancing behaviour.

#### 4.1.2.2. Expected costs

Such as for the benefits, costs accruing from alternative policy options can also be broken down into different types. These include:

- **Direct costs.** Certain policy options might be more costly than available alternatives in terms of resulting charges (e.g. levies); substantive compliance costs (e.g. need to use filtering technologies, renegotiation of existing license agreements); or administrative burdens (e.g. introduction of new reporting obligations for market monitoring). Such costs are typically incurred by industry players.
- **Enforcement costs.** This category can include costs from enhanced litigation, administering and applying sanctions, and monitoring compliance. Such costs typically affect public authorities, but they can also affect private players. The latter can face costs of this type both in the form of opportunity cost of the time spent

engaging in litigation, and as a result of the existence of private regulation such as codes of conduct, which place enforcement activities directly in the responsibility of private players.

- **Indirect costs** are likely to emerge in various forms:
  - *Indirect compliance costs* occur when costs generated by compliance with legal rules are passed on downstream in the form of higher prices (e.g. the cost of an e-book increases since the device producer cannot rely on TPMs).
  - *Substitution effects and technological avoidance measures* (e.g. VPNs). These refer to the case in which end-users rely on a second-best, socially suboptimal course of action (e.g. the use of VPNs to circumvent territorial restrictions).
  - *Reduced efficiency, competition, or innovation*. These effects occur any time a specific policy option falls short of achieving productive, allocative or dynamic efficiency.

### 4.1.3. Coherence

Another important aspect of the assessment of alternative policy options is their coherence with the existing EU *acquis* on copyright, as well as with other, important areas of EU legislation. More specifically, our assessment below will look at the following issues:

- Coherence with CJEU latest case law;
- Coherence with other areas of EU legislation.

### 4.1.4. Summary of policy options

Prior to the assessment of benefits and costs stemming from policy interventions, Table 24 summarises the alternative policy options devised in Section 3.

**Table 24. Summary table of alternative policy options**

<p><i>Option 1</i> “Soft law approach”</p>	<ul style="list-style-type: none"> <li>• More guidance on specific provisions of the InfoSoc Directive, especially those concerning exceptions and limitations</li> <li>• Guidance on the interplay between copyright law and competition law</li> <li>• Promotion of initiatives aiming at making available information about copyright (and related rights) and right-holders toward commercial and non-commercial users.</li> </ul>
<p><i>Option 2a</i> “Light-handed regulation”</p>	<ul style="list-style-type: none"> <li>• Introduction of new legal provision specifying the types of licensing agreements and territorial restrictions that should be regarded as incompatible with the free movement of goods and services in the Internal Market</li> </ul>
<p><i>Option 2b</i> “Comprehensive legislative reform”</p>	<ul style="list-style-type: none"> <li>• Better/clearer definition of exclusive rights</li> <li>• Simplification of the right of online transmission</li> <li>• Introduction of a principle of ‘country of origin’ (or country of upload) for online transmissions of selected categories of</li> </ul>

	copyrighted works <ul style="list-style-type: none"> <li>• Modernisation and further harmonisation of copyright exceptions and limitations</li> </ul>
<b>Option 3a</b> <i>“Complete Unification”</i>	<ul style="list-style-type: none"> <li>• Introduction of an EU copyright Code and copyright title replacing national legislation and titles</li> </ul>
<b>Option 3b</b> <i>“Optional EU copyright registration system”</i>	<ul style="list-style-type: none"> <li>• Introduction of an EU copyright Code and copyright title running on top of national legislation and titles and only applicable to registered works</li> <li>• Introduction of an optional registration system for copyrighted works</li> </ul>

## 4.2. Assessment of policy options

Below, we describe our appraisal of the identified policy options, based on our appraisal of their likely impacts, with a *caveat*: this is only a preliminary assessment, which would need to be further elaborated upon by a full-fledged analysis of the economic, social, and environmental impacts of each of the alternative policy options.

### 4.2.1. Effectiveness

#### 4.2.1.1. Preventing the partitioning of the Internal Market

The specific objective of **preventing the partitioning of the Internal Market** is addressed to different degrees by all the suggested policy options.

- Under the **zero option (baseline scenario)**, this objective would be partially achieved via the implementation of the 2014 Collective Rights Management Directive (Directive 2014/26/EU) that aims *inter alia* at facilitating the clearance of online rights for music repertoires. More specifically, with respect to the music sector, this Directive is expected to reduce transaction costs for acquiring multi-territorial and pan-European licenses. This would reduce cost barriers to cross-border services for online music, with positive impacts on both portability and the multi-territorial availability of copyrighted content. Insofar as licensing of music content constitutes an obstacle to multi-territorial licenses in the film sector (see issues related to licensing pre-existing musical compositions or film soundtracks), the Directive 2014/26/EU would reduce costs also in the provision of audiovisual digital content on a pan-European basis.
- Compared to the baseline, **option 1 (‘soft law’ approach)** would further facilitate the right clearance processes by enhancing identification systems and repertoire databases, provided that the efforts of the EU institutions in promoting such systems will be more effective than previous, comparable initiatives. Increased transparency and better access to information on relevant rights and right-holders

- are expected to lower transaction costs for multi-territorial licensing in all sectors of EU copyright, reducing obstacles to the provision of pan-European services. In addition, guidelines to clarify the interplay between copyright law and competition law might progressively set aside anticompetitive territorial restrictions with expected positive impacts on cross-border portability and trade.
- The effectiveness of **option 2a ('black list')** is likely to be greater than that of either of the two previous options, as those territorial restrictions, which are incompatible with the free movements of goods and services, would *per se* be prohibited and legal certainty would be enhanced. Crucially, this should also address the problem of cross-border portability of content. A more nuanced assessment is related to the impact on the availability of copyrighted content across Member States: while this approach would not affect the transaction costs incurred to acquire multi-territorial licenses, it might end up jeopardising vertical agreements and price discrimination strategies currently adopted by right-holders and/or commercial users, even when those strategies are perfectly legitimate and efficient. As a result, in some Member States (especially those characterised by a low level of *per capita* income) there would be a risk that access to digital content becomes more expensive for end-users. To mitigate that risk, a 'safety mechanism' should be designed to ensure that the 'appropriate remuneration test' is carried out on a country-by-country basis rather than based on the EU average.
  - By clarifying the definition of exclusive rights, simplifying the right of online transmission and introducing the principle of 'country of origin' for the online transmission of copyrighted content, **option 2b (comprehensive legislative reform)** is expected to substantially reduce transaction costs for granting and acquiring multi-territorial licenses. In addition, this option still leaves room for contractual agreements aiming at limiting the territorial scope of the licenses granted. As a result, positive impacts should accrue both in terms of lawful options for cross-border portability and the availability of digital copyrighted content throughout the EU.
  - The **complete unification introduced by option 3a** eradicates the principle of copyright territoriality based on national laws and fully equates copyrighted and non-copyrighted goods and services. This would virtually remove any obstacles imposed by the EU copyright framework on the free movement of copyrighted content, thus leaving the floor entirely to market forces for what concerns both cross-border portability and trade. Vertical agreements and territorial restrictions, which can still be included in contracts, will be subject to the scrutiny of national and EU competition authorities.
  - The '**opt-in' approach provided by option 3b** enables right-holders to choose between a unitary copyright title and the current protection system based on 28 different national copyright legislations and titles. The impact of this option is rather difficult to assess and would largely depend on the level of uptake of the EU title, which in turn is the result of a trade-off between the greater flexibility in territorial exploitation provided by national titles and the simplified licensing and enforcement mechanisms connected to pan-European rights.



#### 4.2.1.2. Removing the tension between copyright exceptions and limitations and new market needs

As already recalled in this briefing paper as well as in our companion ex post evaluation Study, the **zero option** has proven powerless to address the tension between copyright exceptions and limitations and new market needs. Only non-commercial uses of orphan works would be addressed given the existence of legislation enacted in 2012. Even option 2a (**'black list'**) does not significantly contribute to the achievement of this policy objective. The level of effectiveness largely varies across the remaining suggested policy options.

- By providing uniform and digital-friendly notions for some exceptions and limitations whose scope has been limited to a non-digital setting by national implementation or by the formulation of the InfoSoc Directive itself, **the 'soft-law' approach** may contribute to the removal of obstacles to new activities enabled by technological developments. Nonetheless, the issue of cross-border effects of exceptions and limitations would only marginally be tackled, as the optional character of the closed list provided in Article 5 of the InfoSoc Directive would remain as well as, to some extent, existing divergences in national implementation.
- On the contrary, the **comprehensive legislative reform envisaged by option 2b** would remove all obstacles to new technology-enabled uses by: i) creating additional exceptions and limitations for non-commercial purposes; ii) allowing text and data mining through the extension of the transient copy exceptions included in Article 5(1) of the InfoSoc Directive; iii) enabling national courts to apply the 'analogy criterion' to allow new unauthorised uses; iv) shielding relevant exceptions and limitations from both a contractual override and TPMs. At the same time, market fragmentation generated by the territorial scope of exceptions and limitations would be reduced by identifying a core set of mandatory exceptions and limitations on the grounds of their cross-border relevance. In particular, for text and data mining, a cross-border dimension would be ensured by the mandatory character of Article 5(1). If national courts ended up creating or endorsing a different scope for specific exceptions and limitations, copyright obstacles to cross-border uses might still affect the functioning of the Internal Market.
- **Option 3a (unitary title and enactment of an EU Copyright Code)** would radically solve all problems connected with the cross-border effects of exceptions and limitations as uses that do not require authorisation would be permitted by European legal provisions, applied uniformly in each Member State. New activities enabled by technological developments would become possible insofar as up-to-date exceptions and limitations are included in the EU Copyrighted Code. In order to be entirely future-proof, the new provisions would have to be drafted in a technologically neutral way. One possibility to ensure enhanced technology responsiveness would be to introduce a 'fair use' approach based on the three-step test and extend exceptions and limitations to new uses that are similar but not identical to those already covered by the EU Code.

- The **optional registration system provided by option 3b** applies EU-wide exceptions and limitations to creative content registered in the EU system and national exceptions and limitations to content protected under national copyright legislation. The overall result would depend on the level of uptake of the EU title as well as on the ease of access to information included in the EU register, especially for what concerns user-generated content and other derivative works. Accordingly, this would provide legal certainty on the unauthorised uses of a given copyrighted work. Interestingly, the more new exceptions and limitations would be introduced by the new EU Code, the less the EU title would become attractive for right-holders, who might then choose to retain the right to license certain uses and a greater control over transformative uses.

#### 4.2.1.3. Additional remarks

The ancillary objective to improve the functioning of the Internal Market for tangible media and devices subject to copyright levies is addressed by three out of six suggested policy options.

- The **'soft law approach' under option 1** is intended to provide guidance on criteria and methods of implementation of levy systems based on Mr Vitorino's recommendations and the landmark decisions of the CJEU. The effectiveness of this approach is limited: Member States have already introduced in their national law some of the recommendations, together with harmonising interpretations provided by the CJEU. Nonetheless, in several countries, the new provisions such as ex ante exemptions or reimbursement mechanisms to avoid or mitigate both double payments in cross-border transactions and undue payments for professional uses as well as new methods to set levies, have created substantial administrative and compliance costs and have been largely ineffective.
- The effectiveness of **option 2b** is certainly higher when compared to option 1 insofar as the harmonisation of national levy systems results from an EU **legislative intervention** aimed at solving the main issues raised by Mr Vitorino and already partially fixed in several cases by the Court of Justice.
- Whereas the opt-in approach provided by option 3b would still require national systems to ensure fair compensation, **the complete unification under option 3a** may entail the creation of an EU levy system, that could be designed e.g. on the basis of the experience gained in the field of EU customs union legislation. The highest level of effectiveness in integrating the Internal Market for levied media and devices would stem from such an approach.

The baseline scenario as well as all the policy interventions proposed above will be affected by technological developments. At the time of writing, two main trends are worth discussing.

1. The **increasing diffusion of access-based services constitutes a paradigm shift from 'copyrighted goods' to 'copyrighted services'**. As things stand now,

‘copyrighted services’ have access to a higher level of protection as they are fully shielded from the principle of exhaustion, which some national courts are extending to download-to-own copyrighted content<sup>527</sup> and from any Member States’ intervention to balance exceptions and TPMs. Any policy option keeping different levels of protection for the online and the offline world has to cope with the growing importance of new services, such as on-demand streaming, enabled by ultra-fast Internet access and cloud computing that are transforming the copyright industry in a service sector activity.

2. **VPNs provide technological measures to circumvent ‘geo-blocking’** and to access online copyrighted content licensed in a certain Member State from another country. VPN users that want access to fast services enabling the streaming of digital content are usually willing to pay a monthly fee to use premium VPN packages.<sup>528</sup> While this circumvention method is proven to be very successful to bypassing existing obstacles to cross-border portability, cross-border trade of digital works can still effectively be limited by additional measures aiming at partitioning the Internal Market on the ground of the country of residence, such as solutions based on the country that issued the credit card required for payments. Nonetheless, other measures to bypass this additional obstacle are also available to end-users.<sup>529</sup> Interestingly, when it comes to copyrighted content, any activity enabled by ‘geo-blocking’ circumvention constitutes copyright infringement as well as breach of licensing contracts. Therefore, VPNs might fall under Article 6.2 of the InfoSoc Directive and become unlawful if it was proven that they have only a limited commercially significant purpose or use other than to circumvent ‘geo-blocking’. In principle, technical solutions to curtail the use of VPNs are already available.<sup>530</sup> Nonetheless, rather than fighting VPNs, right-holders and commercial users adopting a system of territorial licenses might increase their revenues by providing lawful options to meet this demand generated by users with a positive willingness to pay for cross-border access.

#### 4.2.2. Efficiency

The largest share of expected benefits and costs stemming from a reform of the EU copyright system will accrue not only by interventions aiming at improving the functioning of the Internal Market, but also from potential changes in rules affecting authors’ and performers’ remuneration and copyright enforcement. In what follows, benefits and costs will be identified from the Internal Market standpoint.

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<sup>527</sup> In a recent decision, the Dutch Court of Appeals (Hof Amsterdam) extended the rationale based on the CJEU *UsedSoft* case to the resale of eBooks. For further details, see <http://kluwercopyrightblog.com/2015/01/28/the-dutch-courts-apply-usedsoft-to-the-resale-of-ebooks/>.

<sup>528</sup> For further details see Box 2 of the companion Study on ex post evaluation of the InfoSoc Directive and related legislation.

<sup>529</sup> For instance online payment systems such as ‘Paypal’.

<sup>530</sup> For further details, see “China blocks virtual private network use”, available at: <http://www.bbc.com/news/technology-30982198>.

#### 4.2.2.1. Benefits

- **Increased content availability** is fostered by those policy options that reduce transaction costs for granting and acquiring multi-territorial licenses, and at the same time leave enough room to right-holders and commercial users to enter vertical agreements and pursue price discrimination strategies where efficient. The analysis of this potential benefit to some degree overlaps with the assessment of the effectiveness in achieving the operational goal of ensuring the widest possible offer of copyrighted content throughout the EU (see Section 4.2.1.1 above). The **zero option/baseline scenario** is expected to increase content availability in the music sector and, to a lesser degree, in the film sector. These benefits are comparable to those accruing under **option 1**: however, the latter option is to be preferred due to better identification systems for rights and right-holders and enhanced certainty provided by competition law guidelines. While limiting strategic options available to right-holders and commercial users for partitioning the Internal Market, **option 2a ('black list')** would not necessarily reduce transaction costs, which leads to ambiguous, if not even negative, effects on content availability. Uncertain effects are also generated by the **optional registration system required by option 3b**, in which the impact on transactional barriers to cross-border availability of content largely depends on the level of uptake of the pan-European title. The **comprehensive legislative reform under option 2b** appears, in this respect, as a more balanced strategy that would lead at once to lower transaction costs and broad flexibility to right-holders and commercial users; this option is thus likely to generate substantial benefits in terms of content availability across the EU. In this respect, a **'complete unification' of the EU copyright framework (option 3a)** would exert the most significant impact in terms of lowering transaction costs. In addition, this option would require deep changes in the system of territorial restrictions, which would now be subject to the scrutiny of competition authorities; in the long run, this would potentially remove any unjustified obstacle to the free movement of copyrighted goods and services.
- The reduction of transaction costs related to the granting and acquisition of licenses for copyrighted works is the main source of **cost savings accruing from a reform aiming at creating a Digital Single Market for copyrighted content**. As mentioned above, transaction costs are substantially lowered by the mandatory **EU copyright title under option 3a** as well as by the combined effect of a better/clearer definition of exclusive rights, the simplification of the right of online transmission, and the introduction of the principle of 'country of origin' for online transmission provided by **option 2b**. Arguably, **option 3b** would also reduce transaction costs at least for a subset of copyrighted content available in the EU. The impact of the **'black list' approach**, the **'soft law' approach** and the **zero option** depend *inter alia* on the implementation and impact of the 2014 Directive on Collective Rights Management. Under **option 1**, guidelines for the exceptions of reprography and private copying would lower costs for cross-border transactions of levied media and devices.
- **Benefits in certain fields/activities** are mainly linked to the specific objective of removing the tension between copyright exceptions and limitations and new market

needs (see Section 4.2.1.2 above). The **zero option** and **option 2a** fall short of this target. However, both **the ‘soft law’ approach** and, to a larger extent, **the legislative reform under option 2b** are able to foster new technology-enabled activities that are deemed to generate wide societal benefits such as e-learning, mass digitisation and the online consultation of copyrighted content available in libraries and other educational institutions, e-lending, text and data mining, and any other use related to digital settings. The legislative intervention is more likely to generate the expected benefits stemming from activities meeting new market needs on the grounds of: i) the mandatory and non-waivable character provided to a core set of exceptions (including a new exception for text and data mining) having an impact on cross-border uses; and ii) the flexibility injected by leaving the option to national courts to expand the scope of application of existing exceptions. Comparable results are achieved by **the enactment of an EU copyright Code (Option 3a)**; under this option, as mentioned above, in light of the slow pace of the EU legislative process, mechanisms to ensure the responsiveness of EU-wide exceptions and limitations to technological development should be designed in order to gradually cover new activities that are unforeseeable by the legislator, thus preserving the relevance of the EU intervention. Again, the effects of **the optional registration system envisaged by option 3b** are conditional on the level of uptake.

- If the **availability of pan-European, online services** were considered as a stand-alone benefit for a policy intervention oriented at improving the functioning and efficiency of the Digital Single Market, it would be necessary to take into account the impact of each policy option on two dimensions: i) transaction costs; ii) the interplay between copyright law and competition law. On the one hand, substantial transaction costs pose obstacles to pan-European services irrespective of the commercial strategy pursued by right-holders or service providers. On the other hand, copyright territoriality is able to mitigate the ‘constraints’ imposed by competition law provisions, thus leaving more room to commercial users and/or copyright-holders to partition the market along national borders. As mentioned above, while **options 3a, 2b, and (partially) 3b** are more effective in lowering transaction costs, **option 2a** identifies which territorial restrictions are not compatible with the free movement of goods and services within the EU. Only **option 3a** equates copyrighted works with any other goods or service available on the European market, thus fully unleashing the market integration potential exerted by competition. Importantly, the development of pan-European services would not necessarily ensure affordable access to copyrighted content in all Member States, as convergence toward a single pan-European price is likely to *de facto* make copyrighted content too expensive in lower-income Member States.
- As regards **legal certainty**, the **baseline scenario** would leave the breadth of problems highlighted in our companion ex post evaluation Study unaddressed. A higher and broader level of certainty would be ensured by the availability of **guidance on provisions of the InfoSoc Directive, as contained in option 1**; and to an even greater degree by the **comprehensive legislative reform envisaged by option 2b**. **Option 2a** would only provide a list of territorial restrictions that should not be included in licensing agreements. At any rate, legal uncertainty rooted in the principle of territoriality based on national legal orders would persist under all the

proposed options, with the exception of **complete unification (option 3a)**, which would create a genuine pan-European system of copyright entitlements, covering also aspects related to copyright contract law and enforcement law and practices. On the contrary, **option 3b** would only marginally increase the level of legal certainty and only for a limited share of copyrighted content.

#### 4.2.2.2. Costs

- In terms of costs, options vary significantly and furthermore might generate **direct financial expenses** as well as both **substantive compliance costs** and **administrative burdens**. While the **zero option** leaves matters as they stand and accordingly would not entail any additional **direct cost**, the **optional registration system envisaged by option 3b** may lead to the payment of regular **registration fees or other charges** necessary to fund the new pan-European register; in addition, the registration system would entail **one-off administrative burdens** related to the processing of information required for the registration of copyrighted works. To a lesser extent, the inclusion of new works in identification systems and repertoire databases supported by EU interventions under **option 1** may also generate **one-off administrative burdens**. Such burdens belong to the so-called 'voluntary' information obligations, given the optional nature of the behaviour that triggers them. Conversely, **one-off compliance costs** (mostly in the form of 'adaptation costs') are imposed on right-holders and commercial users by all the remaining policy options and to some degree also by **option 1**. Indeed, the guidance on the interplay between competition law and copyright law foreseen in **option 1 ('soft law')** would likely require amendments to existing licensing agreements. Contractual changes will certainly ensue from the 'black list' prohibiting certain territorial restrictions that are not compatible with the free movement of goods and services unless the involved parties, and especially right-holders, would be able to rely on the related safety mechanisms provided by **option 2a**. Larger one-off compliance costs connected to deeper contractual changes are expected to be incurred on the grounds of **the comprehensive legislative intervention under option 2b** (especially as a result of the simplification of the right of online transmission and the introduction of the 'country of origin' principle) as well as of the '**complete unification**' under **option 3a** that would dramatically alter the existing system of rights (similar costs are likely to stem from **option 3b** for content that is optionally protected by the new EU copyright title). The creation of a pan-European copyright title is also likely to create challenges for the functioning of collective management organisations, and to generate **one-off compliance costs** related to the need to re-draft contracts between such organisations and right-holders, as well as representation agreements between organisations operating in different Member States. It is worth stressing that there is no direct connection between compliance costs and transaction costs: policy interventions that substantially reduce transaction costs for entering licensing agreements may generate initial compliance costs to adapt existing agreements to the new system of rights. Finally, the option to **reform national levy systems** (entailed in options 1, 2b,

- and 3a) by shifting the liability to pay from the manufacturer (or importer) to the retailer would impose additional **compliance and administrative costs** on the latter.
- The zero option, as already stressed, does not generate any additional **enforcement cost** or **cost of other nature affecting public authorities** and sets the baseline to compare the impacts of the proposed actions. Indeed, the impact of new technological solutions on enforcement costs is uncertain, since access-based streaming services might reduce the need to police copyright infringements, but the diffusion of VPNs and other technologies (e.g. peer-to-peer torrent download clients) might call for more costly enforcement approaches. All the suggested interventions but the 'black list' under **option 2a** impose one-off costs on national authorities stemming from the implementation and/or application of new EU rules. In this respect, **option 1** could generate costs, depending on whether national authorities decide to adapt their systems of exceptions and limitations as suggested by EU soft law. Similarly, costs are expected to emerge from the optional registration system under **option 3b**, which would leave national copyright legislation unaffected for non-registered copyrighted content. Substantial costs are likely to result from a comprehensive legislative reform (**option 2b**), since this option would preserve the principle of territoriality; and also from the enactment of an EU copyright Code (**option 3a**), which would replace national copyright legislation. This latter option would require an even more significant broader adaptation of related national provisions.
  - As mentioned in our companion ex-post evaluation Study, the proposed policy options might also generate **indirect costs**. Under the **zero option**: i) commercial users would be exposed to growing incentives to substitute download-to-own business models with access-based services; ii) the demand by end-users for technological measures, such as VPNs, to overcome limited cross-border content availability would likely increase; iii) territorial restrictions would likely soften competition among service providers; iv) new activities enabled by technological evolution as well as cross-border online uses of copyrighted material would increasingly be hampered by the rigid, outdated system of exceptions and limitations. Interestingly, a new policy intervention might reduce costs when compared to the baseline scenario and **any cost reduction would count as a benefit**. In this respect, the '**soft law**' approach is expected to foster both competition among commercial users, by clarifying the role played by competition law in the copyright industry, and innovation, by covering new activities with the existing exceptions. Increased competition might lower incentives to resort to VPN technologies in order to gain access to copyrighted content. The '**black list**' approach (**option 2a**) would further improve cross-border competition among service providers compared to option 1. But **option 2a** would not encourage new technology-enabled uses and would likely create indirect compliance costs, especially when amendments to territorial restrictions make contracts more costly (the 'black list' may impose a burdensome constraint on contractual freedom and lead to the so-called 'straitjacket effect') and these costs are passed on to subscribers. Although one-off compliance costs for right-holders and commercial users are expected to be higher under the **comprehensive legislation reform (option 2b)** and the '**complete unification**' (**option 3a**), contracting parties might be better positioned to re-draft efficient

agreements than under **option 2a**; hence, the 'pass on' effects on consumers is likely to be more limited. Concerning innovation, **option 2b** and **3a** should lead to comparable results. Conversely, the effect on competition of **option 3a** is likely to be more prominent as the constraints of copyright territoriality based on national legal orders are totally removed. The more cross-border services will be available, the less consumers will seek solutions to circumvent 'geo-blocking'. Interestingly, the incentives to move toward access-based services will depend on any difference in the level of protection that the new EU copyright Code will set between the online and offline world. Again, indirect costs generated by **option 3b** will depend on the level of uptake of the new European register.

#### 4.2.3. Coherence

The main problems of **external coherence**, i.e. the interplay between the EU copyright legislation and other EU instruments affecting the same or related policy areas, are generated in the fields of copyright enforcement and right-holders' remuneration, hence, they fall outside the scope of this briefing paper.

Nonetheless, **the 'soft law' approach** under **option 1** as well as the **'black list' provided by option 2a** and the **partial (option 3b) and complete (option 3a) unification** of the EU copyright system are likely to solve, to a different degree, the existing **discrepancies between EU competition law** (which aims *inter alia* at avoiding territorial restrictions along national borders) and **EU copyright law** (which enables right-holders to exercise 28 independent, national rights on the ground of the territoriality principle). Indeed, the introduction of a pan-European system of copyright entitlements would also tackle the additional issues of external coherence as well as internal coherence that have been recorded in the companion Study carrying out an ex post evaluation of the InfoSoc Directive. Besides the 'hard approach' under **option 3a**, **the comprehensive legislative intervention entailed in option 2b** and to some degree **the guidance provided under option 1** would improve **internal coherence** of the EU copyright framework, especially when it comes to the interpretation of the law provided over the years by the CJEU.



Table 25. Summary table of assessment ('impact matrix')

	Baseline	Option 1	Option 2		Option 3	
	Zero option	Soft law	2a: 'Black list'	2b: Comprehensive legislative reform	3a: Complete unification	3b: Optional EU copyright registration system
<b>Effectiveness</b>						
<b>Specific objectives</b>						
- Preventing partitioning of Single Market	•	••	•••	••••	•••••	•••
- Removing tensions between available exceptions and new needs	•	••	•	••••	•••••	•••
<b>Operational objectives</b>						
- Providing lawful options for cross-border portability	•	••	•••	••••	•••••	•••
- Widest possible offer of copyrighted content	•	••	••	••••	•••••	•••
- Cross border dimension of uses covered by exceptions and limitations	•	•	•	••••	•••••	•••
- Removing obstacles to activities related to uses covered by exceptions/limitations	•	•••	•	•••••	•••••	••
<b>Efficiency</b>						
<b>Benefits</b>						
- Increased content availability	•	••	••	••••	•••••	•••
- Cost savings, enhanced surplus	•	•	•	••••	•••••	•••
- Benefits in specific fields/activities	•	••	•	••••	•••••	•••
- Pan-European services	•	•	••	•••	•••••	•••
- Legal certainty	•	•••	••	••••	•••••	••
<b>Costs</b>						
- Direct costs	•	••	•••	••••	•••••	•••
- Enforcement costs	•	••	•	••••	••••	••
- Indirect costs	•••••	•••	•••	••	•	•••
<b>Coherence</b>						
- With CJEU latest case law	•	••	•	••••	•••••	•••
- With other areas of EU legislation	•	••	••	••	••••	•••

Legend: • (lowest likely impact) to ••••• (highest likely impact)

## 5. Conclusions: specific assessment questions

This briefing paper explores the existing policy problems and the possible options for reforming the EU copyright framework, with specific respect to the need to strengthen the Internal Market for creative content. Although the identification of the preferred policy option would fall outside the scope of this paper, our analysis certainly shows that “no action” is not a viable option, due to the existence of very important gaps and significant fragmentation across Member States in this policy domain, which in turn creates potential shortcomings for the welfare of EU citizens and businesses.

Our analysis also allows us to answer a number of specific questions as required by the European Parliament.

- There are many gaps in the existing legal framework, as shown in our ex post evaluation Study. Among these gaps, **only a narrow subset could be partly filled if the existing *acquis* were clarified and made more consistent in terms of both interpretation and implementation.** This is perhaps the case for the compatibility of the InfoSoc and IPRED Directives with other legislation, most notably on fundamental rights, data protection and e-commerce, for which non-legislative documents and clarification efforts could probably address some outstanding problems without requiring legislative reform. Similarly, the lack of flexibility and adaptability of exceptions and limitations to new uses (mass digitisation, text and data mining, e-lending, e-learning, UGC) could partly be remedied if, for example, text and data mining were directly included within the scope of the mandatory exception for transient copies. The lack of clarity on the implementation of specific exceptions (e.g. for the parody, caricature and pastiche exception) could be remedied, at least partly, through more coordinated and consistent implementation. **Gaps that would require legislative intervention include:** the absence of a clear legal framework for the remuneration and compensation of authors and performers; the existing uncertainty as regards the responsibility of online intermediaries; the lack of clear rules on ‘geo-blocking’ practices; the uncertainty as regards the determination of the applicable law in case of copyright infringements occurring online; uncertainty on the applicability of the exhaustion principle to the making available of ‘download-to-own’ content on intangible media; and the lack of clear rules on access to justice and collection of evidence to be used in civil proceedings. As demonstrated by the ongoing debate on copyright reform at the EU level, all these are issues that only legislative intervention could contribute to remedying.
- **Options available for addressing these gaps** range from more narrowly crafted legislative options (e.g. our **option 2a**, which only aims at establishing a ‘black list’ of agreements that are incompatible with the Internal Market) to comprehensive legislation (e.g. our **option 2b**, which entails intervention to clarify the definition of rights, to simplify the right of online transmission, and to introduce the principle of ‘country of origin’ for the online transmission of categories of works, modernise and further harmonise copyright exceptions and limitations) and even more ambitious options that would create a new EU copyright title, by exploiting the possibility granted by the new Article 118 TFEU. The latter option, however, seems somewhat

- impractical or unrealistic based on our findings in terms of costs and administrative difficulties associated to dismantling the existing system.
- From an economic perspective, efficient intervention would at once reduce existing costs generated by the current framework, and create benefits for industry players and end-users. Among the several sources of costs that can be identified in the existing framework, we include direct costs in the form of substantive compliance costs and transaction costs due to the need to negotiate licenses on a country-by-country or multi-territorial basis with one or more counter-parties; reductions in content availability generated by the territoriality of copyright offerings; uncertainty for what concerns the rights and obligations of industry players, as well as on enforcement patterns; inefficiency generated by confusing and contradictory interpretations of certain exceptions and limitations, as well as by the interaction between the use of TPMs and available exceptions and limitations; the lack of legal certainty on text and data mining; the lack of a level playing field between ‘traditional’ distributors and online intermediaries; likelihood of significant market power emerging on the side of specific players; and an overall reduction of the value end-users derive from Internet access. Although it is difficult to estimate these costs in terms of GDP, available data show that a fully integrated Digital Single Market could contribute between €260 billion and €520 billion to European GDP.<sup>531</sup> The long-run growth impact of the already observed digital reform effort has been conservatively estimated at above 1%, and the further efforts in line with the Digital Agenda for Europe targets are expected to generate an additional 2.1% in GDP growth<sup>532</sup>. It is worth stressing that creative industries already represent a substantial part of EU GDP. In 2012, they generated over €500 billion in revenues, or 4.2% of the EU economy, and employed more than 7 million people.<sup>533</sup>
  - **In terms of possible costs generated by the infrastructure necessary to overcome the identified gaps, these depend on the option that is preferred.** To the extent that territoriality is preserved (as in our **options 2a and 2b, but also 3b**), the need to achieve further convergence in the interpretation and implementation of exceptions and limitations might suggest the creation of a permanent platform for the exchange of practices between national authorities, or specific cross-country groups or a dedicated agency in charge of producing implementation reports (e.g. in the case of e-communications, the creation of national regulatory authorities, the European Regulators Group (ERG) and later the Body of European Regulators of Electronic Communications (BEREC), has greatly facilitated the comparison of implementation practices in Member States). This would certainly be beneficial in terms of regulatory consistency across the EU28, but would also entail implementation costs due to the need to set up a dedicated structure and a secretariat, and other related costs. Certainly, any option that requires a pan-EU registration system would also

<sup>531</sup> European Parliamentary Research Service (2014), Mapping the Cost of Non-Europe 2014-2019, European Added Value Unit.

<sup>532</sup> Lorenzani, D., Varga, J. (2014), “The Economic Impact of Digital Structural Reforms”, European Economy. Economic Paper no. 529.

<sup>533</sup> Ernst & Young (2014), Creating growth measuring cultural and creative markets in the EU, Report for GESAC.

entail additional administrative costs, related to all activities that would necessarily be related to the new system.

With no prejudice to future impact assessment work that will focus more on specific policy options, our analysis suggests that 'more Europe' would be needed in the field of copyright, given the existing sources of productive, allocative and dynamic efficiency associated with the current system. Addressing the Internal Market issue in copyright would, in this respect, also lead to addressing many of the shortcomings the current framework presents in related domains such as general legal and industrial policy issues.

## Selected references and case law

### Main references

Ernst & Young (2014), *Creating growth measuring cultural and creative markets in the EU*, Report for GESAC.

European Parliamentary Research Service (2014), *Mapping the Cost of Non-Europe 2014-2019*, European Added Value Unit.

KEA and MINES Paris Tech (2010), *Multi-Territory Licensing of Audiovisual Works in the European Union*, European Commission.

KEA and Vrije Universiteit Brussel (2012), *Licensing music works and transaction costs in Europe*.

Lorenzani, D., Varga, J. (2014), "The Economic Impact of Digital Structural Reforms", *European Economy*. Economic Paper no. 529.

Plum Consulting (2012), *The economic potential of cross-border pay-to-view and listen audiovisual media services*, for the European Commission.

Renda et al. (2014), *Assessing the costs and benefits of Regulation*, a CEPS-Economisti Associati Study for the European Commission. Available at [http://ec.europa.eu/smart-regulation/impact/commission\\_guidelines/docs/131210\\_cba\\_study\\_sg\\_final.pdf](http://ec.europa.eu/smart-regulation/impact/commission_guidelines/docs/131210_cba_study_sg_final.pdf)

### Official documents

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

Commission Recommendation on collective cross-border management of copyright and related rights for legitimate online music services of 18 October 2005, OJ L 276, 21 October 2005.

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A digital Single Market Strategy for Europe, COM(2015)192 final.

Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society OJ L 167, 22 June 2001.

Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, OJ L 299/5, 27 October 2012.

Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, OJ L 84/72, 20 March 2014.

European Commission, Antitrust: Commission sends Statement of Objections on cross-border provision of pay-TV services available in UK and Ireland, Press releases, 23 July 2015, Brussels.

European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the 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.

European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Single Market Strategy for Europe, COM(2015)192 final.

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

European Commission, Impact Assessment Accompanying the Document Proposal for a Directive of the European Parliament and of the Council on Collective Management of Copyright and Related Rights and Multi-territorial Licensing of Rights in Musical Works for Online Uses in the Internal Market, SWD(2012)2014 final.

Vitorino, A. (2013), Recommendations Resulting from the Mediation on Private Copying and Reprographic Levies, available at:

[http://ec.europa.eu/internal\\_market/copyright/docs/levy\\_reform/130131\\_levies-vitorino-recommendations\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/levy_reform/130131_levies-vitorino-recommendations_en.pdf).

### **Other sources**

China blocks virtual private network use, available at:

<http://www.bbc.com/news/technology-30982198>

Copyright Blog of the Wolters Kluwer Law & Business Company, available at:

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

Website of the European Commission, on 'License for Europe, Structured stakeholder dialogue 2013', available at: <http://ec.europa.eu/licences-for-europe-dialogue/en>.

Website of the European Commission, on the guidelines for Better Regulation, available at: [http://ec.europa.eu/smart-regulation/guidelines/tool\\_51\\_en.htm](http://ec.europa.eu/smart-regulation/guidelines/tool_51_en.htm)

**EU Case law**

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

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

C-403/08, *Football Association Premier League Ltd and Others v. QC Leisure and Others* (2012)

C-435/12, *ACI Adam BV and Others v. Stichting de Thuiscope and Stichting Onderhandelingen* (2014)

C-462/09, *Stichting de Thuiscope v. Opus Supplies Deutschland* (2011)

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

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

C-521/11, *Amazon v. Austro Mechana* (2013)

T-442/08, *CISAC v. Commission* (2013)

## **Annex IV**

### **Industry and Industrial Relations aspects of Copyright: The added value and options for improving enforcement and fair remuneration/compensation in the EU Copyright system**

**Briefing paper by VVA**



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## List of abbreviations

<b>CEPS</b>	Centre for European Policy Studies
<b>CRMO</b>	Collective Right Management Organisation
<b>DE</b>	Germany
<b>DRM</b>	Digital Rights Management
<b>EFA</b>	European Free Alliance
<b>EU</b>	European Union
<b>GDP</b>	Gross Domestic Product
<b>InfoSoc</b>	Information Society Directive
<b>IPRED</b>	Intellectual Property Rights Enforcement Directive
<b>IPRs</b>	Intellectual Property Rights
<b>ISP</b>	Internet Service Provider
<b>JURI</b>	European Parliament Legal Affairs Committee
<b>TPMs</b>	Technological Protection Measures
<b>TTIP</b>	Transatlantic Trade and Investment Partnership agreement
<b>UK</b>	United Kingdom
<b>US</b>	United States
<b>WIPO</b>	World Intellectual Property Organisation

## Executive summary

The cultural and creative industries play a major role in EU economic and social development, employing over 7 million people and contributing to around 4.2% of EU GDP. In order to support employment and generate growth in the EU, while promoting cultural specificities and innovation, it is of great importance to protect copyright and related rights against infringements and to ensure the fair remuneration of creators of copyrighted works.

Recent technological developments and digitalisation have changed the way content is created and distributed and have facilitated the expansion of online business models. At the same time, they have posed new challenges such as the need to ensure a fair balance between protecting copyright and related rights against an increasing number of copyright infringements occurring over the internet while also encouraging the pan-European accessibility of services and content as well as future content generation in the EU.

Overall, the interplay between different pieces of legislation in this area, the territorial nature of copyright and the complex system of exceptions and limitations that exists across the EU Member States, has created a scenario whereby the dominant perception is that EU Digital Single Market has not unleashed its full potential. In this context, this briefing paper presents an overview of the current EU framework for enforcement and of the contractual aspects of the remuneration/compensation of authors and performers in the EU and identifies the main gaps in the system.

The civil enforcement system laid down in the InfoSoc Directive and in the IPRED Directive appears to have failed to provide an effective framework for the enforcement of copyright and related rights. In addition, the IPRED Directive fails to provide a clear legal framework to tackle mass scale infringements over the internet and does not appear to be fit for the digital environment. In this context, the liability regime for online intermediaries as laid down in the Electronic Commerce Directive needs to be clarified and more effective enforcement mechanisms may be required, while at the same time continuing to safeguard fundamental rights, such as the protection of personal data and the freedom to conduct a business.

The EU copyright *acquis* provides for minimum levels of harmonisation as regards the levels of remuneration/compensation of authors and performers. These are largely determined by the individual contracts they enter with the entities that exploit and distribute their works. Copyright contracts are mainly governed by national laws of the Member States and contractual terms are dependent on the relative bargaining power of different actors in the value chain, with a high degree of variety across the EU Member States. In addition, a lack of transparency exists as regards revenue allocation and contractual arrangements along the value chain.

For the modernisation of the EU copyright framework vis-à-vis technological developments, this briefing paper lists a number of policy options that could be explored further. In particular, these aim to establish a robust enforcement system of copyright and related rights and a fairer and transparent system for the

remuneration/compensation of authors and performers in the EU. This could be done either through “soft law” measures or through EU legislative intervention.

While “soft law” measures - such as the promotion of voluntary codes of conduct or awareness raising campaigns - allow for a quick adaptation of the EU copyright framework to a fast-changing environment, such as the internet, they may as well increase legal uncertainty and fragmentation across the EU because of their non-binding nature. Conversely, EU legislative intervention both in the establishment of an effective system of (cross-border) enforcement and in the encouragement of a fairer system for the remuneration/compensation of authors and performers, while providing more legal certainty, would require more time and may encounter the opposition of various stakeholder groups along the value chain.

## Chapter 1 – Introduction

In the context of the reform of the European Union (EU) copyright framework, the European Parliament's Directorate C for Impact assessment and European added value commissioned VVA to produce a European Added Value briefing paper on “Industry and Industrial Relations aspects of Copyright: The added value and options for improving enforcement and fair remuneration/compensation in the EU Copyright system”. The present briefing paper has been drafted alongside and in coordination with:

-An Ex-Post “Study on the implementation, application and effects of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (hereafter InfoSoc Directive) and of its related instruments” (hereafter “the Study”) by Centre for European Policy Studies (CEPS)<sup>534</sup>.

-A European Added Value “Briefing paper on the Legal Aspects of Copyright” by Milieu;

-A European Added Value “Briefing paper on the Internal Market aspects of EU Copyright: The added value and options for improving the functioning and efficiency of the Single Market in the field of Copyright” by CEPS;

The aim of the briefing papers, along with the Study by CEPS, is to provide an overall assessment of the relative merits of the further harmonisation of the EU copyright framework and to inform the European Parliament in its evaluation of the InfoSoc Directive and of its related instruments.

Given that the InfoSoc Directive has been examined in a range of recent studies, the main added value of this briefing paper is to present a critical synthesis of gaps and solutions identified in existing research and previous stakeholder consultations, supplemented with an overall assessment of the potential impact of individual options along the value chain. Particular attention is drawn to options aiming to improve the enforcement of existing provisions, as well as those aiming to improve the respect of fundamental rights, generate growth and support employment in the EU cultural and creative industries, and ensure fairer and balanced remuneration/compensation for authors and performers.

Due to the time and resource constraints of this briefing paper, no extensive sector-by-sector research or stakeholder consultation could be conducted. Instead, the paper relies primarily on a review of existing sources and documents, complemented by a targeted (but limited) consultation with certain key stakeholders and experts.

The paper is structured into three chapters. Chapter 2 presents the current EU copyright framework particularly in light of technological developments and the digital transformation. Chapter 3 identifies the main gaps in the current system. In Chapter 4, several policy options regarding the modernisation of the InfoSoc Directive and its related instruments are explored. Finally, main conclusions are presented.

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<sup>534</sup> CEPS and Economisti Associati (2015), Study on the implementation, application and effects of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society and of its related instruments.

## Chapter 2 – Background and Policy Context

### Key findings

- The EU copyright acquis includes the InfoSoc Directive and nine other directives, and is supplemented by extensive CJEU case law.
- Many aspects of copyright protection are left to national legislation, such as copyright contracts.
- Better IPR enforcement and fairer remuneration/compensation in the value chain could support growth, employment and future content generation in the EU cultural and creative industries.
- The modernisation of the EU copyright framework could contribute to the completion of the EU Digital Single Market.
- Digitalisation and technological developments have changed the way content is created and distributed.
- An increasing number of infringements occur over the internet.

One of the main objectives of EU regulation of copyright is to grant protection to the creators of original works by protecting both their moral and economic<sup>535</sup> interests. Copyright is usually limited in time<sup>536</sup> and territorial, which means that protection is granted for a certain period of time and it is limited to the national territory in which the original work was created. Because authors and performers<sup>537</sup> are rarely in the position to produce and distribute their own works, through copyright contracts they entrust someone else, i.e. broadcasters, producers and intermediaries, to commercially exploit and distribute their works, with the aim to secure some remuneration for the transfer of their work.

In the EU, the legal framework for the current copyright system in the digital domain was laid down in the InfoSoc Directive<sup>538</sup>, whose purpose was the harmonisation of certain aspects of copyright and related rights and the implementation of the World

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<sup>535</sup> Economic rights, as recognised by the [Berne Convention](#) and/or the EU copyright framework include the right of reproduction, rental and lending rights, the right of distribution, rights of communication to the public, resale right, translation and adaptation right.

<sup>536</sup> In the EU, copyright protection is currently granted for the lifetime of the author plus 70 years after the death of the author.

<sup>537</sup> A performer is a person who performs or executes a work such as a piece of music, an opera, a play or a film. They often represent the necessary intermediary between the author and the public.

<sup>538</sup> 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. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML>

Intellectual Property Organisation (WIPO) Treaties<sup>539</sup>. Together with the InfoSoc Directive, the body of EU legislation that constitutes the EU copyright framework includes nine other directives<sup>540</sup> and is supplemented by extensive CJEU case law.

Since the adoption of the InfoSoc Directive in 2001, technological developments have changed the way content is created and distributed. Today, a growing number of web users demand access to online content, which has also increased the volume of cross-border cultural exchange. Digitalisation and the establishment of new business models, such as streaming, have promoted a shift from content ownership to the right to access content. In addition to changed consumer behaviour and usage patterns facilitated by the internet, new forms of creation and distribution of works have emerged. Yet, digital technologies have made it easier and cheaper to create and, more importantly, to make content available.

Whereas the European Institutions have made several efforts to harmonise the copyright framework, due to the territorial nature of copyright and related rights, many aspects are implemented differently throughout the EU and/or still left to national legislation. This has led to a high degree of fragmentation across the Member States and to a complex system of exceptions and limitations. In this context, added complexity is brought about by the interplay with legislation in other areas, such as electronic commerce and data protection. Nevertheless, the development of digital forms of exploitation and the sharp increase in copyright infringements occurring over the internet, raises the question if the current EU copyright framework is still fit for purpose.

## 1. The EU Cultural and Creative Industries in the digital environment

As laid down in the EU Digital Single Market Strategy unveiled in May 2015<sup>541</sup>, the European Commission is committed to putting forward legislative proposals for the modernisation of the copyright system before the end of 2015, with the aim to “reduce the differences between national copyright regimes and allow for wider online access to works by users across the EU, including through further harmonisation measures”<sup>542</sup>. The Digital Single Market seeks to ensure that consumers enjoy cross-border access to digital services and to create both a level-playing field for companies and the conditions for a vibrant digital economy and society. According to European Commission President

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<sup>539</sup> WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty. [http://www.wipo.int/wipolex/en/treaties/text.jsp?file\\_id=295157](http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=295157)  
[http://www.wipo.int/wipolex/en/treaties/text.jsp?file\\_id=295477](http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=295477).

<sup>540</sup> These are the Software Directive (2009/24/EC replacing Directive 91/250/EEC), the Rental and lending rights Directive (2006/115/EC replacing Directive 92/100/EEC), the Satellite and Cable Directive (93/83/EEC), the Term of Protection Directive (2011/77/EU amending Directive 2006/116/EC), the Database Directive (96/9/EC), the Resale Right Directive (2001/84/EC), the Enforcement Directive - “IPRED” (2004/48/EC), the Orphan Works Directive (2012/28/EU) and the Collective Rights Management Directive (2014/26/EU).

<sup>541</sup> European Commission (2015), A Digital Single Market Strategy for Europe. [http://ec.europa.eu/priorities/digital-single-market/docs/dsm-communication\\_en.pdf](http://ec.europa.eu/priorities/digital-single-market/docs/dsm-communication_en.pdf)

<sup>542</sup> Ibid.

Juncker's political guidelines, the completion of the Digital Single Market could generate €250 billion of additional growth in Europe<sup>543</sup>.

As highlighted in the European Parliament resolution of 12 September 2013, "the cultural and creative industries play a major role in the EU economic and social development, by promoting the spread of innovation in other sectors, and are an integral part of the Europe 2020 strategy for a smart, sustainable and inclusive economy"<sup>544</sup>. In 2012, the EU cultural and creative industries generated over €500 billion in revenues (around 4.2% of the EU GDP)<sup>545</sup>. Since the EU's cultural and creative industries employ over 7 million people, especially in the performing arts, visual arts, and music sectors<sup>546</sup>, it is of particular importance to promote growth and support employment in the cultural and creative industries and to foster creativity in the EU by ensuring appropriate remuneration/compensation for both authors and performers as well as those who invest in the copyrighted work. In this context, the modernisation of the copyright framework vis-à-vis new technological developments could make a significant contribution to completing the Digital Single Market.

Together with the Digital Single Market Strategy, several initiatives have already been launched by the European Institutions over the last decade, with the aim to adapt copyright rules to technological developments and to the needs of an evolving Information Society. These actions include the launch of a public consultation on the review of the EU copyright rules in 2013<sup>547</sup>, the adoption of a Directive on collective management of copyright in 2014<sup>548</sup>, and the Parliament's Implementation report of the InfoSoc Directive, put forward by the Rapporteur Julia Reda (the Greens/EFA, DE) in January 2015 and adopted in the European Parliament plenary session in July 2015<sup>549</sup>. In 2012, the Commission also launched the "Licences for Europe", a stakeholder dialogue with the aim to facilitate practical industry-led solutions to issues related to copyright.

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<sup>543</sup> European Commission (2014), Political Guidelines for the next European Commission - A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change.

<sup>544</sup> European Parliament (2013), Resolution of 12 September 2013 on promoting the European cultural and creative sectors as sources of economic growth and jobs.

<sup>545</sup> Ernst and Young (2014), Creating growth - Measuring cultural and creative markets in the EU.

<sup>546</sup> Ibid.

<sup>547</sup> European Commission (2014), Report on the responses to the Public Consultation on the Review of the EU Copyright Rules.

[http://ec.europa.eu/internal\\_market/consultations/2013/copyright-rules/docs/contributions/consultation-report\\_en.pdf](http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/contributions/consultation-report_en.pdf).

<sup>548</sup> Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market.

<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0026&from=EN>

<sup>549</sup> European Parliament (2015), 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.

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A8-2015-0209+0+DOC+PDF+V0//EN>



Intellectual Property Right (IPR)-intensive sectors are estimated to generate around 39% of EU GDP and 35% of EU jobs<sup>550</sup>. In order to foster growth and competitiveness in Europe, and to fight counterfeiting and piracy, the Commission has launched a public consultation on the civil enforcement of IPRs<sup>551</sup> and has issued an action plan<sup>552</sup> on IPR enforcement as well as a related strategy for enforcing IPR in third countries<sup>553</sup>. In particular, the action plan foresees a list of ten actions to be carried out, which include targeting IPR infringements on a “commercial scale” by means of self-regulatory instruments aimed at advertisers and payment providers through the application of the “follow the money approach”<sup>554</sup>, the launch of stakeholder consultations and the promotion of awareness campaigns<sup>555</sup>. The importance of IPR protection as a driver for innovation and creativity was also reiterated in the Commission's EU position paper on Intellectual Property<sup>556</sup> in the context of the Transatlantic Trade and Investment Partnership agreement (TTIP) with the US, of March 2015. As set out in the Digital Single Market Strategy, the European Commission will make proposals for modernising enforcement of IPRs by 2016 or early 2017.

For the EU Digital Single Market to unleash its full potential, the enforcement of copyright and related rights through an effective and balanced civil enforcement system and the establishment of a fair remuneration/compensation system for authors and performers, appear to be of particular importance. While copyright infringements have a negative impact on the development of markets for digital content throughout the EU, they at the same time represent a disincentive to content creation as they translate into revenue losses for authors and performers by allowing content to be made available

<sup>550</sup> See Oami/EPO Office (2013), *Intellectual Property Rights intensive industries: contribution to economic performance and employment in Europe*, p.6. It is worth noting that the methodology employed in this study has been subject to criticism. See for example <http://copyright4creativity.eu/wp-content/uploads/2014/06/COPYRIGHT-MYTHS-FACTSHEET1-23062014.pdf>

<sup>551</sup> European Commission (2013), Report on the responses to the Public Consultation on Civil Enforcement of Intellectual Property Rights: public consultation on the efficiency of proceedings and accessibility of measures. [http://ec.europa.eu/internal\\_market/consultations/docs/2012/intellectual-property-rights/summary-of-responses\\_en.pdf](http://ec.europa.eu/internal_market/consultations/docs/2012/intellectual-property-rights/summary-of-responses_en.pdf)

<sup>552</sup> European Commission (2014), Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Towards a renewed consensus on the enforcement of Intellectual Property Rights: An EU Action Plan. <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//>.

<sup>553</sup> European Commission (2014), Communication on Trade, growth and intellectual property - Strategy for the protection and enforcement of intellectual property rights in third countries. [http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc\\_152643.pdf](http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152643.pdf).

<sup>554</sup> The “follow the money” approach foresees new policy options for enforcement seeking to deprive commercial scale infringers of the revenue flows that draw them into such activities through mechanisms that target the payment of revenue associated with alleged illegal activity. See Manara, C. (2012), *Attacking the Money Supply to Fight Against Online Illegal Content?* .

<sup>555</sup> The full list of actions is available at [http://ec.europa.eu/internal\\_market/iprenforcement/docs/action-plan/140701-10-actions\\_en.pdf](http://ec.europa.eu/internal_market/iprenforcement/docs/action-plan/140701-10-actions_en.pdf)

<sup>556</sup> European Commission (2015), *Intellectual Property EU position paper*. [http://trade.ec.europa.eu/doclib/docs/2015/april/tradoc\\_153331.7%20IPR%20EU%20position%20paper%2020%20March%202015.pdf](http://trade.ec.europa.eu/doclib/docs/2015/april/tradoc_153331.7%20IPR%20EU%20position%20paper%2020%20March%202015.pdf)

without remunerating the creators of the material. Revenue losses translate into fewer new works being created and released, fewer artists under contract and less diversity<sup>557</sup>.

## 2. The current EU copyright framework for enforcement and the role of online intermediaries

The main framework for copyright enforcement in the EU is enshrined in the InfoSoc Directive and in the IPRED Directive, which set out the legislative framework for civil injunctions, as shown in Table 1 below. The current provisions and the main gaps in the current system for copyright enforcement will be analysed further in Chapter 3 of this briefing paper.

**Table 26: Overview of the main EU framework for Intellectual Property Right enforcement**

	Legal Framework	Provision	Definition/measures
IPR Enforcement Framework	InfoSoc Directive (2001/29/EC)	Art. 8 (3)	Right to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right
	IPRED (2004/48/EC)	Art. 8	Right to collect information about infringers
		Art. 11	Right to apply for an injunction against intermediaries whose services are used by a third party to infringe an intellectual property right, without prejudice of art. 8 (3) InfoSoc

Source: adapted from European Commission information

As set out in the Digital Single Market Strategy, the European Commission proposals for modernising enforcement of IPRs, will focus on commercial-scale infringements as well as its cross-border applicability. In the digital age, copyright infringements over the internet have multiplied, both in terms of commercial scale and range of commercial purposes and furthermore multiplied at the level of individual users/subscribers, posing a threat to creativity and legitimate innovative business models. Research conducted in the field has shown that piracy in the most affected industries (i.e. TV series, film recorded music and software) was in 2008 responsible for retail revenue losses of €10 billion and losses of more than 185,000 jobs in the EU cultural and creative industries<sup>558</sup>.

<sup>557</sup> European Commission (2008), Impact Assessment on the legal and economic situation of performers and record producers in the EU. [http://ec.europa.eu/internal\\_market/copyright/docs/term/ia\\_term\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/term/ia_term_en.pdf)

<sup>558</sup> TERA (2010), Building a Digital Economy: The importance of Saving Job's in the EU's Creative Industries.

A study conducted in the UK showed that one in six internet users aged above twelve consumed at least one item of online content illegally over the period between March and May 2013<sup>559</sup>.

Estimating the volume of infringements is key in the fight against copyright infringements. Yet, as highlighted in the Study by CEPS and in previous research, difficulties in assessing the effectiveness of the current framework in the fight against infringements are coupled with the lack of reliable data to quantify the level of infringements and the industry's revenue losses<sup>560</sup>. In order to help establish a clear and effective system for the monitoring of infringements and IPRs, the European Observatory on Infringements of IPRs, a network of experts and specialists, was set up<sup>561</sup>.

In this context, online intermediaries/internet service providers (ISP) - which, among others, include search engines, social media, and e-commerce platforms - represent a new player in the content and creative industries value chain and they act as intermediaries between final consumers and the 'classical' creative industries (e.g. film or music production companies). Through the development of online platforms as well as user-generated content sites (UGC), which allow users to share content, a broader and scattered audience can be reached and connected, thus overcoming the limits of distance and time that exist in traditional audio-visual markets<sup>562</sup>. It has been estimated that intermediaries' activities in the EU contributed around €430 billion to EU27 GDP in 2012 and this contribution is expected to increase in the coming years<sup>563</sup>. As a result of these developments, new digital forms of exploitation have emerged.

In addition to the general EU framework for IPR enforcement as summarised in Table 1, the Electronic Commerce Directive establishes as a general rule the non-liability of intermediaries for the content they transmit, store or host. As highlighted in the EU Digital Single Market Strategy, the European Commission is committed to clarifying the rules on the activities of intermediaries in relation to copyright-protected content by the end of 2015.

Table 2 below summarises the current rules for the liability regime of ISPs, the so-called *safe harbour* provisions, which will be further clarified in Chapter 3 of this briefing paper.

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<sup>559</sup> Kantar Media (2014), Online Copyright Infringement Tracker Wave 4, [http://stakeholders.ofcom.org.uk/binaries/research/telecoms-research/online-copyright/w4/OCI\\_MAIN\\_REPORT\\_W4\\_FINAL.pdf](http://stakeholders.ofcom.org.uk/binaries/research/telecoms-research/online-copyright/w4/OCI_MAIN_REPORT_W4_FINAL.pdf)

<sup>560</sup> See, for instance, Rand Europe (2012), Measuring IPR infringements in the internal market. [http://ec.europa.eu/internal\\_market/iprenforcement/docs/ipr\\_infringement-report\\_en.pdf](http://ec.europa.eu/internal_market/iprenforcement/docs/ipr_infringement-report_en.pdf) and CEPS (2013)

<sup>561</sup> <https://oami.europa.eu/ohimportal/en/web/observatory/home>

<sup>562</sup> See Anderson (2006), *The Long Tail: Why the Future of Business Is Selling Less of More*.

<sup>563</sup> Of which, €220 billion direct GDP contribution and €210 billion long-term indirect GDP contribution. See Copenhagen Economics (2014), *The impact of online intermediaries on the EU economy*. <http://www.copenhageneconomics.com/dyn/resources/Publication/publicationPDF/6/226/0/The%20impact%20of%20online%20intermediaries%20-%20April%202013.pdf>

**Table 27: Overview of the main EU framework for the liability regime for internet intermediary service providers**

	Legal Framework	Provision	Definition/measures
Liability regime for intermediary service providers	Electronic Commerce Directive (2000/31/EC)	Art. 12	Mere conduit or non-liability of information society services
		Art 13	Non-liability for caching
		Art 14	Non-liability for hosting
		Art. 15	Ban on a general obligation on online intermediaries to monitor the information they store or transmit

Source: adapted from European Commission information

### 3. Technological developments and the current framework for the remuneration/compensation of authors and performers

The increased possibility for producing and making content available brought by digitalisation has a number of implications for authors and performers. Overall, the impact of technical developments and digitalisation on remuneration/compensation in the cultural and creative industries is uncertain, as financial streams and the respective margins and benefits for activity carried out online differ widely depending on the margins generated and benefits accrued from the sale of tangible (non-digital) copies of creative works. While some creators may increase their revenues, in a context where selection by publishers and producers has become a lesser factor determining success, some other creators may well find themselves in a weaker negotiating position.

In the EU's cultural and creative industries, remuneration is mainly linked to exclusive rights, which can be transferred, licensed, assigned, or alienated in favour of a third party by way of a contractual agreement, or to a system of limitations, regulated through mandatory licenses. Limitations through licensing are dealt with in the InfoSoc Directive and include, among others, unwaivable remuneration rights from reprography and private copying levies<sup>564</sup>. Remuneration rights may be waivable or unwaivable. Under the EU copyright framework, certain remuneration rights, such as the one related to the transfer of the rental right, are expressly unwaivable, which means that authors and performers retain their right to obtain payment for the exploitation concerned, even if they transferred other rights to the producer. Yet, in general, authors and performers right to obtain payment of remuneration will depend on the contractual agreement with the publisher/producer or with other entities entrusted with the exploitation of their works.

<sup>564</sup> Article 5 paragraph 2 (a), (b) and (e)), and allows Member States a more extensive use of such right (Recital 36).

The main EU framework for remuneration/compensation of authors and performers is presented in Table 3 below.

**Table 28 Overview of the main EU framework for remuneration/compensation of authors and performers**

	Legal Framework	Provision	Definition/measures
Remuneration for authors and performers	InfoSoc Directive (2001/29/EC)	Art. 5	Right to fair compensation for exceptions or limitations to the reproduction right
	Rental and Lending Rights Directive (2006/115/EC)	Art. 3	Rightholders and subject matter of rental and lending Right
		Art. 5	Unwaivable right to equitable remuneration for the rental
		Art. 6	Derogation from the exclusive public lending right
		Art. 8	Right to single equitable remuneration paid by the user
	Term of Protection Directive (2011/77/EU)	Art. 3.2	Right to supplementary remuneration for phonograms

Source: adapted from European Commission information

For the purpose of this study, this briefing paper focuses primarily on the contractual aspects of the remuneration of authors and performers, which have not been subject to overall harmonisation at EU level<sup>565</sup>. Hence, the levels of remuneration/compensation are to a high extent left to market forces, i.e. to the relative strengths in bargaining power of the different actors in the value chain and the amount of the remuneration is set by the contracting parties. In this context, only some Member States have a detailed and protective set of legal provisions aiming at rebalancing the bargaining power between creators and their counterparts and/or addressing the issue of remuneration, some of them applicable to certain industry sectors<sup>566</sup>.

Authors and performers also often organise themselves into unions (although these are not present in all the Member States) or freelance associations, some of which negotiate model exploitation contracts with representatives of the industry. In addition, Collective Rights Management Organisations (CRMOs) play a role in establishing the level of remuneration/compensation received by authors and performers. The relationship between CRMOs and their members is regulated by the Directive on the Collective Management of Rights. Collective agreements are the outcome of collective negotiation between authors' representatives, i.e. professional associations, trade unions, guilds or, in some cases, CRMOs - and their counterparts.

<sup>565</sup> European Commission (2001), COM(2001) 398 final, Annex 1, p38.

<sup>566</sup> CRIDS and KEA (2014), Contractual arrangements applicable to creators: Law and practice of selected Member States. [http://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/juri/dv/contractualarrangements\\_/contractualarrangements\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/juri/dv/contractualarrangements_/contractualarrangements_en.pdf)

In this context, copyright contracts should theoretically contribute, and often do contribute to secure fair revenues for creators. However, the development of increasingly dynamic online forms of exploitation of copyrighted works, can over time lead to unfair conditions for the creators of copyrighted works (e.g. global transfer of rights or no right to termination) due to the long duration of copyright contracts. This may require the revision of copyright contracts, where no corrective or adaptive measures are included<sup>567</sup>.

Yet, online intermediaries collect and store a significant amount of data and also control how certain players in the market are remunerated<sup>568</sup>. As highlighted in the European Parliament report on the implementation of the InfoSoc Directive, there is a strong view that in fact, “virtually all the value generated by creative works is transferred to those digital intermediaries, which refuse to pay authors or negotiate extremely low levels of remuneration”<sup>569</sup>. Copyright contracts are thus often imbalanced in favour of the undertakings exploiting the works<sup>570</sup>.

Due to the challenges posed by technological developments, the increase in copyright infringements and the lack of an EU framework covering remuneration/compensation, it would appear crucial to envisage establishing a system that would better ensure appropriate protection and revenues to authors and performers with regard to the digital distribution and exploitation of their works, and aiming at improving their contractual position in relation to other rightholders and intermediaries<sup>571</sup>. This is likely to be crucial for promoting creativity across the EU, while at the same time encouraging investment in copyrighted works.

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<sup>567</sup> CRIDS and KEA (2014)

<sup>568</sup> European Commission (2015), A Digital Single Market Strategy for Europe.

<sup>569</sup> European Parliament (2015), 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.

<sup>570</sup> CRIDS and KEA (2014).

<sup>571</sup> Europe Economics and Ivir (2015), Remuneration of authors and performers for the use of their works and the fixations of their performances.

[http://ec.europa.eu/newsroom/dae/document.cfm?doc\\_id=10411](http://ec.europa.eu/newsroom/dae/document.cfm?doc_id=10411)

## Chapter 3 – Identification of Gaps and Fragmentation

In light of the premises of Chapter 2, this Chapter further analyses the gaps with the current system for copyright enforcement and for the remuneration of authors and performers. While Section I of this Chapter deals with the industry aspects of copyright enforcement, Section II takes stock of the main issues as regards the contractual aspects of remuneration/compensation for authors and performers.

### 1. Industry aspects of copyright enforcement

#### Key findings

- Provisions set out in the InfoSoc Directive, the IPRED Directive and the Electronic Commerce Directive, have not been implemented in a uniform manner throughout the EU.
- Art. 8 (3) of the InfoSoc Directive and art. 11 of the IPRED Directive have failed to provide a harmonised framework for IPR enforcement across the EU.
- The IPRED Directive is not adapted to the digital environment and has had limited application in trials concerning online infringements.
- The liability of online intermediaries and their role in identifying and putting an end to online infringements as set out in the EU Directives (i.e. InfoSoc, IPRED, and Electronic Commerce) need to be clarified.

As summarised in Table 1 and 2, the main provisions that Member States are required to transpose in their legal systems to guarantee effective enforcement of copyright in the digital environment are included in three Directives, namely the InfoSoc Directive, the IPRED Directive and the Electronic Commerce Directive. While the InfoSoc Directive and the IPRED Directive set out the legislative framework for civil injunctions, the Electronic Commerce Directive sets out the liability regime for online intermediaries.

Since the adoption of the InfoSoc Directive, a series of issues regarding copyright enforcement have emerged from the interplay between these and other legal instruments, creating a fragmented scenario where each Member State applies its own copyright rules and interprets EU provisions differently<sup>572</sup>. As highlighted in Chapter 2-II, added complexity has been brought about by recent technological developments, which have changed the way in which content is created, distributed and accessed.

<sup>572</sup> CEPS and Economisti Associati (2015).

In particular, the main gaps in the current system as identified in previous research and stakeholders' consultation and further expanded in the study by CEPS include:

- The limited application of judicial enforcement by means of art. 8 (3) of the InfoSoc and art. 11 of the Directive on the Enforcement of IPRs (IPRED), with extra-judiciary means replacing civil injunctions;
- The lack of a clear definition of the concepts of "commercial scale" and "commercial purpose" infringements, as opposed to infringements at individual user/subscriber level in the IPRED Directive;
- The lack of clear guidelines on the liability of intermediaries, as set out in the Electronic Commerce Directive;
- The lack of balance between the protection of digital copyright and of other fundamental rights as to ensure proportionality of enforcement.

As shown in Table 1, the main framework for the enforcement of copyright and related rights is laid down in art.8 (3)<sup>573</sup> of the InfoSoc Directive and in art. 11 of the IPRED Directive. These cover injunctions against intermediaries whose services are used by a third party. The judicial enforcement of copyright by means of civil injunctions as set out in art. 8 (3) of the InfoSoc Directive and art. 11 of the IPRED Directive have not been widely and uniformly implemented across the EU. The recourse to national courts, where legal actions undertaken have different and contradictory results across Europe, has contributed to the creation of a scenario where the enforcement of the EU copyright framework relies heavily on case law and occurs on a country-by-country basis. The different levels of protection that exist across the EU Member States, also pose problems for the cross-border enforcement of provisions. As highlighted in the responses to the consultation on IPR enforcement, it appears that national courts are in general reluctant to execute measures requested by a foreign court.

In the context of digitalisation and the emergence of new business models, a major role is played by online intermediaries/ISPs. In this context, the EU copyright framework provides for a number of provisions on their liability (see table 2). With the so-called *safe harbour* provisions, the Electronic Commerce Directive restricts the liability of ISPs acting as mere conduits, caching and hosting service providers for the communication of infringing material<sup>574</sup>, and bans any general obligation to monitor content they transmit or store<sup>575</sup>. The CJEU has clarified that online intermediaries whose services are used by third parties to infringe IPRs cannot be exempted from liability if the ISP plays an active role that presupposes knowledge of such infringing content<sup>576</sup>. In this context, some platforms have already put in place voluntary measures to prevent infringements<sup>577</sup>.

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<sup>573</sup> Under Art. 8(3), Member States have to ensure that right holders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.

<sup>574</sup> Art. 12, 13 and 14 of the Electronic Commerce Directive.

<sup>575</sup> Art. 15 of the Electronic Commerce Directive

<sup>576</sup> Joined Cases C-236/08 and C-238-08 *Google France & Google v Louis Vuitton and Others*, par. 114-120; C-324/09 *L'Oréal v. eBay International* (2011), par. 113.



The costly and lengthy nature of civil injunction proceedings has provided an incentive for the industry to put in place extra-judicial enforcement measures, such as voluntary codes of conduct and or administrative-based “notice and take down” procedures which appear to be faster, cheaper and less burdensome enforcement measures for rightholders<sup>577</sup>. An example is constituted by the HADOPI in France<sup>579</sup>, an agency/administrative body with a mandate to sanction those accused of illegal file-sharing. Yet, the current French Government is envisaging a revisiting of the HADOPI rules, as it appears to have largely failed to effectively remedy the problem of copyright infringement<sup>580</sup>.

As already highlighted, due to progressive digitalisation and an increase in the number of web users, over the last decade IPR infringements have become a mass phenomenon. In this context, added complexity is brought about by the controversial issue of the disclosure of the identity of infringers, which is regulated by national privacy laws. As regards the identity of infringers, the current provisions under the IPRED Directive<sup>581</sup> do not appear to be adapted to copyright infringements occurring online<sup>582</sup>. A better balance should therefore be struck between the enforcement of copyright, in relation to which IPRs are considered as a property right, and constitutes therefore a fundamental right that needs to be protected, and the safeguarding of other fundamental rights (e.g. protection of personal data/privacy). Yet, it is worth noting that infringers can also operate anonymously, which has emerged as one of the main problems for IPR enforcement<sup>583</sup>. This has led some stakeholders to argue that an obligation to “Know Your Customer” should be imposed on intermediaries<sup>584</sup>. Yet, the CJEU has stated that injunctions aimed at blocking access to infringing materials should pass a proportionality test to ensure a fair balance with the online intermediary’s freedom to conduct business and other fundamental rights<sup>585</sup>.

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<sup>577</sup> Such as, for instance, the Music Matters initiative, which involves artists, retailers, songwriters, labels and managers and also aims at educating consumers about where to legally find and enjoy digital music.

<sup>578</sup> European Commission, Report on the responses to the Public Consultation on Civil Enforcement of Intellectual Property Rights: public consultation on the efficiency of proceedings and accessibility of measures; CEPS and Economisti Associati (2015).

<sup>579</sup> The Haute Autorité pour la Diffusion des Oeuvres et la Protection des droits sur Internet (HADOPI) is a French agency/administrative body with a mandate to sanction those accused of illegal file-sharing established by Law 2009/669 of 12 June 2009, amended on 15 September 2009, Journal officiel de la République française.

<sup>580</sup> In July 2015, the French senate put forward some propositions for a reform of the HADOPI, available at <http://www.senat.fr/rap/r14-600/r14-6001.pdf> (in French).

<sup>581</sup> Namely art. 6, 7 (gathering and preserving evidence) and art. 8 (right of information).

<sup>582</sup> The right to information as provided for under art. 8 of the IPRED Directive would allow the disclosure of the identity of internet users found in possession of infringing goods on a commercial scale or providing services used in infringing activities.

<sup>583</sup> European Commission (2013), Report on the responses to the Public Consultation on Civil Enforcement of Intellectual Property Rights: public consultation on the efficiency of proceedings and accessibility of measures, p.13.

<sup>584</sup> Ibid.

<sup>585</sup> See C-275/06 Productores de Música de España (Promusicae) v Telefónica de España SAU (2008), par. 70.

In light of the above, a balanced system for (cross-border) enforcement of copyright and related rights appears to be crucial to address all the above issues as to ensure the protection of both creators and their works. A list of policy options which could contribute to achieving these goals are listed and analysed in Chapter 4.

## 2. Remuneration and compensation of authors and performers

### Key findings

- The remuneration of authors and performers for the exploitation of exclusive rights is mainly left to contractual arrangements and market forces.
- There is a lack of transparency in revenue allocation and contractual arrangements along the value chain.
- A modernised framework should increase authors' and performers' bargaining power vis-à-vis producers, publishers, and online intermediaries.
- Significant differences exist in Member States' legal frameworks relating to the scope of transfer and the remuneration to be paid to authors and performers by the entities exploiting their works.

As highlighted in Chapter 2-III, the EU provides for minimum level or harmonisation as regards remuneration/compensation for authors and performers. Regarding exclusive rights and remuneration deriving from contracts, the InfoSoc approach to authors' and performers' remuneration can be defined as *'hands-off'*, as the text does not contain any specific provisions on the issue of the 'fair' distribution of revenues along the value chain for legitimate uses of creative content<sup>586</sup>. In the absence of a clear legal framework for the remuneration of rightholders, some concepts such as "fair remuneration" have to some extent been clarified by the CJEU<sup>587</sup>. As a result of the lack of clear provisions on this subject matter, remuneration levels are determined by market mechanisms and contractual arrangements on a country-by-country basis as well as national legal contexts. Contractual arrangements are influenced to a high extent by the differences in bargaining power among the different actors in the value chain.

In recent years, in parallel with emerging business models for the creation and distribution of content, the models for the rewarding and remuneration of rightholders and the flow of revenues in the content and creative industries have evolved, and it is

<sup>586</sup> Although some provisions, such as those provided for under the Terms of Extensions Directive, do exist in the EU acquis.

<sup>587</sup> E.g., case C-245/00 – SENA, case C-192/04 – Lagardère; Case C-467/08 – Padawan; case C-271/10 – VEWA.

likely they will keep evolving. The payment of remuneration can take various forms: it can be (1) proportional, which foresees the participation of the authors in the profits from the exploitation of their works and depends on the commercial success of a work, (2) a lump sum (paid *ex ante* and dependent upon the expected success and anticipated revenues) or (3) a combination of the two. In the case of disproportionate advantage for the transferee, according to national law of some Member States, some contracts may also include a “best seller clause”, which means that the remuneration agreed upon in the contract can be reviewed.

The public consultation on the review of EU copyright rules<sup>588</sup> highlighted a number of issues as regards the current framework for copyright contracts. These include:

- Many contracts for the exploitation of works were concluded before the emergence of digital content distribution;
- The loss of information and bargaining power for authors/performers who enter into agreements with publishers/producers and ISP. This is due, for example, to confidentiality clauses included in the contracts;
- The imposition of contractual terms to authors and performers from publishers and producers especially in certain sectors, such as audio-visual (“buy-out” contracts);
- The impossibility for authors and performers, in many cases, to renegotiate their contracts, in particular for future exploitation of their works; and
- The poor quality or lack of accounts and reporting by publishers and producers as regards the use of the rights transferred by the author or the performer.

As highlighted in the CEPS Study, the analysis of this subject-matter is hampered by several obstacles, which include the diversity in arrangements and parties’ relative market power throughout the value chain and across sectors, the lack of transparency concerning intra-value chain transactions and the existing differences in revenue allocation between types of products/works<sup>589</sup>. A recently published study conducted on behalf of the European Commission on the level of remuneration paid to authors and performers in the music and audio-visual sectors has confirmed the need for more transparency in revenue allocation in the contracts of authors and performers in relation to the rights transferred. Furthermore, the study highlighted the need to clarify the scope of the transfer of rights as it appears that authors and performers do not fully understand what remuneration they are owed for the exploitation of their rights<sup>590</sup>. This is caused by

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<sup>588</sup> European Commission (2014), Report on the responses to the Public Consultation on the Review of the EU Copyright Rules, p.77-82.

<sup>589</sup> In order to fill the gap in the available evidence as regards revenue allocation in the value chain of the cultural and creative industries, the European Commission has awarded two service contracts for two studies on this subject matter. The first is on the remuneration of authors and performers for the use of their work and the fixations of their performances; the second is on the remuneration of authors of books and scientific journals, translators, journalists and visual artists for the use of their work, awarded respectively in February and November 2014. The first of the two studies was published in July 2015, whereas the second one should be available in early 2016.

<sup>590</sup> Europe Economics and Ivir (2015), Remuneration of authors and performers for the use of their works and the fixations of their performances.

the complex contractual relations between creators on the one hand and publishers, producers and CRMOs on the other.

As the EU framework in this area provides for minimum levels of harmonisation, Member States are free to adopt legislative and non-legislative measures to regulate the remuneration of rightholders. In particular, significant differences exist in Member States' legal frameworks relating to the scope of transfer and the remuneration to be paid to authors and performers by the entities exploiting their works and, specifically, for authors' and performers' contracts. While some countries have a detailed set of rules to protect authors in negotiating contracts, others provide transferees, the entity in charge of the exploitation of the copyrighted material, with a high degree of contractual freedom<sup>591</sup>. Despite that some countries, such as France, Germany, Poland and Spain do provide some measures in this respect, the majority of national copyright laws have left the form of remuneration to be paid to the author or performer to be determined by the contracting parties<sup>592</sup>.

At national level, there are some collective bargaining agreements specifically dealing with the issue of remuneration<sup>593</sup>. In Germany, for instance, the general principle of "equitable remuneration"<sup>594</sup> was introduced for the transfer of rights. In the absence of a contractual arrangement on remuneration, a specific procedure is put in place to fix the latter. This unconditional right to adequate remuneration contributes to balance the contractual relationship with exploiters of copyrighted works, by providing authors with significantly increased bargaining power<sup>595</sup>. Yet, the case of collective agreements has raised the question of the compatibility of these provisions with competition law<sup>596</sup>. Even where self-employed authors and performers have organised themselves into dynamic trade unions, the European rules of competition law can pose a major obstacle to their collective action as certain agreements may distort the Internal Market rules<sup>597</sup>.

The high fragmentation that exists across the EU suggests that action at EU level may be needed as to ensure authors and performers are adequately remunerated for their works, especially as regards new and dynamic forms of digital exploitation of copyrighted works. Yet, with the increase in cross-border cultural exchange, the increased diversity of national provisions as regards remuneration could also affect multi-territorial services across the EU. In this context, Chapter 4 presents some policy options that could further be explored to ensure the fair remuneration/compensation of authors and performers.

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[http://ec.europa.eu/newsroom/dae/document.cfm?doc\\_id=10411](http://ec.europa.eu/newsroom/dae/document.cfm?doc_id=10411)

<sup>591</sup> CRIDS and KEA (2014).

<sup>592</sup> Ibid.

<sup>593</sup> Ibid.

<sup>594</sup> Remuneration is considered to be adequate if it corresponds to what is customary and fair in business relations, given the nature and extent of the possibility of exploitation that is granted, in particular the duration and time of exploitation, and considering all circumstances.

<sup>595</sup> CRIDS and KEA (2014)

<sup>596</sup> CEPS (2013), Report of the CEPS digital forum.

<sup>597</sup> Europe Economics and IviR (2015).

## Chapter 4 – Identification and Assessment of Policy Options

### Key findings

- Soft law measures include collaborative solutions such as self-regulation and awareness raising actions. Their outcome is highly dependent on the degree of involvement of the private sector.
- Overall, soft law measures allow for a quick adaptation of the legal framework to a fast-changing environment such as the internet.
- Self-regulation measures may increase fragmentation across the EU and are likely to fall short in taking into account the interests of consumers and society at large.
- The importance of enforcement of existing provisions, which is crucial for IPR enforcement, could be emphasised.
- EU legislative action could ensure more legal certainty to ISPs, rightholders and users.
- EU legislative action requires more time and may encounter the opposition of some stakeholders along the value chain.

In light of the findings of Chapters 2 and 3, this Chapter presents a set of policy options, of both a legislative and non-legislative nature, that could be considered as to ensure better copyright enforcement and fairer remuneration/compensation of authors and performers, especially as regards their contractual relations with exploiters of their works. These originate from previous stakeholder consultations (e.g. on the review of EU copyright rules, on IPR enforcement and on the Electronic Commerce Directive) as well as previous research conducted in the field.

### 1. Policy options for copyright/IPR enforcement

Ahead of the publication of the European Commission proposal on IPR enforcement expected in 2016 or early 2017, the following sections provide a list of policy options for the promotion of copyright enforcement in the EU. These take into account the need to protect both rightholders' and intermediaries' fundamental rights, e.g. freedom to conduct a business<sup>598</sup>, while ensuring the cross-border availability of content to end-users. The first set of policy options are regarded as "soft law", whereas the second set of options would require legislative intervention at EU level. One additional policy option is represented by option "zero", which does not require new policy action.

<sup>598</sup> Art. 16, Charter of Fundamental Rights of the European Union (2012) <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012P/TXT&from=EN>

## 1.1. “Soft law” measures

### a) *Self-regulation: Code of conduct/code of practice*

A first option is represented by seeking collaborative solutions through supporting the development of voluntary codes of conduct agreed by intermediaries. This could consist in blocking copyright-infringing websites by ISP, or reporting on ex-post fraudulent online transactions. Such a tool could focus on traditional intermediaries, such as ISP or telecom service providers, but could also involve other actors of the ecosystem such as search engines – to identify infringing websites – , or payment service providers – monitoring and reporting dubious transactions or even stopping transfers.

Self-regulatory measures may refer to encouraging the adoption of internal corporate policies, the preparation of Memoranda of Understanding (see for example the MoU on the Sale of Counterfeit Goods via the internet prepared under the initiative of the European Commission<sup>599</sup>) or codes of conduct in the same vein as the one prepared in Denmark based on a stakeholder dialogue supervised by the Ministry of Culture<sup>600</sup>. In the Danish case, a code of conduct signed in 2014 commits ISPs to block access to copyright-infringing websites within seven days after a court decision. Rightholders and ISP now meet more regularly to involve other actors such as online search engines, payment providers, social media and many other service providers.

One of the main advantages of self-regulatory measures such as code of conducts is represented by the fact that these can be more easily revised compared to legislation. This makes such a regulatory instrument the ideal choice in environments that keep evolving, such as the internet<sup>601</sup>. Yet, the main risk associated with such an approach is represented by the fact that, unless these self-regulation measures are put forward at EU level, the fragmentation of European markets will still exist. Furthermore, its effectiveness will also depend to a high extent on the level of involvement of the private sector as they represent non-binding instruments.

One of the main drawbacks of this regulatory instrument is represented by its lack of accountability. As these instruments are agreed upon by the sectors of the industry most closely concerned, they are likely to fall short in taking into account the interests of consumers and society at large<sup>602</sup>. Yet, soft regulation should always fully respect fundamental rights, notably privacy, freedom of expression and information<sup>603</sup>, and to the extent possible also involve users and not only ISPs and rightholders.

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<sup>599</sup> Memorandum of Understanding,

<http://ec.europa.eu/DocsRoom/documents/10468/attachments/1/translations/en/renditions/native>

<sup>600</sup> The code of conduct is available (in Danish) at:

<http://www.teleindu.dk/wp-content/uploads/2014/10/TI-code-of-conduct-blokeringer.pdf>

<sup>601</sup> Kluwer Law International (2010), Codes of Conduct and Copyright Enforcement in Cyberspace.

<sup>602</sup> Kluwer Law International (2010), Codes of Conduct and Copyright Enforcement in Cyberspace.

<sup>603</sup> Art. 11, Charter of Fundamental Rights of the European Union.

b) Encourage the set up of specialised courts

In order to better deal with this highly specialised area, Member States could be further encouraged to set up dedicated copyright chambers in national courts. For instance, Portugal set up a specialised intellectual property court which is competent to handle actions concerning industrial property, copyright and related rights<sup>604</sup>. This trend could be extended to other Member States. Yet, a renewed Commission drive to extend and guide would better enable judges from these new courts to form a network of expert IPR judges participating in the EU Observatory on Infringements of Intellectual Property Rights. The establishment of such a network would also allow for the circulation of good practices.

This capacity-building framework has the potential to: (1) increase the judges' expertise; (2) increase the predictability of judgements and therefore increase legal certainty; (3) raise the appropriateness of compensation for damages; and (4) boost the efficiency and the swiftness of the proceedings. Guidance could also be provided on how to calculate damages deriving from infringements.

c) Undertake awareness-raising actions

Considering the ineffectiveness of the frameworks set up in several EU Member States and of the attempt to criminalise users' infringements of copyright, awareness-raising actions have recently taken a new turn underpinned by the consideration that infringing consumers act on the basis of their needs, and not of their morals, when they access content online. Hence, fighting piracy has departed from a focus on "blaming" to a focus on making *legal* content accessible. While this can be addressed through wider availability and cheaper access to legal offers, studies conducted in the field show that a significant number of web users has indeed acknowledged its inability to discern what is legal from what is illegal content when browsing the web<sup>605</sup>.

Actions in this area can for instance take the form of legal tools, such as the projects already supported by the EU Observatory on Infringements of IPRs on the "European Aggregator of Legal Offers". This tool consists of an EU-wide online platform linking with national aggregators of legal offers, and it is currently a pilot project involving France, Latvia, Portugal and the UK. The focus here is on enabling consumers to find legal offers online. The pilot project is due to be updated in September 2015<sup>606</sup>.

Educational campaigns are another tool to be supported and reinforced, as they aim to contribute to a change in consumer behaviour. At European level, the Public Awareness Working group of the EU Observatory on Infringements of IPRs launched a Youth Action

<sup>604</sup> Law n.º 46/2011, of 24 June implemented with decree 67/2012 of 20 March.

<sup>605</sup> See, for instance, Kantar Media, Online copyright infringement tracker benchmark study Q3 2012, study commissioned by OFCOM. Available at <http://stakeholders.ofcom.org.uk>.

<sup>606</sup> Similarly, IFPI launched the "Pro-Music website", linking licensed music services across 60 countries all over the world, with the support of governments. See the "IP in the digital world working group meeting" paper.

Plan to coordinate campaigns with stakeholders (mostly national IP offices). Furthermore, the Observatory has launched an annual fund based on the co-financing principle to support awareness-raising actions. It is divided into two types of grants: one for public organisations (bilateral agreements between national offices and the Observatory) and one for private bodies<sup>607</sup>. Grants range between €15,000 and €50,000, for a total amount of €500,000<sup>608</sup>.

Awareness-raising actions are consensual and most likely to be supported by most stakeholders and authorities. However, they are mostly concerned with user infringements, and not larger or commercial scale infringements.

d) Provide guidelines on existing legislation to foster harmonised practices

Considering that a number of the existing discrepancies between the EU legal bases and implementation at national level stem from the misunderstanding of certain provisions of EU law, the European Commission could provide guidelines to harmonise practices among Member States in order to ensure the enforcement of existing provisions. This clarification work could cover a number of concepts enshrined in the *acquis* such as the scope of "commercial scale" in the IPRED Directive<sup>609</sup>.

The benefit of this approach is that it requires less burdensome proceedings and consultation process, although its impact will only be marginal. These clarifications can potentially be transformed into legal requirements, as highlighted in Section 2 below.

## 1.2. Legislative action

The sections below provide a second set of options, which would require EU legislative action.

a) Alignment and adaptation of the relevant directives

A reopening of the directives mentioned in this Chapter may be required to clarify some provisions with a view to ensuring better compliance and enforcement of copyright and related rights. In addition to the notions referred to in Section 1 (d) of this Chapter, which could be clarified in amending new legislation, the European Commission could consider adapting the IPRED Directive to better deal with online infringements by facilitating the

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<sup>607</sup>See "Public Awareness Working Group of the European Observatory on Infringements of Intellectual Property Rights, meeting on 25 September 2014, Brussels" paper

<sup>608</sup><https://oami.europa.eu/ohimportal/en/web/observatory/call-for-proposals>

<sup>609</sup>The notion of commercial scale is not defined in the by IPRED Directive. It has been understood qualitatively or quantitatively depending on the Member State and considered from very different perspectives, e.g. the activity of the intermediary, or of the infringer. Existing discrepancies, in particular as regards art. 6 and 7 of the IPRED Directive, are detrimental to cross-border enforcement, since a court could be required by a foreign court to execute a measure which is not known to the judges.



involvement of intermediaries and even by introducing a provision allowing for the blocking of payments to individuals involved in infringement on a commercial scale<sup>610</sup>.

A second element that requires further clarification or development, would be injunctions against intermediaries (art. 9 and 11 of the IPRED Directive and art. 8 of the InfoSoc Directive), which have proven ineffective in dealing with copyright infringement over the internet (in particular in the case of commercial scale infringements generating revenues). Ineffectiveness arises from two problems: first, there is no common understanding over the types of intermediaries covered, nor are there any provisions on the conditions for justifying an injunction. Secondly, there is a need to clarify the extent to which intermediaries can be involved in the enforcement process, with regards to their fundamental rights and those of end users. Infringements can encroach on the freedom to conduct business, or on the freedom of expression, should specific injunctions lack clarity in terms of their scope.

Provisions referring to the general framework for “notice and take down” procedures are also an option to be considered in order to provide more legal certainty to ISPs, rightholders and users<sup>611</sup>. In 2012, the European Commission launched an initiative on “notice-and-action” procedures through the Communication on e-Commerce and other online services, subject to a public consultation which closed in September 2012. These procedures begin with a notification to the hosting ISP – for instance an electronic commerce platform or a company that hosts websites – about illegal content on the internet in order to facilitate the quicker taking down of content infringing copyright. The legal basis for these procedures is laid down in art. 14 of the Electronic Commerce Directive and should have been regulated in a separate directive, which was however withdrawn.

While the Electronic Commerce provides general rules for intermediaries’ liability, it does not provide procedural rules on notice and take down. This was considered as a viable policy option in previous research<sup>612</sup>. Yet, monitoring obligations also deserves special attention. Art. 15 of the Electronic Commerce Directive impedes Member States from imposing any kind of general obligation on intermediaries to monitor the content they store or transmit. However, some national courts have deemed certain monitoring and filtering possible under certain conditions.

It appears to be crucial to ensure that these kinds of measures are proportionate to the public objective to be achieved and do not put at risk fundamental rights and freedoms. It is also advisable to ensure better implementation of the InfoSoc directive, particularly of art. 8 (3), which allows injunctions to require internet access providers to stop allowing access to infringing websites. This article has not been implemented in a number of

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<sup>610</sup>CEPS (2013), Report of the CEPS digital forum, p.23.

<sup>611</sup> The legal basis for these procedures is laid down in art. 14 of the Electronic Commerce Directive. An initiative on “notice-and-action” procedures was also launched in 2012 in the Communication on e-Commerce and other online services. The Communication is available at: [http://eur-lex.europa.eu/resource.html?uri=cellar:87375c7c-1bd0-445d-b251-60599af8c73b.0009.03/DOC\\_2&format=PDF](http://eur-lex.europa.eu/resource.html?uri=cellar:87375c7c-1bd0-445d-b251-60599af8c73b.0009.03/DOC_2&format=PDF).

<sup>612</sup> Kluwer Law International (2010), Codes of Conduct and Copyright Enforcement in Cyberspace.

Member States, therefore the European Commission should call on all Member States to properly implement the *acquis* and initiate infringement procedures if necessary<sup>613</sup>.

Alignment is also needed in relation to data protection law, so that it does not present an obstacle to the application of its Article 8<sup>614</sup>. Currently, the absence of an interface between the protection of internet user privacy and the disclosure of infringers' identity in the context of civil enforcement proceedings limits the enforcement of IPRs<sup>615</sup>.

Last but not least, adopting measures to facilitate cross-border civil injunctions - which is likely to become increasingly complicated due to differences in the transposition of the IPRED Directive into national laws - could be considered.

## **2. Policy options for fair remuneration/compensation of authors and performers**

The following sections present an analysis of options or additional measures to support fairer revenues for authors and performers, to better reward creativity and innovation, and to drive new growth streams by addressing the gaps highlighted in Chapter 3 of this briefing paper. The policy options explored aim to enable the development of new business models and to provide significant incentives in support of the creation of content. Yet, reasonable flexibility should be granted. These options should also support economic activity linked to national cultural and linguistic specificities and related activities, especially in the case of the cross-border exploitation of creative works. These are both of a legislative and non-legislative nature. One additional policy option is represented by option "zero", which does not require new policy action.

For a review of the current system, as highlighted in the study conducted by CEPS and in the most recent study on remuneration conducted on behalf of the European Commission, data on revenue allocation and re-intermediation trends in different supply chains should keep being collected and analysed<sup>616</sup>. Moreover, an analysis of how private regulation could interact with public legislation in this field could be carried out.

### **2.1. Non-legislative action**

#### *a) Stakeholder engagement*

One of the possible options of a non-legislative nature is to initiate a dialogue with both stakeholders in different sectors and the Member States, in order to share best practices

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<sup>613</sup> CEPS (2013), Report of the CEPS digital forum, p.22.

<sup>614</sup> Article 8 provides for a right of information: upon request of the claimant, the competent judicial authorities may order the provision of information on the origin of the goods or services that are thought to infringe an intellectual property right and on the networks for their distribution or provision.

<sup>615</sup> CEPS (2013), Report of the CEPS digital forum.

<sup>616</sup> This issue could be partly addressed by the two studies commissioned by the European Commission to Europe Economics and that will be published in the coming months.

and assess the possible ways to ensure fair remuneration for authors and performers and across the value chain.

A possible outcome of such a dialogue could be the development of model clauses that would deal with aspects such as the determination of the remuneration of the author in the contract for each mode of exploitation, its mode of calculation and, if proportional, the types of revenues on which it will be based. According to the most recent study on remuneration conducted on behalf of the Commission, this option would require further attention and research<sup>617</sup>.

Discussions could also generate recommendations and guidelines to be implemented at national level. A particular emphasis could be put on contracts dealing with the online exploitation of works.

*b) Undertake awareness raising actions*

This option entails encouraging the Member States and relevant authors to invest in raising awareness on contractual practices among creators and performers. Reportedly, collective organisations play an important role in raising creators' awareness by providing their members with information and/or training on legal issues as well as negotiating tactics<sup>618</sup>. In addition, they may provide them with standard contracts which members may follow in the negotiating process.

*c) Promotion of collective bargaining agreements*

Trade unions play an important role in the negotiation of contracts, although in some Member States doubts exist in relation to the compatibility of collective negotiation and the determination of remuneration. Collective bargaining agreements have been reported as a positive solution to reinforce the bargaining power of authors and performers<sup>619</sup>. However, before encouraging strengthening the role of trade unions by promoting collective bargaining agreements, the European Commission would have to further scrutinise its compatibility with competition law. It has to be noted that trade unions do not exist in all Member States and that some of them are not influential participants in trade negotiations with intermediaries.

## **2.2. Legislative action**

In case legislative action is preferred, new regulatory instruments could explicitly recognise authors' and performers' rights to adequate remuneration for the exploitation of their work. In addition, the law could also request that copyright contracts observe certain requirements such as the determination of the remuneration of the author in the

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<sup>617</sup> Europe Economics and Ivir (2015).

<sup>618</sup> CRIDS and KEA (2014)

<sup>619</sup> CRIDS and KEA (2014)

contract for each mode of exploitation<sup>620</sup>, its mode of calculation and, if proportional, the types of revenues on which it will be based.

According to the most recent study on remuneration conducted on behalf of the Commission, the determination of the remuneration of authors and performers for each mode of exploitation is likely to raise some issues to be considered. These include, for instance, a potential increase in administrative costs for exploiters, which could ultimately have a negative impact on remuneration as well as the potential costs associated with updating contracts following technological developments and emerging business models per type of exploitation.

Other complementary solutions could be explored. These include:

- a) The model prescribed in the Term of Protection Directive, including a “revert back” clause<sup>621</sup> as well as a supplementary royalty to be paid after a defined period of time.
- b) Foreseeing an additional remuneration in case contracts apply to unknown forms of exploitation and/or restricting the duration of the transfer of rights relating to future works and performances. In this case, authors could also be entitled to an additional fair remuneration as and when these emerge. Authors and performers could also be given the opportunity to negotiate an adequate remuneration for unknown and unforeseen forms of exploitation of their works as they emerge.
- c) The inclusion of “use it or lose it” clauses, which would entail a reverting of rights to the creator if the content is not exploited, or “best-seller” clauses giving authors the right to renegotiate their contract and increase their share of the proceeds from exploitation in certain circumstances. “Use it or lose it” clauses for authors’ rights are currently in place in some EU Member States including Austria, Belgium, Germany, Luxembourg, Portugal and Spain<sup>622</sup>.
- d) Equally as important, provisions concerning better transparency and requirements on exploiters to report financial streams and revenues related to the exploitation also deserve further consideration. Reporting obligations already exist in some Member States.
- e) Unwaivable rights to remuneration could be proposed for digital exploitation, in particular as regards the audio-visual sector, possibly subject to collective management inspired by the Spanish system for authors and performers of audio-visual works<sup>623</sup>.

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<sup>620</sup> Europe Economics and Ivir (2015).

<sup>621</sup> Which allows the rightholder to claim back its rights and regain ownership of its work.

<sup>622</sup> CRIDS and KEA (2014).

<sup>623</sup> Under Spanish law (Art.10, *Spanish Copyright Law*), the author enjoys an unwaivable and not transferable right to remuneration for the exploitation of audiovisual works online and other forms of communication to the public. These must be managed by a collecting society.

- f) Inspired by provisions in consumer law and the Unfair Terms Directive<sup>624</sup>, clauses deemed as abusive could be considered to be invalid; certain clauses could indeed be blacklisted as occurs in the Unfair Terms Directive. Also in this field, it may be advisable to facilitate alternative dispute resolution or collective redress to enable authors or performers to denounce adhesion contracts, in which one side holds all the bargaining power.

### 3. Overall assessment of proposed options

All in all, the options for enforcement and fair remuneration/compensation considered in this Chapter may have different impacts on the various stakeholders across the value chain. The latter can be grouped in the following categories:

- i) Authors and performers;
- ii) Online intermediaries/ISP;
- iii) Publishers, producers, and broadcasters/distributors, i.e. “traditional” intermediaries;
- iv) CRMOs;
- v) End users/consumers;
- vi) Institutional users, such as public libraries, research centres, universities;
- vii) EU society as a whole.

In case of no new policy action, the existing gaps in the enforcement of copyright are likely to have a negative impact on those who invest in copyrighted works as well as on the creators. In the absence of EU action to improve enforcement, it is unlikely that the Member States will implement new provisions and/or provisions that are much different from those already in place. As regards the remuneration of authors and performers, if no EU action is taken and the status quo is maintained, their position is unlikely to improve. Yet, the constant increase in cross-border cultural exchange may increase divergences in remuneration with different patterns for remuneration across the Member States.

Overall, soft law measures allow for a quick adaptation of the legal framework to a fast-changing environment, such as the internet. Their main advantages are represented by the flexibility they introduce, and the support they are likely to muster, in particular from intermediaries. Self-regulation also appears to represent a more cost-effective choice as compared to the law making process. However, the flexibility of the system may ultimately increase legal uncertainty especially as regards protection of personal data, freedom of expression or to conduct a business. Furthermore, self-regulation agreed upon by the industry may lack in accountability as certain provisions are likely to be more favourable to the stakeholders directly involved. Likewise, soft law measures as regards remuneration/compensation for authors and performers may not improve their position in relation to the undertakings exploiting their works.

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<sup>624</sup>Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31993L0013:en:HTML>

The modernisation of regulatory instruments by means of legislative action, is likely to contribute to increased harmonisation and legal certainty across the EU. The latter may result in a better functioning of the EU Digital Single Market and it is expected in particular to improve the situation of authors and performers' remuneration. This could ultimately contribute to foster growth and content creation in the EU cultural and creative industries. At user/consumer level, increased legal certainty coupled with a wider legal offer is likely to increase their trust in the Digital Single Market. Yet, a legislative process would be more lengthy and costly and cannot be adapted to a fast-changing and dynamic environment such as the internet and may not be representative of future developments.

As regards the remuneration/compensation of authors and performers, since a variety of issues arise regarding the differences in contractual practices and bargaining power in the value chain, a revised framework to promote innovation and creativity should seek to address the shortcomings of the existing EU copyright system as regards fair earnings for the affected groups of authors and performers, and in particular address any abuse of bargaining power in relations between the weaker authors and performers and the other actors involved throughout the copyright value chain, and the corresponding imbalances in wealth distribution. Whereas many authors and performers would benefit from increased protection, those who invested in the copyrighted works and who shared or fronted the bulk of the financial risk however, including producers, publishers and distributors, may well see their profit margins reduced as a result, and accordingly, users may also have to pay a higher price for using copyrighted content.

It is worth highlighting that the industry sector in which authors, performers and intermediaries operate is also likely to influence how the different policy options will impact the sector and the different stakeholders involved. Due to the constraints of this briefing paper, a sector by sector analysis could not be presented. However, conducting further research would be recommended. In particular, sector by sector research and impact assessments of the proposed options are encouraged, together with the establishment of a continuous dialogue with the stakeholders involved.

## Conclusions

This briefing paper has contributed to highlighting and summarising several issues related to the protection of copyright and related rights in the digital environment. As emerged from previous research and stakeholders' consultation, it appears to be crucial setting up a system that would ensure at the same time protection of the copyrighted works as well as new content creation in the EU.

Given the importance of the cultural and creative industries and IPR-intensive sectors' contribution to the EU economy, the protection of IPRs against an increasing number of infringements occurring over the internet appears to be crucial to support content creation and employment in the cultural and creative industries. Yet, better enforcement of copyright and related rights has to be coupled with the establishment of a system that would ensure fair remuneration/compensation for authors and performers.

The increase of cross-border cultural exchange and the development of new business models and online forms of exploitation of copyrighted works, call for action at EU level. This should be aimed at fostering harmonisation of existing provisions and at ensuring greater legal certainty so as to facilitate the cross-border enforcement of copyright and related rights and a fairer remuneration/compensation system for authors and performers in all Member States.

While the abovementioned issues could be tackled either with "soft law" measures or through EU legislative action, the fast-changing nature of the digital environment should be taken into account and an adequate level of flexibility should be maintained. While soft law measures ensure more flexibility and speedy adaptation to a fast changing digital environment, they are likely to add legal uncertainty. On the other hand, EU legislative intervention would require more time to roll out, may end up restricting the development of future high added value innovative technologies, and would likely encounter the opposition of those stakeholders along the value chain who would need to adapt their business models, or who may well end up no longer being profitable as a result.

## Bibliography

- Anderson (2006), *The Long Tail: Why the Future of Business Is Selling Less of More*.
- CEPS and Economisti Associati (2015), *Study on the implementation, application and effects of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society and of its related instruments*;
- CEPS (2013), *Report of the CEPS digital forum*.
- Copenhagen Economics (2014), *The impact of online intermediaries on the EU economy*.  
<http://www.copenhageneconomics.com/dyn/resources/Publication/publicationPDF/6/226/0/The%20impact%20of%20online%20intermediaries%20-%20April%202013.pdf>
- CRIDS and KEA (2014), *Contractual arrangements applicable to creators: Law and practice of selected Member States*.  
[http://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/juri/dv/contractual\\_arrangements\\_contractualarrangements\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/juri/dv/contractual_arrangements_contractualarrangements_en.pdf);
- Ernst and Young (2014), *Creating growth - Measuring cultural and creative markets in the EU*;
- Europe Economics and Ivir (2015), *Remuneration of authors and performers for the use of their works and the fixations of their performances*.  
[http://ec.europa.eu/newsroom/dae/document.cfm?doc\\_id=10411](http://ec.europa.eu/newsroom/dae/document.cfm?doc_id=10411) ;
- European Commission (2008), *Impact Assessment on the legal and economic situation of performers and record producers in the EU*.  
[http://ec.europa.eu/internal\\_market/copyright/docs/term/ia\\_term\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/term/ia_term_en.pdf);
- European Commission (2012), *Communication on A coherent framework for building trust in the digital single market for e-commerce and online services*. [http://eur-lex.europa.eu/resource.html?uri=cellar:87375c7c-1bd0-445d-b251-60599af8c73b.0009.03/DOC\\_2&format=PDF](http://eur-lex.europa.eu/resource.html?uri=cellar:87375c7c-1bd0-445d-b251-60599af8c73b.0009.03/DOC_2&format=PDF);
- European Commission (2013), *Report on the responses to the Public Consultation on Civil Enforcement of Intellectual Property Rights: public consultation on the efficiency of proceedings and accessibility of measures*.  
[http://ec.europa.eu/internal\\_market/consultations/docs/2012/intellectual-property-rights/summary-of-responses\\_en.pdf](http://ec.europa.eu/internal_market/consultations/docs/2012/intellectual-property-rights/summary-of-responses_en.pdf);
- European Commission (2014), *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Towards a renewed consensus on the enforcement of Intellectual Property Rights: An EU Action Plan*.  
<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//>;
- European Commission (2014), *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Trade, growth and intellectual property - Strategy for the protection and enforcement of intellectual property rights in third countries*.  
[http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc\\_152643.pdf](http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152643.pdf);



European Commission (2014), Political Guidelines for the next European Commission – A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change;

European Commission (2014), Report on the responses to the Public Consultation on the Review of the EU Copyright Rules.

[http://ec.europa.eu/internal\\_market/consultations/2013/copyright-rules/docs/contributions/consultation-report\\_en.pdf](http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/contributions/consultation-report_en.pdf);

European Commission (2015), A Digital Single Market Strategy for Europe. [http://ec.europa.eu/priorities/digital-single-market/docs/dsm-communication\\_en.pdf](http://ec.europa.eu/priorities/digital-single-market/docs/dsm-communication_en.pdf);

European Commission (2015), A Digital Single Market Strategy for Europe. [http://ec.europa.eu/priorities/digital-single-market/docs/dsm-communication\\_en.pdf](http://ec.europa.eu/priorities/digital-single-market/docs/dsm-communication_en.pdf);

European Commission (2015), Intellectual Property EU position paper. [http://trade.ec.europa.eu/doclib/docs/2015/april/tradoc\\_153331.7%20IPR%20EU%20position%20paper%2020%20March%202015.pdf](http://trade.ec.europa.eu/doclib/docs/2015/april/tradoc_153331.7%20IPR%20EU%20position%20paper%2020%20March%202015.pdf);

European Parliament (2013), Resolution of 12 September 2013 on promoting the European cultural and creative sectors as sources of economic growth and jobs. <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2013-368>;

European Parliament (2014), Adapting the EU copyright rules to the digital transformation

[http://www.europarl.europa.eu/RegData/etudes/note/join/2014/536333/IPOL-IMPT\\_NT\(2014\)536333\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2014/536333/IPOL-IMPT_NT(2014)536333_EN.pdf);

European Parliament (2015), 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;

Kluwer Law International (2010), Codes of Conduct and Copyright Enforcement in Cyberspace;

Manara, C. (2012), Attacking the Money Supply to Fight against Online Illegal Content?;

Kretschmer, M., Derclaye, Est., Favale, M., and Watt R. (2010), The Relationship Between Copyright and Contract Law, Intellectual Property Office. [http://eprints.bournemouth.ac.uk/16091/1/\\_contractlaw-report.pdf](http://eprints.bournemouth.ac.uk/16091/1/_contractlaw-report.pdf);

Oami/EPO Office (2013), Intellectual Property Rights intensive industries: contribution to economic performance and employment in Europe;

Rand Europe (2012), Measuring IPR infringements in the internal market. [http://ec.europa.eu/internal\\_market/iprenforcement/docs/ipr\\_infringement-report\\_en.pdf](http://ec.europa.eu/internal_market/iprenforcement/docs/ipr_infringement-report_en.pdf).

Tera Consultants (2010), Building a Digital Economy: The importance of Saving Job's in the EU's Creative Industries.

<https://oami.europa.eu/ohimportal/documents/11370/71142/Building+a+Digital+Economy,+the+importance+of+saving+jobs+in+the+EUs+creative+industries>



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This European Implementation Assessment aims to provide briefing for the Committee on Legal Affairs (JURI) ahead of the publication of the Commission's legislative proposals concerning the modernisation of the EU copyright framework, which are expected towards the end of 2015.

The specific objective is to help JURI's Members achieve a better understanding of the actual gaps and weaknesses in the existing EU copyright framework and to provide an analysis of the options for modernising the framework.

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