

EU study on the

Legal analysis of a Single Market for the Information Society

New rules for a new age?

5. *Copyright and digital content*

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Table of contents

Chapter 5 Copyright and digital content	2
1. Introduction.....	2
1.1. <i>Current trends — and their issues</i>	3
1.2. <i>The copyright infringements problem</i>	6
2. Overview of the current legal framework.....	8
2.1. <i>Overview of all EU legal instruments relating to digital content</i>	8
2.2. <i>Most important legal provisions</i>	10
3. Key issues in the current EU legal instruments.....	14
3.1. <i>Gaps</i>	14
3.2. <i>Ambiguities</i>	16
3.3. <i>Unbalanced provisions</i>	17
3.4. <i>Obstacles for the Single Market</i>	20
3.5. <i>Issues relating to TPMs</i>	21
3.6. <i>Relation to the eCommerce Directive</i>	24
3.7. <i>Future-readiness and technological neutrality</i>	25
4. Practical impact of current legal framework.....	31
4.1. <i>National Implementation of EU level legal instruments</i>	31
5. Practical example: Europeana.....	39
5.1. <i>Introduction</i>	39
5.2. <i>Licence restrictions</i>	40
5.3. <i>Orphan works</i>	41
5.4. <i>Consequences of format shifting</i>	42
5.5. <i>Public domain works</i>	42
6. Conclusions.....	43
7. Recommendations.....	44
7.1. <i>Responding to the changed role of users</i>	44
7.2. <i>Meeting business requirements</i>	48
7.3. <i>Promoting the fair balance of rights between the interested parties</i>	53
7.4. <i>Dealing with TPMs</i>	60
7.5. <i>Start a fundamental copyright debate</i>	62

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Chapter 5

Copyright and digital content

I. Introduction

Rapid changes in technology, modifications of legal instruments and new business models have created *"the perfect storm around intellectual property conceptions"*¹. The vast usage, exchange and distribution of digital content have created a new reality for the different interests of the content owner (rightholder) and of the user of the content to meet.

Different interests – Rightholders want to fully commercially exploit the value of their content, maintain their rights as much as possible, increase infringement detection possibilities, and enhance control over their work through the use of technological measures. Conversely, content users want to freely interact with the digital environment and make a profitable use of the digital content at a minimum cost by exploiting the individual qualities of a digital work. In the new digital era, these two interests are closely related, and in some occasions they merge with each other.

EU-level initiatives – In a 2007 Single Market Report, the European Commission highlighted the need to promote the free movement of knowledge and innovation as the *"Fifth Freedom"*². In the same vein, the European Parliament and the Council have stressed that there is an increasingly apparent demand for quality digital content in Europe with balanced access and users rights³. The participation of all stakeholders in the knowledge-based economy is a strategic objective for the European Union. This is also in line with the Lisbon European Council, that set the transition to a knowledge-based economy as a new strategic goal for the European Union, by stipulating that it is important: *"to become the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion"*⁴. The presidency conclusions further recommended to establish an *"information society for all"*, in order to prepare the evolution to a competitive, dynamic and knowledge based economy. This shift to a knowledge-based economy will be a powerful engine for growth, competitiveness and jobs, capable of improving the quality of life and the environment⁵. In addition, article 118 of the Lisbon Treaty stipulates that *"in the context of the establishment and functioning of the internal market, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements."*

Hence, in order to fully reach the goal of an information society for all, it is essential to make digital content more accessible, usable and exploitable for everyone in Europe. Furthermore, as the new knowledge-based economy requires the contribution of all parties, it is important to reconcile all interests and to carefully balance their rights and obligations in order to establish a harmonised regime of

¹ *Promoting innovation and economic growth: the special problem of digital intellectual property a report by the digital connections*, Council of the committee for economic development, 2004, p. 14

² "A single market for 21st century Europe", COM(2007) 724 final, p. 9

³ Decision 456/2005/EC [OJ L 79/1/29-3-2005], consideration nr. 5

⁴ Presidency Conclusions, Lisbon European Council 23-24 March 2000, para. 5

⁵ *Ibid.*, para. 8

protection throughout the Single Market. This chapter therefore investigates today's digital content challenges.

1.1. Current trends — and their issues

In order to better understand the situation described previously, current practical issues and trends must be further presented.

Within the new digital environment, Internet users and owners of personal digital devices (such as personal computers, CD-players, DVD-players, iPods, etc.) are now able to play the role of the **creator, re-creator and distributor** of the digital information⁶. Any user who obtains the right digital equipment — most of which are cheap and easy to obtain and to use in everyday life — can produce digital works. Although there is every reason to believe that this phenomenon is only in its infancy, it remains unclear to which extent this user-generated content will become prominent in the future⁷.

Furthermore, the distribution of information and entertainment is **shifting from the physical to the digital environment**, while at the same time there is also a move from tangible to intangible methods of content distribution⁸. The distribution has also become **more direct**: due to the penetration of digital devices, it is now possible to distribute content directly to the user. This also means that the role of typical offline intermediaries (administrators, publishing companies, music companies, etc.) tends to diminish.

For these reasons, the role of the user in the creation, modification and distribution of digital content has changed significantly. The penetration of digital culture has led to the conversion of the role of the consumer of the content to that of an **interactive user** of the pre-existing copyrighted materials. The user not only has the ability to tailor the content according to his desires and needs, but also the ability to choose the conditions under which he can receive this content. The interactivity of the content relates not only to the content itself, but also to all the conditions surrounding its consumption⁹. The user creative content phenomenon is showing considerable development: according to the i2010 Mid Term Review *"User-created content experienced especially rapid take-up, confirming the Internet as a medium of two-way communication, but now on the richer level facilitated by broadband access. 24% of European citizens posted or participated in online fora in 2007, up from 18% in 2006, with Estonia the most active country at 44%.28"*¹⁰.

Moreover, the new information era has promoted the **individualisation of content**. The multiplication of consumer's choices has modified the business model: from *"push"* (where only the service provider determined the schedule) to *"pull"* (where the consumer's choices regarding the content have been multiplied)¹¹.

⁶ G. MAZZIOTTI, *EU Digital Copyright Law and End User*, Springer, 2008, p. 4

⁷ See European Internet Foundation, *The digital world in 2025 - indicators for European Action*, available at www.eifonline.org/site/download.cfm?SAVE=10859&LG=1, p. 22

⁸ *Study on the implementation and effect in member states' laws of the Directive 2001/29/ EC on the harmonisation of certain aspects of copyright and related rights in the information society*, Institute for Information Law, final report, February 2007, p. 8

⁹ *Interactive Content and Convergence: Implications for the Information Society, A study for the European Commission*, (DG Information Society and Media, Final Report 2006), p.25

¹⁰ i2010 Mid Term Review, (COM/2008/199) p.36

¹¹ *Ibid.*

From the business point of view, digitisation of content allows traditional business models to **promote online transactions**. Within this environment, new online business models are developed that promote the new digital content. These business models "are characterized by various elements such as the type of transport technology (downloading or streaming), the type of network used for distribution (open or proprietary), the type of DRM used, the level of interactivity etc"¹².

Companies tend to develop **business models** that are either exclusively offered online, or that are transferred from already existing commercial ventures, so as to increase the quantity of customers being addressed. Moreover, new business models appear that take advantage of consumers' involvement in the creation and distribution of content, and that build upon user generated work in order to commercially exploit it.

Moreover, technological advances have made that **copying has become a rather prevalent act**. The fact that copying has been made simpler, has led to a change of mentality of the digital users. The general public can easier than ever before and in more cost effective ways, download, copy, store and share copies of works. The low threshold towards copying digital content may lead to what has been called as "home-pirating" or "soft-pirating". In many instances this is considered by the users as a "safe" practice¹³. These practices proliferate due to the lack of effective and financially efficient measures for mass protection against those actions¹⁴, and the high costs and difficulties to detect and prosecute infringements. (Due to the importance of copyright infringements for the creative sector, this issue is further investigated in the next section.)

New concepts have appeared that try to meet the needs of the participants in the current knowledge based economy. Such a notion is that of "**open content**", described by some authors as "a definitive work published in a format that explicitly allows copying and modifying of its information by anyone"¹⁵, and by others as not for profit content, produced (often collectively) with the intentional purpose of making content available for further distribution and improvement by others at no cost.

An "**open content licence**" is a licence that enables copying and distribution of content without payment. The rights and obligations set forth by these licences varies. In some cases, the creation of derivative works by the grant of permission to re-use the licensed content may be more controlled, whereas in some other cases it might be completely free¹⁶.

¹² Study on the implementation and effect in Member States' laws of the directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, final report, Institute for Information Law, February 2007, p. 21

¹³ In some Member States, such as the Netherlands, the downloading of audiovisual works does indeed seem legal, to the extent it falls within the scope of the home copying exception. See *Kamervragen met antwoord 2006-2007, nr. 2256, Tweede Kamer* and *Kamervragen met antwoord 2007-2008, nr. 1862, Tweede Kamer*

¹⁴ Copyright Directive 2001/29 EC- Part 1, *lawdit reading room*, available at www.lawdit.co.uk/reading_room/room/view_article.asp?name=../articles/CD_2001_-_Article_6_-_23.07.04_v12.htm

¹⁵ Intellectual property guidelines, version 1.0, edited by Minerva EC Working Group, September 2008, p. 31

¹⁶ Some common restrictions include the following: (i) works which derive from an open content license must themselves be released under an open content license (this prevents a third party from making a commercial product on the basis of content he received for free); (ii) the open content shall not be used in a commercial application; (iii) a copy of the license must be attached to any derivative work (this ensures that further descendant works are covered by the same license); (iv) attribution of the source of the content must be attached to the content, and retained in later derivative ("descendant") works. This attribution is often the only form of reward enjoyed by the original/previous creator, and is used by him as a method to develop reputation, employability, etc; (v) no warranty is provided (the work is provided on an 'as is' basis); (vi) The license cannot be modified. See *Intellectual property guidelines*, version 1.0, edited by Minerva EC Working Group, September 2008, p. 32

An example of an open content licence is the Creative Commons (CC) set of licences. These licences define a spectrum of possibilities, between full copyright (all rights reserved) and the public domain (no right reserved). These licences help the creator keep the copyright upon his work while at the same time allowing certain uses (the so called "some rights reserved copyright"). The goal of Creative Commons is to create an easy mechanism for rightholders to turn their work over to the public or exercise some but not all of their legal rights over the work.

Some stakeholders question whether licences such as Creative Commons would be able to fulfil the needs of a licensor and a licensee. According to one stakeholder, a licence alone is not enough: "what is crucial to remember (as it is not explicit in the information supporting the CC licensing scheme) is that the licence does not, in itself, provide any rights protection to the creator as it lacks any support infrastructure. Without any means of exercising control the creator is, in effect, giving away all rights (globally and in perpetuity) whether that is the intention or not. Legislation will not change this; consumer and creator education, involvement of existing models for individual and collective rights management, and creator-controlled open DRM systems could potentially be more effective"¹⁷.

Related to that is, also, the notion of "**open access**", which consists of a publication model for cultural and academic publications through the Internet¹⁸. Much of the open access content is published under an open content-like licence.

In the same vein, as regards software, is the rise of **open source software** (OSS). According to the i2010 Mid Term Review *"open source software is also expected to increase its contribution to the dynamics of the software market; [...] open source will have a significant impact on the European economy"*¹⁹. Overall, the features that characterise open source software²⁰ are the free access and use of software, the freedom to use the program for every purpose (commercial or not), the freedom to make and distribute copies, as well as the freedom to modify the program and distribute the modified program.

Different OSS licences exist, with differences relating mainly to the freedom that is provided to the licensee regarding the derivative works. In general, two types of licences can be distinguished: "*permissive*" licences that allow to use the software in any way the recipient chooses²¹, and "*restrictive*" licences (also called "copyleft licences") that are based on the principle of reciprocity, according to which the derivative work of the licensee must be licensed under the same licence²².

Although OSS licences are generally considered to be compatible with copyright law system, some important issues regarding copyright rules are raised. One such issue is that most of the OSS licences are worded under US law, which could be a source of legal uncertainty in Europe, since intellectual property regimes in Europe and the United States are different. According to the LEGALIST project's findings²³ *"more European modeled licenses should be considered so as to adapt OSS license terms to*

¹⁷ Submission by the Authors' Licensing & Collecting Society to the All Party Internet Group Inquiry into Digital Rights Management, 17th January 2006

¹⁸ *Intellectual property guidelines, version 1.0*, edited by Minerva EC Working Group, September 2008, p. 34

¹⁹ i2010 MidTerm Review, (COM/2008/199) p. 27

²⁰ Report in legal issues on Open Source Software, *LEGALIST*, Issue date: 07/06/2005, p. 15

²¹ Examples: the BSD, MIT and Apache licenses

²² Examples: the GNU Public License (GPL), European Union Public License (EURL) and Mozilla Public License (MPL)

²³ Legal Issues in Open Source Software, *LEGALIST*, Issue date: 07/06/2005, p. 32

the European law²⁴. Another important issue, particularly within business environments, is the possibility that source code under a restrictive licence would "contaminate" a company's proprietary source code, due to the reciprocal nature of restrictive licences and the wide interpretation given to derivative works. Although no case law is known in this regard, this issue causes a significant amount of companies to refrain from (re)using open source software.

I.2. The copyright infringements problem

I.2.1. The stakeholders' perception of copyright infringements in the digital environment

Reasons – Digital copyright infringements (often called "digital piracy") flourish due to the low cost of reproduction and distribution, the quality of digital copies (which is typically identical to the quality of the original work), increased availability of broadband technology, the availability of many new consumer devices that can process and store large amounts of digital data (pc's, netbooks, MP3 players, ebook readers, digital VCRs, ...), the ubiquitous availability of source materials, the limited amount of legal alternatives, and the many editing possibilities offered by modern software²⁵.

User perception – One of the most remarkable characteristics of the copyright infringement phenomenon is the fact that it is often not perceived as un-ethical²⁶. The mechanisms used in certain types of digital pirated content could indeed lead to the perception that *"supplying digital piracy might not be an illicit or blameworthy activity, especially as a significant part of the exchanges of pirated digital products occur without profit motives which can be perceived as a socially acceptable 'sharing'"*²⁷. Studies have mentioned that consuming pirated digital content is considered as normal by many users, and treated differently than other infringements of the law²⁸: *"is not a massive criminal conspiracy, but rather the collective actions of millions otherwise law-abiding Internet users of all ages who have grown accustomed to the culture of free content that is the hallmark of the Internet"*²⁹.

Infringing users defend their conduit with varying arguments, such as³⁰:

²⁴ Taking for example the European Union Public License. The European Commission approved the English, French and German versions of the EUPL (v.1.0) on 9 January 2007. By a second Decision of 9 January 2008, the European Commission validated the EUPL (v.1.0) in all the other official languages, in respect of the principle of linguistic diversity of the European Union, as recognised by Article 22 of the Charter of Fundamental Rights. By a third Decision of 9 January 2009, the European Commission adopted a revised version of the Licence while at the same time validated it in all the official languages (EUPL v.1.1). Available at <http://ec.europa.eu/idabc/eupl>

²⁵ See *Piracy of digital content*, Chapter 2

²⁶ *Ibid*, p. 13

²⁷ *Ibid*, p. 49

²⁸ As found in *Piracy of digital content*, Organization for Economic Co-operation and Development, 2009, available at www.oecd.org/dataoecd/50/22/42619490.pdf, p. 41 pre-publication version

²⁹ *Confronting Digital Piracy, Intellectual Property Protection in the Internet Era*, Shane Ham and Robert D. Atkinson, Progressive Policy Institute, available at www.ppionline.org/documents/Digital_Copyright_1003.pdf, p. 2. According to the writers *"the justification of this attitude can be found in more than one reason; Firstly because there is a strong belief among users according to which content provided by Internet is free while the same content is paid in the offline world. Secondly, there is another mistaken belief related mostly to consumer-oriented media products that ties the content and the media together allowing consumers to believe that media itself is the expensive item while content embodied is an unlimited resource that can be taken for free, leading users to a misconception at least as far as copyright is related. Finally, the factor of anonymity of the Internet fosters piracy culture as the reduced detection risks means that even those consumers that recognize the illegal character, will conduct copyright infringement"*, p. 7

³⁰ See J. GANTZ and J.B. ROCHESTER, *Pirates of the digital millennium*, p. 78-88

- Digital infringements are more like "obtaining" instead of stealing, because no physical objects are actually taken away from their owners.
- *"Illegal downloading is a minor issue; declining CD sales are self-inflicted by the record industry, which responds too slowly to changing habits of users."*
- *"Record companies rip off artists."*
- *"Consumers or minors are never prosecuted, so can freely pirate. "*
- *"If they don't want me to download, then why do I have the software and hardware with which to do it?"*
- *"It's mine. I bought it, and I can make copies for myself if I want to."*
- *"Products are overpriced and sold by greedy megacorporations."*

Rightholders perception – Contrary to the users, digital copyright infringements are considered as very severe from the online content industry, since they cause great injuries to the interests and profits of the online content industry. Business stakeholders emphasize that copyright infringements – and particularly the existence of peer-to-peer file sharing networks – constitute *"the single most important obstacle to further online dissemination of works in Europe"*³¹

1.2.2. The treatment of digital copyright infringements

Different treatment – The 2009 OECD Document on digital copyright infringements³² notes that the lack of a common definition of "digital piracy" / digital copyright infringements results in a significantly different treatment in different jurisdictions, where different exceptions to the rightholder's rights apply (private, domestic use etc). Accordingly, what is in one jurisdiction considered illegal may be considered legitimate in another. There are also many differences from a procedural point of view: in some jurisdictions, copyright infringements are treated as a civil offense, while in others they are treated as a criminal offense³³.

Reasons – The "different speeds" at which Member States deal with copyright infringements is a result of the fundamental differences in civil and criminal procedure law, an area that is even less harmonised than substantive copyright law³⁴. This disparity of regulatory regimes in various European Member States has been characterised as an issue of primary importance by stakeholders³⁵.

Evolving nature – The treatment of digital copyright infringements seems to be a continuously evolving phenomenon. Legal actions have extended to three different dimensions. Initially, copyright industry mainly initiated legal battles against file sharing software packages (such as Napster, KaZaA and Grokster). Afterwards, legal actions were also taken against individual users who uploaded copyright

³¹ International Confederation for Music Publishers (ICMP), Response to Commission Consultation on the Green Paper Copyright in the Digital Economy, p. 1, available at http://circa.europa.eu/Public/irc/markt/markt_consultations/library?l=/copyright_neighbouring/consultation_copyright/international_confederat/EN_1.0_&a=d

³² Piracy of digital content, OECD, 2009, available at <http://browse.oecdbookshop.org/oecd/pdfs/browseit/9309061E.PDF>, p. 10

³³ Interactive Content and convergence : implications for the information society, October 2006, p. 49

³⁴ Copyright and Digital Media in a Post- Napster World: International Supplement, Berkman Centre for Internet and Society, January 2005, p. 34

³⁵ Interactive Content and convergence : implications for the information society, October 2006, p. 49

material on a large scale³⁶. The current efforts seem to be focused on policy options, such as the "three strikes down" laws and initiatives that are being considered across the EU, particularly in France.

Prosecution of individuals – While prosecution of individuals for digital copyright infringements have gained much media attention in the United States, lawsuits have also emerged in across Europe, although to a lesser degree.

In Spain, for example, there was the case of Sharemula.com, a website which published hyperlinks that enabled users to download movies, music and software³⁷. The case was brought to Court by the Anti-piracy Federation in 2006. In 2007, a Madrid Court dismissed the case (against fifteen individuals), underlining that neither the site nor its administrators had infringed any law and that the site included legal content. In the appeal procedure, the provincial Court of Madrid rejected all allegations, concluding that indexing such hyperlinks cannot be viewed as copyright infringement³⁸.

In Denmark, the International Federation of the Phonographic Industry (IFPI) brought a case against a man who shared around 13 000 music files on Direct Connect. IFPI had tracked illegal activity via an IP address linked to the man. In 2008, the appeal court ruled that no other person than the man concerned could have used the IP address and ordered him to pay 160 000 kroner in damages, and to delete the music files he obtained illegally³⁹.

However, due to the lack of common definition of digital copyright infringement that has been previously described, as well as the non-harmonised approach of its treatment by the different Member States, it is not clear how the different Courts within the Member States will construe the facts *in each diverse* case. In addition, it is not easy for rightholders – especially in cases of massive infringements like for instance in P2P platforms – to turn against every single individual infringer. The effort and the time necessary to prosecute individuals in different countries may be too high and too costly to be worth the attempt. It is also very problematic to enforce Court decisions against individuals. In addition, as also stated in section 7.3.1 below, we do not believe that the solution to battle copyright infringements resides in criminalizing and prosecuting individuals. All of the above require the co-operation of the Member States for the uniform treatment of digital copyright infringements within the Single Market at a more centralized level in order to effectively tackle with the issue at stake without targeting only individual users (see also the relevant recommendations in section 7.3.1 below).

2. Overview of the current legal framework

This section 2 offers a "helicopter view" of the most pivotal provisions and regimes that have the greatest impact on today's digital content issues.

2.1. Overview of all EU legal instruments relating to digital content

First generation – Digital content, copyright issues and related rights in the European Union are governed by legislation both at the EU level and the national level⁴⁰. Harmonisation between Member

³⁶ BERKMAN CENTRE FOR INTERNET AND SOCIETY, *Copyright and Digital Media in a Post-Napster World: International Supplement*, January 2005, p. 30

³⁷ Spain: Indexing torrent files is not copyright infringement available at <http://www.edri.org/edriagram/number6.18/link-torrents-not-infringement>

³⁸ *Ibid.*

³⁹ See <http://torrentfreak.com/ifpi-wins-danish-file-sharing-case-081021/>

⁴⁰ *Copyright and digital media in a post-napster world: International Supplement*, Berkman Center for Internet & Society and GartnerG2, January 2005, p. 9

States was conducted between 1991 and 1996 as a result of several EU Directives which aimed at a vertical standardisation. This bulk of Directives included the Computer Programs Directive⁴¹, the Rental Right Directive⁴², the Satellite and Cable Directive⁴³, the Term Directive⁴⁴, the Database Directive⁴⁵, the Artists' Resale Rights Directive⁴⁶ and the E-Commerce Directive⁴⁷, all of which constitute the first generation of copyright directives.

Second generation – The first of the second generation European Commission Copyright Directives (and the most important, until today) piece of EU legislation regarding digital media and content is the Copyright Directive⁴⁸ which came into force on the 22 June 2001 requiring transposition to the member states by 22 December 2002. After the Copyright Directive, the so-called "Enforcement Directive" came into force in 2004⁴⁹.

Other EU legal instruments – Other relevant acts (binding and non binding) to digital content include the Directive on the Reuse of Public Sector Information⁵⁰, the Audiovisual Media Services Directive⁵¹, the Directive on Copyright, Satellite Broadcasting and Cable Retransmission⁵², the "Echerer" Report of the European Parliament on a Community framework for collecting societies for authors' rights⁵³, the Commission Recommendation on Collective Cross-Border Management of Copyright and Related Rights for Legitimate Online Music Services⁵⁴, the (results of the) monitoring of the Commission Recommendation 2005/737/EC of 18 October 2005 on collective cross-border management of copyright and related rights for legitimate online music services⁵⁵, the Green Paper on Copyright in the Knowledge

⁴¹ Council Directive 91/250/EEC of the 14 May 1991 on the legal protection of computer programs, OJ L 122/42, 17.05.1991

⁴² 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 346/61, 27.11.1992

⁴³ 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 248/15, 6.10.1993

⁴⁴ Council Directive 93/98 EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights, OJ L 290/9, 24.11.1993

⁴⁵ Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ L 77/20, 27.03.1996

⁴⁶ Directive 2001/84/EC of the European parliament and of the Council of 27September 2001 on the resale right for the benefit of the author of an original work of art, OJ L 272/32, 13.10.2001

⁴⁷ Directive 2000/31 EC of 8 June 2000 on certain legal aspects of the information society services, in particular electronic commerce in the Single Market, OJ L 178 17.7.2000. The eCommerce Directive refers indirectly to copyright.

⁴⁸ Directive 2001/29 EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the Information Society, O J L 167/10 22.6.2001

⁴⁹ Directive 2004/48 EC of the European Parliament and of the Council of 29 April of 2004 on the enforcement of intellectual property rights, Corrigendum, O J L195/16, 02.06.2004

⁵⁰ Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the reuse of public sector information, O J L 345, 31.12.2003

⁵¹ Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities O J L 332, 18.12.2007

⁵² Council Directive 93/83/EEC of 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 , 06/10/1993 P. 0015 - 0021

⁵³ A5-0478/2003, available at www.europarl.europa.eu/sides/getDoc.do?language=EN&objRefId=31582

⁵⁴ Commission Recommendation of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services O J L 276/54, 21.10.2005

⁵⁵ 7 February 2008, available at http://ec.europa.eu/internal_market/copyright/docs/management/monitoring-report_en.pdf

Economy⁵⁶, the subsequent Communication on Copyright in the Knowledge Economy⁵⁷, the i2010 mid term review⁵⁸, the Decision on Establishing a Multi-Annual Community Program to Make Digital Content in Europe more accessible, usable and exploitable⁵⁹, the Communication from the Commission on Creative Content Online in the Single Market⁶⁰, the Decision on Establishing a Competitiveness and Innovation Framework Program (2007-2013)⁶¹, the Commission Recommendation on the Digitisation and Online Accessibility of Cultural Material and Digital Preservation⁶², and the Reflection Document on Creative Content in a European Digital Single Market⁶³.

2.2. Most important legal provisions

Within the list of EU legal instruments, the following legal provisions and legal instruments are most relevant to the topic of digital content⁶⁴.

Copyright Directive – The Copyright Directive includes content provisions, as well as communications and information technology rules. It also refers to issues of access and use of content. The objectives of the Copyright Directive were, firstly, to adapt legislation on copyright and related rights so as to reflect technological developments and, secondly, to transpose into community law the main international obligations arising from the two treaties on copyright and related rights adopted from the World Intellectual Property Organization⁶⁵.

In addition, the Copyright Directive aimed at harmonising the different copyright regimes within the European Union that were an obstacle to the Single Market⁶⁶. This harmonisation was expected to *"lead to legal certainty so as to create a Single Market within which the competition would flourish"*⁶⁷ and, at the same time, *"to promote substantial investment in creativity and innovation including network infrastructure which in turn will lead to growth and competitiveness of the European Industry across industrial and cultural sectors which will consequently create new jobs"*⁶⁸. According to recital 31, the Directive equally aimed to achieve *"a fair balance of the rights and interests between the different*

⁵⁶ Green Paper on Copyright in the Knowledge Economy, COM(2008) 466/3

⁵⁷ 19 October 2009, COM(2009) 532 final, available at http://ec.europa.eu/internal_market/copyright/docs/copyright-infso/20091019_532_en.pdf

⁵⁸ (COM/2008/199)

⁵⁹ Decision No 456/2005/EC of the European Parliament and of the Council of 9 March 2005 establishing a multiannual Community programme to make digital content in Europe more accessible, usable and exploitable, O J L 79/1, 24.3.2005

⁶⁰ Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0836:FIN:EN:PDF>

⁶¹ Decision 1636/2006/ EC of the European Parliament and of the Council of 24 October 2006 establishing a Competitiveness and Innovation Framework Programme (2007-2013), O J L 310, 9.11.2006

⁶² Commission Recommendation of 24 August 2006 on the digitisation and online accessibility of cultural material and digital preservation, O J L 236, 31.8.2006

⁶³ Creative Content in a European Digital Single Market: Challenges for the Future - A Reflection Document of DG INFSO and DG MARKET, 22 October 2009, available at http://ec.europa.eu/avpolicy/docs/other_actions/col_2009/reflection_paper.pdf

⁶⁴ a more detailed analysis of the most significant legal instruments will follow in the next subparagraph

⁶⁵ Study on the implementation and effect in member states' laws of the Directive 2001/29/EC, on the harmonisation of certain aspects of copyright and related rights in the information society, final report, Institute for Information Law, February 2007, p.7

⁶⁶ Legal Framework and technological protection of digital content: moving forward towards a best practice model, Urs Gasser, available at <http://law.fordham.edu/publications/articles/200flspub6876.pdf>, p. 19

⁶⁷ Copyright Directive, recital 1

⁶⁸ Copyright Directive, recital 4

*categories of right-holders, as well as between the different categories of right-holders and users of protected subject matter must be safeguarded"*⁶⁹.

The most significant rules of the Copyright Directive regarding the horizontal harmonisation of national laws are the standardisation of the fundamental exclusive rights⁷⁰, the introduction of an exhaustive list of copyright exceptions of optional character⁷¹ and the implementation of rules regarding technical protection measures.

Enforcement Directive – The Enforcement Directive was adopted to reduce the inconsistencies existing in the enforcement means of different Member States, which *"hampered the proper function of the Single Market since it was difficult to ensure equivalent protection of intellectual property throughout the European Community"*⁷². Therefore, its main goals are *"to bring into line the enforcement measures across European Union with the purpose of approximating legislative systems in order to ensure a high, equivalent and homogenous level of protection for intellectual property in the Single Market"*⁷³ and *"to create a level playing field for the enforcement of IP rights in the Member States"*⁷⁴. Additional goals are the promotion of innovation and business competitiveness⁷⁵, the safeguarding of employment in Europe⁷⁶, the prevention of tax losses and destabilisation of the markets, the insurance of consumer protection and the maintenance of public order⁷⁷.

The Directive established a general framework for the exchange of information between national authorities. At the same time, its objective was to strengthen the defence of the rights of the right-holders and to protect users from unfair litigation⁷⁸. Also, it introduced the measures, the procedures and the remedies necessary to ensure the enforcement of intellectual property rights within the Single Market⁷⁹, and aimed at adopting effective means for presenting, obtaining and preserving evidence⁸⁰. Furthermore, it established provisional measures for the immediate termination of infringements, as well as procedures to prevent further infringements of intellectual property rights⁸¹. At the same time, this Directive determined the damages and the corrective measures that could be enforced in case of an infringement.

Satellite Broadcasting and Cable Retransmission Directive – Recital 21 explains that the main objective of this Directive is *"to ensure that protection for authors, performers, producers of phonograms and broadcasting organizations is accorded in all Member States and that this protection is not subject to a statutory licence system"*. Moreover in recital 33 it is stressed that *"whereas minimum rules should be laid down in order to establish and guarantee free and uninterrupted cross-border broadcasting by*

⁶⁹ Copyright Directive, recital 31

⁷⁰ reproduction right, right of communication to the public, right of making available to the public and distribution right

⁷¹ However, only one of the exceptions is mandatory (article 5 par.1 of the Copyright Directive); member states were free to adopt all or none of the rest of the exceptions included in this exhaustive list (article 5 pars 2-5 of the Copyright Directive)

⁷² Corrigendum to Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, O J L 195/16 02.06.2004, recital 8

⁷³ Directive 2004/48/EC, o.c., recital 10

⁷⁴ Directive 2004/48 of the European Parliament and the council of 29 April 2004 on measures and procedures to ensure the enforcement of intellectual property rights, Konstantinos Rakintzis, available at www.law.ed.ac.uk/eyl/04rpKosta.htm

⁷⁵ Enforcement of Intellectual Property Rights, available at <http://europa.eu/scadplus/leg/en/lvb/l26057a.htm>

⁷⁶ <http://europa.eu/scadplus/leg/en/lvb/l26057a.htm>

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ Enforcement Directive, article 1

⁸⁰ Enforcement Directive, recital 20

⁸¹ Enforcement Directive, recital 22 and 24

satellite and simultaneous, unaltered cable retransmission of programmes broadcast from other Member States, on an essentially contractual basis". Among the most important provisions regarding the function of the licensing methods are the extension of applicability of collective agreements to individual rightholders not represented by a collecting society under certain conditions (for broadcasting by satellite), the compulsory collective management of cable retransmission rights, the equal treatment for those rightholders that have not transferred the management of their rights to a collecting society compared to those represented by collecting societies, the legal presumption for the constitutional protection of the ownership, as well as the introduction of mediation system of general acceptance for the disagreement resolution.

Cross-border copyright management of music services – The 2005 Commission "Recommendation on collective cross-border management of copyright and related rights for legitimate online music services"⁸² has a major policy impact, although it is not binding. As the online environment is multi-territorial by nature, the purpose of this sector-specific Recommendation was to create a licensing policy that would correspond to the ubiquity of the online world⁸³, in order to enhance legal certainty and to foster the development of legitimate online services.

More specifically, this Recommendation aims to develop effective structures for cross-border management of rights, by abolishing local factor hurdles (such as the residence or the nationality of the rightholder or the manager). According to the Recommendation, minimum protection provisions of rightholders should be incorporated either in contracts or in statutory membership rules in all categories of rights. In addition, the Single Market should be promoted by adopting rules that exclude discrimination on the grounds of residence, nationality and category of rightholder. Market fragmentation should be cured by modifying licensing structures in the online music sector. These objectives are to be achieved by promoting a regulatory environment that suits to the management of copyright and related rights for the provision of legitimate online music services at the Community level⁸⁴. Member States were invited to take the steps necessary to facilitate the growth of legitimate online services in the Community.

Green Paper on Copyright in the Knowledge Economy – The purpose of this (non-binding) green paper is to foster a debate on how knowledge for research, science and education can best be disseminated in the on line environment⁸⁵. The Green Paper stipulates that a high level of copyright protection is pivotal for the proliferation of intellectual creation, since it provides the rightholders with a reward for their efforts and it promotes creativity and innovation. However, at the same time, it is recognised that due to the emergence of new ways of delivering digital content "*it is necessary to allow consumers and researchers to access protected content*"⁸⁶. In addition, it is underlined that some stakeholders claim that income is not distributed fairly between the different categories of rightholders despite the introduction of exclusive rights in the Copyright Directive. It also points out that the way that the exhaustive list of exceptions was drafted in the Copyright Directive led to different implementations of the provisions stipulated in the Directive. Finally, the Green Paper calls the stakeholders to comment on the issues raised by the document, taking into account the basic question whether a fair balance is

⁸² Commission Recommendation of 18 October 2005 on collective cross- border management of copyright and related rights for legitimate online music services, O J L 276/54, 21.10.2005

⁸³ Recital 6

⁸⁴ Paragraph 2 of the Recommendation

⁸⁵ Green Paper on Copyright in the Knowledge Economy COM(2008) 466/3 p. 3

⁸⁶ *Ibid* p. 4

currently achieved between the different categories of right-holders and users⁸⁷. Following the aforementioned Green Paper, a 2009 Communication from the Commission regarding "Copyright in the Knowledge Economy"⁸⁸ was published. In this document it was stressed that during the Public Consultation on the Green Paper "[...] two divergent views emerged. Libraries, archives and universities favor the 'public interest' by advocating a more permissive copyright system. Publishers, collecting societies and other right holders argue that the best way to improve the dissemination of knowledge and provide users with increased and effective access to works is through licensing agreements". Apart from highlighting the problem, the Communication proceeded into presenting future steps to deal with the problems of the libraries and archives, of the orphan works, of teaching and research, of persons with disabilities and of the user- created content. This document concluded by mentioning that "[...] copyright policy must be geared toward meeting the challenges of the internet- based knowledge economy. At the same time a proper protection of Intellectual Property Rights is decisive to stimulate innovation in the knowledge based economy. Different interests have to be carefully balanced"⁸⁹.

Creative Content Online in the Single Market – This Communication⁹⁰ aimed at launching further actions to support the development of innovative business models and the deployment of cross-border delivery of diverse online creative content services⁹¹. According to the Communication, the notion of creative content online is twofold: from the consumers' side, creative content online is equivalent to new ways to access and influence content available on line. From the side of the companies, however, it equals to the possibility to offer new services and to develop new markets⁹².

e-Content Plus Program – Decision 456/2005/EC⁹³ established the e-Content Plus Program, and underscored the important values set by the European Union in relation to the new digital content environment (in line with the Lisbon strategic goals previously mentioned). This Program was created to fund the development of new concepts and tools, in order to make digital content in Europe more accessible, usable and exploitable — taking into account the importance of the characteristics of digital content (accessibility, re-usability, exploitability) to the new knowledge-based economy.

The Decision held that *"the shift to the digital based economy, prompted by new goods and services, will be a powerful engine for growth and competitiveness"*⁹⁴. At the same time, it recognised that *"the demand for quality digital content in Europe with balanced access and user rights, by a broad community be they citizens in society, students, researchers, SMEs and other business users, or people with special needs wishing to augment their knowledge, or 're-users' wishing to exploit digital content resources to create services, is increasingly apparent"*⁹⁵. In addition, it was stated that *"access, use and distribution of digital content would be enhanced by improving interoperability at the service level"*⁹⁶. Although the e-

⁸⁷ The full list of the relevant responses can be found at

http://circa.europa.eu/Public/irc/markt/markt_consultations/library?l=/copyright_neighbouring/consultation_copyright&vm=detail&sb=Title.

⁸⁸ COM (2009) 532 final, p. 4

⁸⁹ COM (2009) 532 final, p. 10

⁹⁰ Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0836:FIN:EN:PDF>

⁹¹ COM (2007) 836 on Creative Content Online in the Single market, 3/01/2008, p. 3

⁹² *Ibid.*, p. 2

⁹³ Decision no 456/2005/EC of the European Parliament and of the Council of 9 March 2005 establishing a multi-annual Community programme to make digital content in Europe more accessible, usable and exploitable, O J L 79/1 24.03.2005

⁹⁴ *Ibid.*, recital 3

⁹⁵ *Ibid.*, recital 5

⁹⁶ *Ibid.*, recital 8

Content Plus Program has expired on December 31st 2008, the actions to make digital content in Europe more accessible, usable and exploitable will be continued.

ICT Policy Support Program – The Information and Communications Technologies (ICT) Policy Support Program, one of three specific programs implemented through Decision no 1639/2006⁹⁷ establishing a competitiveness and Innovation Framework Program (2007-2013) was adopted to stimulate innovation and competitiveness, and to accelerate the development of a sustainable information society⁹⁸. It supports activities to enhance innovation and implementation of ICT based services and it promotes the exploitation of digital content by citizens, governments and businesses.

International legal instruments – In addition to EU-level legislation, there is a set of international treaties that establishes standards for copyright protection, such as the Berne Convention for the Protection of Literary and Artistic Rights⁹⁹, the Rome Convention for the protection of Performers, Producers of Phonograms and Broadcasting Organizations¹⁰⁰, the Universal Copyright Convention and the Agreement on Trade - Related Aspects of Intellectual Property Rights (TRIPS), the WIPO Copyright Treaty¹⁰¹ and the WIPO Performances and Phonograms Treaty¹⁰².

The treaties have been used by national Courts to interpret national law. However, Courts have used many diverse ways to interpret the local transposition of the legislative provisions. In section 4.1.3 below, an indicative reference in some important and interesting cases is made to depict how the relevant provisions have been construed by the Courts in different Member States, and to delineate how significant Court decisions are for the establishment of the Single Market for digital content.

3. Key issues in the current EU legal instruments

3.1. Gaps

Lack of a single standard of originality – Although the Copyright Directive was aimed at harmonising the range of exclusive rights for digital works, it did not adopt a common definition of the standard of originality for the work under protection. Hence, Member States are free to uphold their own regime of originality standards for copyright protection in the information society under the copyright systems that they traditionally follow¹⁰³. In practice, this means that a work that may be protected under copyright law in one Member State may not be protected in another Member State. This lack of common originality standards in relation to the digital content could create obstacles in the function of the Single Market, since it leads to discrepancies between the legal regimes of the different Member States.

The Europeana project (see also the detailed discussion below) constitutes a practical example of the consequences of the lack of a single standard of originality. As part of this project, objects in the public domain are digitised, in order to make them available on the Europeana website. However, in some Member States, when public domain items are digitised, the digitising company could claim a new copyright originated from the digitisation, even when no creative efforts are employed during the digitisation process.

⁹⁷ O J L 310/15 9.11.2006

⁹⁸ ICT PSP work programme 2009, p. 4

⁹⁹ Of September 9, 1886 as amended, available at www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html

¹⁰⁰ Of 26 October 1961, available at www.wipo.int/treaties/en/ip/rome/trtdocs_wo024.html

¹⁰¹ Of December 20, 1996, available at www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html

¹⁰² *Ibid.*

¹⁰³ G. MAZZIOTTI, *EU Digital Copyright Law and End- User*, Springer, 2008, p. 53

Applicable law & competent court – The Copyright Directive does not deal with the topic of choice of law or with the competent court. This creates legal uncertainty, as it is not always predictable in advance which law or court shall apply, which in turn could impede cross border investments from the rightholder.

For example, in case of a copyright infringement in the offline environment, the applicable law is the law of the country for which protection is sought under Article 5 (2) of the Berne Convention. However, in an online context, the applicable law is either the law of the country where the unauthorised uploading ("copying") of the work takes place, or the law of the country where the work is accessed or downloaded without prior authorisation from the rightholder¹⁰⁴.

Absence of segmentation-preventing measures outside online music¹⁰⁵ – The lack of a harmonised method of copyright management throughout the Member States can lead to segmentation of the Single Market. However, this issue has only been contemplated in relation to online music. The (non-binding) Commission Recommendation¹⁰⁶ of 2005 aims to provide guidelines to cure market fragmentation, by introducing a modification of licensing structures in the online music sector. In addition, Member States were invited to take the steps necessary to facilitate the growth of legitimate online services in the Community, by promoting a better regulatory environment. However, these provisions only apply to online music, and do not extend to other types of digital copyrighted content disseminated online, and are not mandatory.

Practical example: online licensing across Europe. *An major social community platform wanted to secure the necessary rights from the major Belgian musical rightholders association (SABAM), for using musical tracks on its website. However, during the contractual discussions with SABAM, it became clear that – although SABAM has mutual agreements with many similar organisations in other Member States and presents itself as a "one stop shop" – SABAM can only clear rights for service providers established in Belgium. Consequently, the social community platform needs to negotiate separately with each rightholder association of each Member State. This constitutes an important impediment for a platform that simultaneously targets most European Member States.*

Exhaustion principle applying only to physical media – Article 4 of the Copyright Directive stipulates that the exhaustion principle applies to physical media ("original of a work or copies") incorporating the protected work. Recitals 28 and 29 further explain that *"the first sale principle of the original of a work or copies thereof by the right-holder or with his consent in the Community, exhausts the right to control the release in the Community of a work incorporated in a tangible tool"*. This wording limits the principle of exhaustion to *tangible* goods only, excluding on-line services and intangible goods that incorporate digital content.

Getting legal certainty to reuse content – Copyright emerges without any formalities: although some countries used to require rightholders to register their works in order to receive protection, these formalities have been abolished. In the offline world, *"the abolishment of formalities (meaning registration or any mark of the created content) before the development of digital technologies was considered as a positive step since it removed a burden from those who wanted to create content by eliminating requirements for work protection"*¹⁰⁷.

¹⁰⁴ P. TORREMANS, *Private International Law aspects of IP - Internet Disputes*, p. 245

¹⁰⁵ G. MAZZIOTTI, *o.c.*, p. 68

¹⁰⁶ Commission Recommendation of 18 October 2005 on collective cross-border management of copyright and related rights for legitimate online music services, *o.c.*, p. 54

¹⁰⁷ G. MAZZIOTTI, *o.c.*, p.53

Even so, the lack of formalities¹⁰⁸ often makes it difficult for someone who wants to use an existing work to find the rightholder and to obtain the permission required.

For example, if someone would like to reuse a picture on a random website, it will often not be clear who is the rightholder of this picture (see also analysis on the orphan work issue in section 3.7.5 below). Due to the ever-increasing amount of copying and reuse of content on the Internet, it is even difficult on photo and video sharing websites that explicitly attribute ownership (such as Flickr, YouTube or stock.xchng) to receive certainty that content is really owned by the alleged rightholder, and whether such person's permission suffices for reuse.

This "gap" in the current legal rules could lead to the limitation of creativity, since those willing to develop digital content may find it difficult to build upon previous works that are not registered or recorded in any repository (see also the discussion in section 7.2.5 below).

3.2. Ambiguities

Some of the general terms used in the Directives are drafted in a rather general language¹⁰⁹, are vague and are open to different interpretations. The vagueness of these expressions prevents clear understanding of the actual rights and the content of the rights. This issue is further aggravated due to the fact that the market is reluctant to seek clarification of the legal situation through Courts because of the cost and the time included in a Court decision¹¹⁰.

Independent economic significance – One characteristic example is the criterion of "*no independent economic significance*"¹¹¹. The Copyright Directive does not include any specific guidelines on what constitutes "independent economic significance", which creates ambiguity, in particular when combined with the broad scope of the reproduction right^{112 113}.

Lawful use – Another example is the expression "*lawful use*" in article 5.1.b, which is open to diverse interpretations because the lawfulness of the use rests in criteria found outside of article 5.1 itself¹¹⁴. According to recital 33 of the Copyright Directive, a use should be considered lawful where it is authorised by the right-holder or not restricted by law. However, this explanation still leaves a margin of uncertainty since it is not clear whether it refers to copyright limitations or to any limitation of the restrictions imposed by the copyright regime¹¹⁵. Furthermore, the two criteria used in recital 33 may in some cases contradict each other. The use of the word "*or*" instead of the word "*and*" could lead to the interpretation that the will of the right-holder is equal to the provisions set by law.

Adequate legal protection – Yet another example of ambiguous wording is found in articles 6.1 and 6.2 of the Copyright Directive. Here, the ambiguity resides in what constitutes "adequate legal protection", who is entitled to invoke it, when does a device have only a limited commercially significant purpose or

¹⁰⁸ This issue is further discussed in section 7.2.5

¹⁰⁹ Green Paper on Copyright in the Knowledge Economy COM(2008) 466/3 p. 5

¹¹⁰ Interactive content and convergence: Implications for the Information Society, A study for the European Commission, (DG Information Society and Media, Final Report 2006), p. 194

¹¹¹ article 5.1 of the Copyright Directive

¹¹² *Study on the implementation and effect in Member States' laws of the Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, final report*, Institute for Information Law, February 2007, p. 50

¹¹³ "The Copyright in the Information Society Directive: an overview", (24) *EIPR* 2002, p. 58 as found in G. MAZZIOTTI, *o.c.*, p. 63

¹¹⁴ *Study on the implementation and effect in Member States' laws of the directive 2001/29/EC, o.c.*, p. 48

¹¹⁵ *Ibid.*, p. 76

use other than to circumvent, etc.¹¹⁶ According to article 6.3 of the Copyright Directive, all the measures mentioned are deemed "effective technological measures" without any further prerequisites.

Scope of private copying exception – Member States are not allowed to adopt exceptions that could allow private copying by commercial enterprises or legal entities, even if there is no commercial purpose included¹¹⁷. It is not clear, however, whether the private copying exception should be limited to copies made by the beneficiary himself; article 5.2.b does not clearly indicate whether Member States can allow the third parties to actually produce the digital copies. A legal entity may thus rely on the private copying exception provided that its service constitutes some form of agency¹¹⁸.

3.3. Unbalanced provisions

Lack of harmonised exceptions and limitations – Article 5 of the Copyright Directive provides ample discretionary margin to the Member States to decide if and how to implement the exceptions and limitations set forth¹¹⁹. The lack of homogeneity throughout limitations and exceptions of article 5 is a result of two factors: the optional character of the exceptions, and the actual way that Member States have implemented those exceptions and limitations into their national laws. In the 2008 Green Paper it was mentioned that *"the approach chosen by the drafters has left Member States a great deal of flexibility in implementing the exceptions contained in the Directive"*¹²⁰.

The disparities in the legislation of Member States could lead to the adoption of standard terms and conditions with dubious legal validity throughout the Single Market. This is a highly controversial issue, since there exist many different opinions in relation to whether it is necessary or not to alter the existing status of the limitations and exceptions regime established in the Copyright Directive (see also the discussion below).

Different sector specific approaches for the private use exceptions – Article 5.2 of the Copyright Directive introduces an exhaustive list of exceptions to the reproduction right that can be implemented by Member States. This list of exceptions is not obligatory, so that Member States can choose whether to implement or not any (or none) of them.

The Database Directive and Computer Programme Directive take a different approach. Article 6.1 of the Database Directive¹²¹ lays down that *"(t)he performance by the lawful user of a database or of a copy thereof of any of the acts listed in Article 5 which is necessary for the purposes of access to the contents of the databases and normal use of the contents by the lawful user shall not require the authorization of the author of the database. Where the lawful user is authorized to use only part of the database, this provision shall apply only to that part"*. In addition, article 5.2 of the Computer Programme Directive¹²²

¹¹⁶ *Ibid.*, p. 112

¹¹⁷ *Copyright law and consumer protection*, European Consumer Law Group, February 2005, p. 11

¹¹⁸ The implementation of the Directive 2001/29/EC in the Member States, part II, February 2007, Queen Mary Intellectual Property Research Institute, p. 19

¹¹⁹ *"firstly, the aforementioned article uses a language that is not binding for the member states ('may provide for exceptions and limitations') and secondly it omits to lay down strict rules that member states are expected to transpose into their legal system"*: Study on the implementation and effect in Member States' laws of the directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, final report, Institute for Information Law, February 2007, p. 53

¹²⁰ Green Paper on Copyright in the Knowledge Economy COM(2008) 466/3 , p. 5

¹²¹ Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ L 77/20, 27.03.1996

¹²² Council Directive 91/250/EEC of the 14 May 1991 on the legal protection of computer programs, OJ L 122/42, 17.05.1991

permits a person that is entitled to use a computer program to make a back-up copy, so far as it is necessary for that use. Hence, in the provisions set in the Computer Programme Directive and the Database Directive, these acts are not considered as "exceptions" to copyright, but instead as rights of the user that cannot be circumvented by contract. Moreover, the provisions of the Computer Programme and the Database Directives are mandatory for all Member States.

Breadth of reproduction rights – The reproduction rights included in the Copyright Directive have been criticised as being overly broad and overlapping with the right of communication to the public¹²³.

Nevertheless, the reproduction right and the right of communication to the public are strictly separated in most contracting processes. For example, in order to license online music, most online forms of dissemination require the simultaneous clearance of both rights. This significantly complicates the licensing process¹²⁴.

The broad scope of the reproduction right practically extends to all parties involved in the dissemination and use of the online digital content. This way, the right of reproduction covers any use of a work or other subject matter, even where *"similar acts of use in the analogue world (such as receiving a television signal or reading a book) would fall well outside the scope of what intellectual property aims to protect"*¹²⁵.

The exception introduced by article 5.1 of the Copyright Directive has set some limitations to the reproduction right, by imposing an obligatory exception for transient and incidental reproduction acts. However, this exception does not alleviate the overlap of the reproduction right with the right of communication to the public and the right of making available to the public.

The extensive scope of the reproduction rights expands liability for copyright infringement to more parties, so that – compared to analogue works – more authorisation actions are required for the use of digital content¹²⁶. This could prevent parties in the Single Market from engaging in acts in the online environment, while the same acts would not be restricted in the offline environment. As a result, business ventures dealing with digital content will require more time and money to acquire all necessary permissions.

Breadth of the scope of the Enforcement Directive – The IP enforcement regime of the Enforcement Directive is broad, covering even minor, unintentional and non commercial infringements. Its broadness stems from the fact that it applies to any infringement of IP rights as provided by community law and national law of the Member States¹²⁷. Article 2 of the Enforcement Directive stipulates that *" [...]this directive shall apply [...] to any infringement of intellectual property right as provided for by Community law or/and by the national law of the Member State concerned"*. This article has been criticised for the lack of distinction between infringements on a *commercial* scale and

¹²³ Study on the implementation and effect in Member States' laws of the directive 2001/29/EC, *o.c.*, p. 24

¹²⁴ Creative Content in a European Digital Single Market: Challenges for the Future - A Reflection Document of DG INFSO and DG MARKT, 22 October 2009, available at http://ec.europa.eu/avpolicy/docs/other_actions/col_2009/reflection_paper.pdf, p. 5

¹²⁵ *Ibid.*

¹²⁶ Study on the implementation and effect in Member States' laws of the directive 2001/29/EC, *o.c.*, p. 39

¹²⁷ Copyright and Digital media in a post – Napster world: International Supplement, Berkman Center for Internet and Society and GartnerG2, January 2005, p. 11

infringements on a *personal scale*¹²⁸, and for the "*absence of guidance on the scope of intellectual property rights that enforcement measures are to be directed towards*"¹²⁹.

The lack of distinction between commercial and private scale infringement has particularly raised concerns among consumers. These concerns are based on the opinion that the Enforcement Directive treats all infringements with similar seriousness, while in reality the infringements may significantly differ¹³⁰. As a result, some critics state that civil liberties in Europe were attacked by "*a legal instrument treating average consumers who accidentally infringe copyright with the same toughness as it does for commercial counterfeiters*"¹³¹. Some have even proposed¹³² that the scope of the Enforcement Directive should be limited to *intentional* commercial infringements only¹³³.

The Enforcement Directive has therefore been criticised by some members of the market for rendering the business environment unfriendly for certain ventures, such as phone companies and internet access providers. Contrary to the eCommerce Directive, which limits the liability of some intermediaries, the Enforcement Directive enables judicial authorities to order the disclosure of information on the origin and distribution of infringing content¹³⁴, as well as to order interlocutory injunction against them¹³⁵, including seizure of equipment used for the distribution¹³⁶. As a result, the question arises to which extent the Enforcement Directive can be reconciled with the intent to promote innovation and investment in the online Single Market.

Also internet access providers are concerned about the permission granted by the Enforcement Directive to confiscate and destroy their equipment and servers without a previous Court hearing for the allegedly infringing activity of their customers¹³⁷. Thus, as identified by them, "*a hostile business environment is created where threat of liability is likely to impede further investment on digital content sector*".

¹²⁸ Only some articles are limited to "commercial scale" infringements: articles 6.2, 8.1 and 9.2 (see recital 14)

¹²⁹ The implementation of the notion of "commercial scale" versus "private use" in the framework of the directive 2004/48/EC: The consumer perspective, workshop on the state of implementation of Directive 2004/48/EC on the enforcement of intellectual property rights in Member states, 26 June 2008, Policy Department C, Citizens' Rights and Institutional Affairs, September 2008, PE 408.304 available at: www.europarl.europa.eu/document/activities/cont/200809/20080926ATT38299/20080926ATT38299EN.pdf, p. 6

¹³⁰ Compare, for example, a teenager who illegally downloads a work and a large company that repeatedly downloads copyrighted material.

¹³¹ EU passes dangerous IP Law, Despite MEP' s Conflict of Interest " Midnight Knocks" by Recording Industry Executives Go – Ahead, available at http://ipjustice.org/CODE/release20040309_enshtml

¹³² IP Justice is an international civil liberties organisation that promotes balanced intellectual property laws, available at www.ipjustice.org

¹³³ Top 8 reasons to reject the EU IP Rights Enforcement Directive, available at http://ipjustice.org/CODE/release20040302_en.shtml

¹³⁴ Article 8 of the Directive 2004/48/EC, Corrigendum to the Directive 2004/48/EC of the European Parliament of the Council of 29 April 2004 on the enforcement of intellectual property rights, O J L 195/16 02.06.2004

¹³⁵ Article 9 of the Directive 2004/48, Corrigendum to the Directive 2004/48/EC of the European Parliament of the Council of 29 April 2004 on the enforcement of intellectual property rights, O J L 195/16 02.06.2004

¹³⁶ Article 7 of the Directive 2004/48, Corrigendum to the Directive 2004/48/EC of the European Parliament of the Council of 29 April 2004 on the enforcement of intellectual property rights, O J L 195/16 02.06.2004

¹³⁷ EU passes Dangerous IP Law, Despite MEP's Conflict of interest "Midnight Knocks" by Recording Industry Executives get Go-Ahead, o.c.

3.4. Obstacles for the Single Market

The different rules that have been adopted by the Member States constitute as an obstacle to the further development of cross border services within the Single Market. The **level of knowledge** necessary for the conclusion of one simple agreement per territory is in many cases too high to make the effort for commercial ventures within the Single Market worthwhile. The lack of actual harmonisation creates the requirement of extensive legal research before entering into a market or service, which in turn raises procedural and transactional costs for the interested parties. However, territorial restrictions are often also the deliberate result of commercial decisions by rightholders and providers of audiovisual media services (even though authors often grant worldwide rights to their publishers, collecting societies or producers)¹³⁸.

This lack of harmonisation, combined with the uncertainty regarding the scope of limitations, obliges parties to negotiate the terms of use of the protected work with every rightholder and in every territory (which in practice favours the strongest contractual party). Enterprises that are willing to undertake cross-country business ventures need **costly and time consuming expert services in order to enter into agreements outside of their territory**. For example, in the field of online music, the public performance rights (right to make available) are licensed on a national basis¹³⁹.

As acknowledged by Commissioner Reding, *"Europe's content sector is suffering under its regulatory fragmentation, under its lack of clear, consumer-friendly rules for accessing copyright-protected online content, and serious disagreements between stakeholders about fundamental issues such as levies and private copying"*¹⁴⁰. It is therefore not surprising that the European Commission has made the online single market the key priority for the post-2010 era.

This is particularly burdensome for SMEs and universities¹⁴¹, which often cannot afford such costly services. Consequently, SMEs could be impeded from entering into contractual agreements in a different territory since they lack the legal expertise to bargain with a stronger contractual party (in case of a B2B transaction). Nevertheless, according to some stakeholders, the overall harmonisation conducted so far is sufficient¹⁴², so that attention should be concentrated to the implementation and enforcement of the already developed framework.

The variety of exceptions and limitations has particularly raised **concerns about the use of DRMs across the Single Market**. Due to the different implementations adopted in each Member State, a rightholder who wishes to commercially exploit his digital work in the online environment would be obliged to program these protection technologies in such a way so as to meet the requirements set in every different local legal regime. Hence, those rightholders that are not able to undertake the cost necessary for a country-by-country analysis are obliged to opt for one of the following: to adopt standard

¹³⁸ Creative Content in a European Digital Single Market: Challenges for the Future - A Reflection Document of DG INFSO and DG MARKT, 22 October 2009, available at http://ec.europa.eu/avpolicy/docs/other_actions/col_2009/reflection_paper.pdf, p. 11

¹³⁹ *Ibid.*, p. 6

¹⁴⁰ Communication, "Commission sees need for a stronger more consumer-friendly Single Market for Online Music, Films and Games in Europe", 3 January 2008, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/5>

¹⁴¹ See the Communication from the Commission regarding Copyright in the Knowledge Economy, COM (2009) 532 final, page 7: "[Libraries and universities] contend that trans-national licensing within the EU is difficult or impossible. Libraries and universities assert that it would be more practical and efficient to have one central organisation to grant a wide range of online rights with respect to digital material."

¹⁴² *Ibid.*

terms and conditions drafted according to their local laws, regardless the risk of being illegal in another Member State or to transact on line only with the local users, or to completely avoid on line transactions.

3.5. Issues relating to TPMs

Lack of guidelines – Due to the ease with which digital works can be copied, rightholders not only rely on the law itself to prevent illegal copying, but also rely on technological protection measures ("TPMs"), such as Digital Rights Management ("DRM"), to prevent/restrict unauthorised acts. However, the Copyright Directive does not provide specific guidelines for the implementation of TPMs. For that reason *"there is a great variety to the scope of protection afforded to them in each Member State"*¹⁴³. Also, *"since art. 6.1 of the Directive 2001/29/EC lays down that Member States should provide adequate legal protection without further indicating the nature of this protection, this permits a variety of legislative solutions to be adopted from each Member State ranging from civil to criminal law"*¹⁴⁴.

Lack of explicit distinction between access control and copy control – In the online world, digital copyrighted works are usually governed by the terms of a licensing agreement. In addition, they can be protected by technological protection measures ("TPMs"), which are measures designed to prevent/restrict acts that are not authorised by rightholders. The use of TPMs is encouraged by the Copyright Directive, as it confers a new right to the rightholders: the control of access to their digital work through TPMs.

Both methods are used to define permissible uses¹⁴⁵, and to prohibit users from reproducing works and communicating them to the public. It has been observed that *"right-holders of the content seem to be satisfied by their complete control of the use of the copyrighted work which practically leads to the abolishment of the reasonable expectations of the consumers regarding certain acts (for example the number of the permitted downloads and the right to make a back up of the file)"*¹⁴⁶.

The Copyright Directive does not distinguish between "access control" and "copy control", granting equal legal treatment to both "methods" of control. The most important consequence of this lack of distinction is that rightholders using TPMs are both entitled to control access to their digital work, and to control the copies of the work¹⁴⁷. In other words, access control is equivalent to copy control. Copyright protection is therefore extended beyond the protection bestowed to analogue works¹⁴⁸.

Possible circumvention of copyright provisions by TPMs – Article 6 of the Copyright Directive distinguishes between a rightholder's ability to "control" use and the user's right to "gain access"¹⁴⁹. The rightholder is allowed to restrict access to the work, based not on copyright law itself, but on the technology (particularly TPMs) and the contractual freedom. HEIDE has pointed out that *"the reliance on this access control power is not reliance on any legal mechanism and in so relying on a different 'rights structure' does not require adherence to any exception limitations that is required under that legal structure [...] where copyright law is not preferred, there can be no reliance upon its exceptions"*¹⁵⁰. In

¹⁴³ Study on the implementation and effect in Member States' laws of the directive 2001/29/EC, o.c., p. 97

¹⁴⁴ *Ibid.*

¹⁴⁵ Study on the implementation and effect in Member States' laws of the Copyright Directive, o.c., p. 168

¹⁴⁶ Study on the implementation and effect in Member States' laws of the Copyright Directive, o.c., p. 169

¹⁴⁷ Copyright Directive 2001/29/EC- Part 1, available at www.lawdit.co.uk

¹⁴⁸ *Ibid.*

¹⁴⁹ Copyright Directive 2001/29/EC- Part 1, available at www.lawdit.co.uk

¹⁵⁰ *Ibid.*

other words, the attention of the legal protection is shifting from the copyrighted work to the technology that protects it.

In addition, the Copyright Directive does not create a clear link between the notion of "lawful use" and the beneficiary of the copyright exceptions¹⁵¹. The intention of article 6.4 is to secure that the beneficiaries of certain exceptions and limitations will be actually at the legal position to exercise those rights. However, the fact that the Member States are not obliged to implement the exceptions of article 5 of the Directive in their national laws (all but one) reduces the practical impact of article 6.4, since no such rights may exist¹⁵². Hence, article 6.4 only creates obligations when Member States decide to provide the exceptions and limitations in their national law. Thus it has been commented that *"by not providing the discretionary exceptions and limitations of art 5 (2) (3) of the Directive, Member States can easily prevent the objective of the provision from being established"*¹⁵³.

Moreover, copyright exceptions can be contracted out. According to some authors *"the all lawful uses of article 5 of the [Copyright Directive] can be restricted by the application of DRMs which ban access to the copyrighted material to unauthorized users regardless of the lawfulness of their purpose"*¹⁵⁴. Article 6.4 of the Copyright Directive holds that where TPMs control access and use of copyrighted work, only those users that have legal access to the protected work can exercise copyright exceptions. Hence, it has been observed that *"through the use of technological measures and licenses, rightholders can easily prohibit acts that are not restricted by law"*¹⁵⁵.

In this way, it seems that restrictions to lawful uses through contractual consent and access control technologies could, in some cases, be "legitimised". This was also pointed out by the Study on the Implementation and Effect of the Enforcement Directive: *"a rule of precedence has been established between contractual arrangements and the application of technological protection measures"*¹⁵⁶. Some arguments also claim that the interpretation of article 6.4 create a two-track policy *"which has practically silenced the lawful use of copyrighted works in an online environment in many countries"*¹⁵⁷.

TPM exceptions do not apply to online services under "agreed" contractual terms – Member States must ensure that the various exceptions for beneficiaries that are set forth in article 5 of the Copyright Directive¹⁵⁸ are respected, even when TPMs are applied by rightholders¹⁵⁹. However, according to article 6.4 of the Copyright Directive this should not be ensured for *"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"*.

¹⁵¹ G. MAZZIOTTI, *EU Digital Copyright and the end user*, Springer, 2008, p. 86

¹⁵² W. BASLER, "Technological Protection Measures in the United States, the European Union and Germany: How much fair use do we need in the 'Digital World'", *Virginia Journal of Law and Technology*, fall 2003, vol 8, no 13, p.16

¹⁵³ W. BASLER, "Technological Protection Measures in the United States, the European Union and Germany: How much fair use do we need in the 'Digital World'", *Virginia Journal of Law and Technology*, fall 2003, vol 8, no 13, .p. 25

¹⁵⁴ G. MAZZIOTTI, *EU Digital Copyright and the end user*, Springer, 2008, p.87

¹⁵⁵ EU Digital Copyright and the end user, o.c., p.87

¹⁵⁶ Study on the implementation and effect in Member States' laws of the directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, final report, Institute for Information Law, February 2007, p. 152

¹⁵⁷ Green Paper Common Position Interdisciplinary Centre for Law and ICT – K.U.Leuven, p. 2

¹⁵⁸ e.g., using protected works for private use, teaching or scientific research

¹⁵⁹ Article 6.4

This wording creates ambiguity for interactive and on-demand digital services. Although the majority of these services are offered under a non-negotiated licence¹⁶⁰, nevertheless they could still fall under the definition of "agreed contractual terms" because the user usually has to accept the terms before using the content (e.g., by clicking on an "I accept" button). In this way, the provision of article 6.4 could leave out of protection most of the online digital work, allowing TPMs to abolish the exceptions and limitations in article 5 of the Copyright Directive.

This discrepancy could lead to the development of a dual analogue v. digital system. Some narrators have pointed out that *"as soon as more and more material becomes available through internet (online distribution), technical measures will permit exceptions of great importance to be abandoned"*¹⁶¹. Contractual terms set by the rightholder could thus force the user to abandon his lawful uses of digital works, while this is not allowed in the analogue environment. This inequality between the analogue and the digital environment could impede the dissemination of digital content within the Single Marketplace.

Reasons for applying TPMs – Articles 6.1 and 6.2 of the Copyright Directive do not differentiate between the reasons for *applying* TPMs and the reasons for *circumventing* them. This could raise concerns as regards the fair balance between the interests of the user and the interests of the rightholder. According to the study on the implementation and effect of the Copyright Directive, this results in the situation where any act of circumvention is prohibited¹⁶². Furthermore, TPMs are also used for reasons others than copyright protection, e.g. to protect market share, limit consumers to specific devices, etc. Although the anti-circumvention measures should have been restricted to copyright infringements, nevertheless their protection extends also to TPMs that are not used to protect copyrighted material.

Circumvention for legitimate purposes – Acts of circumvention done for legitimate purposes are not protected, so that *"the protection conferred by art. 6 of the Directive 2001/29 seems to extend to non-restricted acts too"*¹⁶³. This could also lead to efforts of distortion of competition by limiting the permitted consumer choices in device and content. In this regard, the European Consumer Law Group has declared that *"although TPMs consist legitimate means to protect copyrighted works and enforce the relative intellectual property rules, nevertheless this should not happen at all cost"*¹⁶⁴.

TPMs and personal data protection – TPMs have the ability to gather a great deal of data regarding the persons that purchase digital content, by tracing what a person reads, listens, his/her viewing habits, etc. Moreover, TPMs have the ability to "impose" on the user the obligation to give his consent to gathering his personal information, in order to allow him to view, use or in any other way utilise the protected work. The use of TPM technologies can therefore conflict with a user's data protection rights and privacy rights, by tracing the use of the protected work and monitoring a user's behaviour¹⁶⁵.

A recent example is the incident whereby online book shop Amazon decided to delete all books of writer Georges Orwell from the TPM-protected "Kindle" electronic book (due to a licensing issue with the publisher of the book). Customers who had bought a copy of this book and downloaded it to their Kindle device, suddenly found that the book was surreptitiously and remotely deleted by Amazon¹⁶⁶. Many customers therefore complained about their privacy rights being infringed by the TPM measures applied

¹⁶⁰ Study on the implementation and effect in Member States' laws of the directive 2001/29/EC, o.c., p. 126

¹⁶¹ G. MAZZIOTTI, *EU Digital Copyright and the end user*, Springer, 2008, p. 98

¹⁶² Study on the implementation and effect in Member States' laws of the directive 2001/29/EC, o.c., p. 114

¹⁶³ Study on the implementation and effect in Member States' laws of the directive 2001/29/EC, o.c., p. 100

¹⁶⁴ Copyright Law and Consumer Protection, o.c., p. 21

¹⁶⁵ Giuseppe Mazziotti, *EU Digital Copyright Law and End-User*, Springer, 2008, p. 92

¹⁶⁶ www.nytimes.com/2009/07/18/technology/companies/18amazon.html

by Amazon. Ironically, one of the books that was remotely deleted by Amazon, was the privacy-relating "1984" book from which the term "Big Brother" was derived.

Recital 57 of the Copyright Directive lays down that "*these technical means, in their technical functions, should incorporate privacy safeguards in accordance with 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 the free movement of such data*". However, the wording used in the recital only encourages – and does not mandate – the use of privacy enhancing technologies (PETs). The use of the word "should" (instead of "shall"¹⁶⁷ or "must") leaves the effective protection of personal data to the rightholders that employ DRMs. Furthermore, the reference to the data protection issues is only included in the recitals of the Copyright Directive, which demonstrates that the Copyright Directive omits to directly address the use of PETs¹⁶⁸. Therefore, "*the effective availability and use of DRM technology may raise privacy concerns*"¹⁶⁹.

Persons with disabilities – As pointed out by the Communication from the Commission on Copyright in the Knowledge Economy¹⁷⁰, TPMs are an additional obstacle towards making content available to persons with disabilities (only 5% of books published in Europe are converted into accessible formats), because they prevent the conversion into accessible formats of legally acquired works by organisations or individuals.

Adequate information – Another issue related to TPMs is that consumers fear that they are not always capable of knowing their possibilities "*especially regarding to what they can or cannot do with their digital hardware and content*"¹⁷¹. They claim that in many instances they are not properly informed about the specific characteristics of a device and/or a work and for that reason their choice does not meet their expectations¹⁷². They identify themselves as being the weaker party in a transaction since "*they do not dispose any choice as to whether to accept or refuse the restrictive terms of use even if they are regarded as unfair*"¹⁷³. In addition, although common use of information in the analogue world is permitted (such as sharing a CD with friends), these kind of activities are no longer permitted in the digital world¹⁷⁴.

3.6. Relation to the eCommerce Directive

The role of online intermediaries' provider is not always clear. It is not clear to which extent the provisions of article 8.3 of the Copyright Directive conflicts with the prohibition of a general monitoring obligation set forth in articles 15 of the eCommerce Directive. This issue is being discussed in depth in section 4.6 of Chapter 6 (liability of online intermediaries).

¹⁶⁷ See L. BYGRAVE, "The technologisation of Copyright: Implications for Privacy and related interest", *European Intellectual Property Review*, 2002, vol. 24, no 2, p.9

¹⁶⁸ *Ibid.*

¹⁶⁹ Giuseppe Mazziotti, o.c., p. 34

¹⁷⁰ COM(2009) 532 final, 19 October 2009, p. 7

¹⁷¹ Accommodating the needs of iConsumers: Making sure they get their money' s worth of digital entertainment, Guilbault L., 19 June 2008, Springer

¹⁷² *Ibid.*

¹⁷³ *Ibid.*

¹⁷⁴ Making place for iConsumers in Consumer Law, Helberger N., available at www.ivir.nl/publications/helberger/Making_place_for_the_iConsumer.pdf

3.7. Future-readiness and technological neutrality

3.7.1. Few exceptions fit properly in the digital environment

Even though the final text of the Copyright Directive includes a number of optional limitations, only a small number of those limitations were designed to fit properly in the digital environment (as it was then perceived): the private use exception¹⁷⁵, the exception for acts of reproduction for libraries¹⁷⁶, and the exception for research / private study terminals of publicly accessible establishments^{177 178}. Still, even those exceptions have received criticism that they are not fit (or not fit anymore) with the current developments of the digital world.

Conversely, there are multiple exceptions and limitations in the Copyright Directive¹⁷⁹ that are not relevant to the Single Market or/and do not foster the deployment of the dissemination of the digital content¹⁸⁰. In this regards, the aim set by the Copyright Directive (namely to adopt rules relevant to digital content technological development), is not completely reached, since only a limited number of (optional) exceptions addresses the multiple challenges of the digital era as they were then identified.

Consequently, stakeholders have expressed the view *"that the rights granted under the [Copyright Directive] do not actually initiate or promote the establishment of new innovative business models but that they contribute to the legitimization of the business models that were already in the market previous to the 2001 Directive"*¹⁸¹. They claim that the Copyright Directive did not add much to the promotion of innovative business models and that this Directive was neutral as far as the establishment of new business models is concerned.

3.7.2. Future-readiness of exclusive rights, limitations and exceptions

While some legal provisions are sufficiently flexible to be adapted to future challenges, other provisions are less future-ready and raise concerns in relation to their ability to respond to the new technological challenges.

For example, the **right of communication to the public**¹⁸² is worded in such a way that it does not directly target specific technologies. The same is true for the **right of making available to the public**¹⁸³. The criteria set forth in this article are technology neutral, while the requirement of access from a place and at a time individually chosen by the user covers shifting technological methods and the portability of

¹⁷⁵ article 5.2.b

¹⁷⁶ article 5.2.c

¹⁷⁷ article 5.3.n

¹⁷⁸ Study on the implementation and effect in Member States' laws of the directive 2001/29/EC, o.c., p. 44

¹⁷⁹ Such as those in articles 5.2.e, 5.3.e, 5.3.g, 5.3.h, 5.3.i and 5.3.j

¹⁸⁰ Study on the implementation and effect in Member States' laws of the directive 2001/29/EC, o.c., p. 46

¹⁸¹ Study on the implementation and effect in Member States' laws of the directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, final report, Institute for Information Law, February 2007, p. 73

¹⁸² article 3.1 Copyright Directive

¹⁸³ article 3.2 Copyright Directive

the means used (pc, mobile phone etc). This way, this right does not discriminate against one or another type of technology used¹⁸⁴.

Conversely, the **right of reproduction** is *not* technologically neutral in its current wording. The provisions of article 5.1 Copyright Directive seem to have been written having in mind a specific technology¹⁸⁵, namely the one that allows internet access providers to operate.

Most of the **limitations and exceptions** of the Copyright Directive are generally phrased in such a broad way that this could reassure their technological neutrality¹⁸⁶. However the **exhaustive character** of the list of exceptions and limitations contained in the Copyright Directive may pose some obstacles to the future readiness of the provisions stipulated in this Directive¹⁸⁷. By prohibiting other exceptions or/and limitations, new trends and technological developments that require those new exceptions will not be covered: *"the exhaustive quality of the (exceptions and limitations') list raises questions [...] (since) Member States cannot anticipate the fast sociological and especially technological developments and revise exceptions accordingly. Consequently, great opportunities are lost on both sides (both right holders and users) as no flexibility is left to Member States"*¹⁸⁸. Moreover many arguments have been raised by different stakeholders on whether some of these exceptions and limitations reflect the current situation of the digital environment and whether they are still able to cope with the advances of specific domains. The proponents of these arguments propose for an amendment of the exceptions and limitations regime of the Copyright Directive by altering or/and providing more clarifications to some of the exceptions and limitations. However, others are fully satisfied with the status quo created by the Copyright Directive (for further discussion on the exceptions and limitations see below).

3.7.3. Different sector specific rules?

According to a 2006 Study¹⁸⁹ *"the role of information has been transformed to a sui generis commodity that led to the augmentation of the need for vast exchange of information and for more people to access the information. This fact means that so far as it is commercially viable and consumer desirable, content producers should be able to make distribution deals without excessive technical, legislative and regulatory obstacles"*. In order to accomplish this goal and to meet the objective to establish the transfer of knowledge as the "Fifth Freedom", it is necessary to guarantee the movement of knowledge within the Single Market for all types of information. It has been supported however by some stakeholders that **the present set of legal rules does not sufficiently cover the needs of all types of information flow**, so that different sector specific rules may be necessary for different categories of information.

Hence, for example, arguments were raised asking for "a partially distinct set of rules for scientific research, fostering wide and efficient dissemination, e.g. by securing competitive market conditions and

¹⁸⁴ Study on the implementation and effect in Member States' laws of the directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, final report, Institute for Information Law, February 2007, p. 75

¹⁸⁵ *Ibid.*

¹⁸⁶ This, however, does not apply to the exception in article 5.2.a (which specifically mentions reproductions on paper *"or any similar medium"*) and in article 5.3.n, which refers to communication or making available *"by dedicated terminals"*.

¹⁸⁷ This has been identified as the *lack of flexibility of the exhaustive exceptions and limitations lists* to take account of technological developments and to foster innovation, available at http://ec.europa.eu/internal_market/copyright/docs/studies/etd2005imd195recast_report_2006.pdf - p. 7 as found in Google's Contribution to the European Commission public consultation on "Copyright in the Knowledge Society, p. 6

¹⁸⁸ Green Paper Common Position Interdisciplinary Centre for Law and ICT – K.U.Leuven, p. 2

¹⁸⁹ *Interactive content and convergence: Implications for the Information Society*, A study for the European Commission, (DG Information Society and Media, Final Report 2006), p. 27

*thereby encouraging innovative dissemination models. Copyright law as part of these market conditions should provide for a wide array of limitations to copyright, keeping market entry barriers low for new providers and their technologies and avoiding that scientific knowledge becomes "privatised" by publishers"*¹⁹⁰.

The discussion on sector specific rules is closely related to the discussion on whether it is necessary or not to change the exceptions and limitations regime of the Copyright Directive. Sector specific rules may constitute an interesting alternative when no consensus can be reached among the different stakeholders on the modification of the current exceptions and limitations regime.

*For example libraries and archives might request for a more updated legislation since it is felt that "the current exception, which only allows online dissemination of digitised content on the premises of the institution ("on site") obviously hinders these organisations to fulfil their role in the 21st century information society"*¹⁹¹.

The Commission has already adopted certain sector specific non mandatory rules and initiatives to provide guidance in particular subject-matters that are of high importance.

*For instance, **digitisation of scientific work and material of cultural heritage** is considered as a very important issue since it will enable access and use of works through users' personal computer. The idea of improving visibility of collections held by museums, archives and other institutions has been promoted by the Commission through the Digital Library Initiative (DLI) and other projects such as the Lund Digitisation Action Plan and The European Library*¹⁹².

*Part of the discussion regarding digital content refers to the **digitization of European Cultural Heritage**, meaning the digitisation and online accessibility of cultural material and digital preservation. Due to its importance, the Commission has proceeded to the Communication on the digitisation and online accessibility of cultural material and digital preservation*¹⁹³. *As mentioned in recital 3 "the development of digitised material from libraries, archives and museums should be encouraged. The online accessibility of the material will make it possible for citizens throughout Europe to access and use it for leisure, studies or work. It will give Europe's diverse and multilingual heritage a clear profile on the Internet. Moreover, the digitised material can be re-used in industries such as tourism and the education industry, as well as in new creative efforts. Member States are recommended to adopt national strategies for long term preservation and access to digital material."*

*Moreover, the Commission issued the Communication on **scientific information in the digital age: access, dissemination and preservation***¹⁹⁴, *which stated: "this Communication's objective is to signal the importance of and launch a policy process on (a) access to and dissemination of scientific information and (b) strategies for the preservation of scientific information across the Union". For this reason the Communication announces a series of measures at the European level. This document also identifies issues and challenges of organisational, legal, technical and financial nature.*

3.7.4. *Is all content (still) equal in the digital era?*

Under the current copyright rules, all copyrighted content is protected in the same way: even trivial original work is protected under copyright law. However, the ubiquity of the Internet and the increased dissemination of digital content have enhanced the content creation by internet users, and new tools have been developed that allow creating or reusing digital work easier and more cost effectively than ever before.

¹⁹⁰ Comments by the MAX PLANCK INSTITUTE FOR INTELLECTUAL PROPERTY, COMPETITION AND TAX LAW, p. 4

¹⁹¹ Green Paper Common Position Interdisciplinary Centre for Law and ICT – K.U.Leuven, p. 3

¹⁹² http://ec.europa.eu/information_society/activities/digital_libraries/background/index_en.htm

¹⁹³ C (2006) 3808 FINAL, 24.08.2006

¹⁹⁴ Communication from the Commission to the European Parliament, the council and the European Economic and social committee on scientific information in the digital age: access, dissemination and preservation COM (2007) 56 FINAL 14.2.2007

Value-differentiated content – Most stakeholders will likely agree that not all user-created content holds the same value: there is very valuable content (with clear present or future commercial value, such as for example music and films), less valuable content and low-value content (such as for instance an SMS messages, messages sent in a social network, etc.). The question arises whether all this content should be treated the same way, particularly because the author does not always have the same intentions regarding the exploitation of his/her work. It could therefore be argued that the current legal regime, which obliges all digital user-created content to be treated in the same way regardless of its value and regardless of the intentions of the author, is not ready to meet these new trends¹⁹⁵.

Collaborative content – A related issue is that copyrighted material is increasingly created in a collaborative way (e.g., wikis, open content such as Wikipedia, open source software, etc.). In such cases, it is difficult to identify the actual rightholders. Moreover, under the current legal rules of most Member States, dealing with co-ownership of intellectual property rights is a legal labyrinth. Not only does the "default regime" for co-ownership differ significantly *among* Member States, the legal rules on co-ownership of intellectual property rights are also not extensively developed in most Member States (they rely on a mix of general co-ownership rules and specific rules for some types of intellectual property rights).

3.7.5. Feasibility of clearing rights

The problem of locating the rightholders – According to the 2008 Green Paper on Copyright in the Knowledge Based Economy¹⁹⁶ within the current legal framework *"the obligation to clear rights before any transformative content can be made available can be perceived as a barrier to innovation in that it blocks new, potentially valuable works from being disseminated"*¹⁹⁷. The problem of locating the rightholder(s) of a work in order to ask for the permission to use or re-use it is very intense in the digital world, where in many instances it is not easy to identify the rightholders, due to various factors such as for instance the ubiquity of the Internet, the frequent use of pseudonyms, the anonymity of the users etc.

This is further aggravated due to the "orphan works" issue that arises when data on the author/rightholder(s) is simply missing or outdated, which is particularly problematic when a work has multiple authors. In these cases, it can be very costly and time consuming to find or to identify the rightholders in order to grant permission to exploit their work. In addition, users that use an orphan work are never sure whether they will be held liable for copyright infringement¹⁹⁸.

The significance of this problem must not be underestimated. For example, as a result of the decay that is inherent to the physical properties of early twentieth century film, half of the movies made before 1950 cannot be recovered¹⁹⁹. By sustaining a lack of incentive to initiate conservation efforts, the legal uncertainty with regard to orphan works may lead to the irretrievably loss of parts of our cultural heritage. It can be argued that solving the problem of orphan works would be beneficial for all stakeholders involved. Authors could use older works to create new value, rightholders may benefit from remuneration from a new source and more valuable content would be made available to consumers²⁰⁰.

¹⁹⁵ For further discussion on this, matter see section 7.2.5 below

¹⁹⁶ Green Paper on Copyright in the Knowledge Economy, COM(2008) 466/3 p. 19

¹⁹⁷ *Ibid.*

¹⁹⁸ Green Paper on Copyright in the Knowledge Economy, COM(2008) 466/3 p. 10

¹⁹⁹ Center for the Study of the Public Domain, *Access to Orphan Films*, www.law.duke.edu/cspd/pdf/cspdorphanfilm.pdf, p. 3

²⁰⁰ Gowers Review of Intellectual Property, 2006, available at www.cri-international.com/2006_UK_Gowers_Review_of_Intellectual_Property_6.12..pdf, p. 70

EU initiatives – In light of the above, the Commission adopted the (non-binding) Commission Recommendation of 24 August 2006 on the digitisation and online accessibility of cultural content and digital preservation, 2006/585/EC, L236/28, encouraging Member States to create mechanisms to facilitate the use of orphan works and to promote the availability of lists of known orphan works. Furthermore, a High Level Expert Group on Digital Libraries adopted a "*Final Report on Digital Preservation, Orphan Works and Out of Print Works*", and a (non-binding) memorandum of understanding on orphan works was signed by representatives of libraries, archives and rightholders.

The Digital Library Initiative – In the context of the i2010 Digital Libraries Initiative, an overall solution for the issue of orphan works was proposed. The aim of this proposal is to provide cultural institutions with the possibility to identify the digitisation status of a work, to gain access to it and to enable digitalization if this has not already been done.

The proposal identifies three key issues in this respect²⁰¹:

- The establishment of **sector-specific criteria for diligent search** for rightholders to copyright works. By harmonising the search criteria throughout the Member States, searches in various Member States could be made subject to the principle of mutual recognition²⁰².
- The creation of one or more **databases of orphan works**. This would allow interested parties to make an assessment of the copyright restrictions resting on a particular work without having to re-initiate a thorough search for rightholders, and would consequently maximise the potential use and distribution of orphan works; and
- The development of a **rights clearance mechanism** to issue a licence to use an orphan work. Following a diligent search in accordance with the agreed upon criteria, and on the condition that no rightholder has been identified, such a mechanism should provide for the provision of non-exclusive licences to the work.

With regard to the rights clearance mechanism, various approaches could be adopted²⁰³. The three main solutions that should be considered by the Member States are:

- **The creation of an extended collective licensing mechanism**. Such a mechanism would allow one or more institutions to grant licences that apply automatically to all rightholders in a given field, even if unknown or untraceable. In view of the pronounced presence of collective copyright organisations, this option is feasible in the European context. This is contrary to the United States, where collective copyright organisations are of less significance²⁰⁴. In Denmark, Finland, Sweden and Hungary, such a system – although not specifically created to deal with the issue of orphan works – is already being used in this respect.

²⁰¹ i2010 Digital Libraries Copyright Subgroup's Recommended Key Principles for Rights clearance centres and databases for out-of print work, available at http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg_minutes/copyright/key_principles_opw.pdf, p. 2

²⁰² i2010: Digital Libraries High Level Expert Group – Copyright Subgroup, Final Report on Digital Preservation, Orphan Works, and Out-of-Print Works, available at www.ifap.ru/library/book305.pdf, p. 14

²⁰³ Commission Staff working document accompanying the Commission Communication on Europe's cultural heritage at the click of a mouse: Progress on the digitisation and online accessibility of cultural material and digital preservation across the EU, 11.8.2008, available at http://ec.europa.eu/information_society/activities/digital_libraries/doc/communications/progress/swp.pdf, p.14 – 15 (SEC (2008) 2372)

²⁰⁴ J. GINSBURG, "Recent Developments in US Copyright Law: Part I – "Orphan" Works", <http://ssrn.com/abstract=1263361>, p. 15

- **The grant of a non-exclusive licence by an independent body.** An alternative approach would be to allow an independent body to issue a non-exclusive licence after conducting a diligent search for the rightholders. This approach has been recommended by the Copyright Subgroup of the i2010 Digital Libraries High Level Expert Group. Under this setup, one or more "rights clearance centres" would be able to grant orphan works licences²⁰⁵. For this purpose, Member States should encourage rightholders to vest licence-granting authority in such clearance centres. Licensing policies, criteria and fees should also be discussed with rightholders representatives, such as collective copyright organisations.
- **Creation of an exception to copyright.** In the UK Gowers Review of Intellectual Property, it was recommended to deal with the issue of orphan works through an amendment of the Copyright Directive. This would entail amending the Directive to include an exception which permits the use of genuine orphan works, provided the user has performed a reasonable search and, where possible, gives attribution. However, such an exception is currently contrary to the permissible exceptions set forth in the Copyright Directive, which are at present incompatible with a commercial orphan works exception²⁰⁶.

Regardless of the option chosen, national solutions will need to take into account issues of mutual recognition in Member States to achieve the necessary cross-border effects²⁰⁷. In accordance with the second key principle identified by the i2010 Digital Libraries Copyright Subgroup's, such efforts can for example be supported by creating databases, shared at European level, of declared orphan works²⁰⁸. To simplify such centralisation efforts, it could be considered to encourage Member States to adopt harmonised solutions to the problem of orphan works in their national legislation.

Communication from the Commission on "Copyright in the knowledge Economy"²⁰⁹ – Despite the aforementioned initiatives, up until now, only limited progress has been made by the Member States on this point²¹⁰. The issue of orphan works published on line in blogs, social networks, portals, etc. remains uncovered, which could hamper the proliferation of user created content and create obstacles to novel digital ventures.

In its 2009 Communication on Copyright in the Knowledge Economy²¹¹, the Commission indicated that the issue of orphan works will be examined in an impact assessment, in order to find possible approaches to facilitate the digitisation and dissemination of orphan works (e.g., legally binding stand-alone instruments on the clearance and mutual recognition of orphan works; an exception to the Copyright Directive, or guidance on cross-border mutual recognition of orphan works).

The ARROW project – ARROW (Accessible Registries of Rights Information and Orphan Works) is a project undertaken by a Consortium of European National Libraries, publishers and collective management organisations also representing writers through their main European associations and national organisations²¹² which is funded under the eContentplus program dealing with copyright issues

²⁰⁵ Key Principles for Rights clearance centres and databases for out-of print work, p. 16; COM (2008) 513, p.14 – 15.

²⁰⁶ Gowers Review of Intellectual Property, 71

²⁰⁷ COM (2008) 513, p. 15

²⁰⁸ Two initiatives that can be mentioned in this respect are MILE and ARROW. Both projects aim to centralise information relating to orphan works.

²⁰⁹ COM (2009) 532 final, p. 5

²¹⁰ COM (2009) 440 Final, p. 5

²¹¹ 19 October 2009, COM(2009) 532 final, available at http://ec.europa.eu/internal_market/copyright/docs/copyright-infso/20091019_532_en.pdf, p. 6

²¹² www.arrow-net.eu

such as orphan works. As described on its official web site, ARROW targets at supporting EC's Digital Library Project by finding ways to identify rightholders, rights and clarify the status of the rights specifically by determining whether it is orphan or out of print²¹³. This project will enable obtaining information on practical copyright issues such as the rightholders, the rights concerned and their administration as well as information regarding where permission to use these rights can be found²¹⁴. This project aims also at achieving interoperability of the sources of information held by several copyright players.

4. Practical impact of current legal framework

4.1. National Implementation of EU level legal instruments

4.1.1. Discretionary margin allowed by articles 5.2 to 5.5 Copyright Directive

Articles 5.2 to 5.5 of the Copyright Directive contain an exhaustive list of limitations and exceptions to the reproduction right. This limited list was intended to enhance harmonisation and legal certainty throughout the Single Market. However, the exceptions and limitations contained in this list are only optional: Member States can choose whether or not to implement them. Moreover, these exceptions and limitations are expressed in a very broad way²¹⁵. Therefore, Member States have a significant discretionary margin in deciding how to implement those provisions in national law. This has resulted in a variety of implementations. Below are some indicative examples of how the countries have made use of this discretionary margin.

Private copying – Member States are allowed to adopt their own copyright limitations regarding private copying. Article 5.2.b of the Copyright Directive lays down that they may provide for exceptions and limitation "*in respect of reproductions on any medium made by a natural person for private use 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*". However, only a few Member States have implemented article 5.2.b as such²¹⁶. Hence, while article 5.2.b is reflected in all Member States, its regulatory framework and the details of its scope vary²¹⁷. For instance in the United Kingdom and in Ireland, copying for private uses is generally considered as copyright infringement, while in Belgium and Portugal private copying is immunised against contractual overrides²¹⁸. In the Czech Republic and in Poland the existing laws did not change, so that a general exception applying to acts of private copying remains in place subject to the condition that the purpose must be for personal use²¹⁹. The scope of permissible uses is more extensive in Austria and Germany, but the production of digital copies for uses

²¹³ *Ibid.*

²¹⁴ *Ibid.*

²¹⁵ Study on the implementation and effect in Member States' laws of the directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, final report, Institute for Information Law, February 2007, p. 4, p. 39

²¹⁶ The implementation of the Directive 2001/29/EC in the Member States, part II, February 2007, Queen Mary Intellectual Property Research Institute, p. 16

²¹⁷ *Ibid.*, p. 17

²¹⁸ N. HELBERGER and P.B. HUGENHOLTZ, "No place like home for making a copy: private copying in European Copyright and Consumer Law", *Berkley Technology Law Journal*, Vol 22:1061, p.1078

²¹⁹ The implementation of the Directive 2001/29/EC in the Member States, part II, February 2007, Queen Mary Intellectual Property Research Institute, p. 17

exceeding the private use is subject to specific requirements. A very important deviation in the German implementation concerns the treatment of digital copies made for personal rather than purely private purposes where "the German implementation has drawn a distinction on the basis of the traditional regulation of copying for 'other own uses'²²⁰. Thus, legal entities are enabled to exploit personal use restrictions for copies made for example for scientific purposes²²¹.

As to the issue of copies made by third parties, there is uncertainty regarding the extent that a beneficiary may employ third parties to facilitate private copying in his behalf²²². As a result, Member States that have not addressed this issue will find difficulty in distinguishing between agency type situations and situations where legal entities have made copies with remuneration²²³. More specifically in Hungary there is an expressed prohibition on third party copying, in Italy services of reproductions of sound and video recording are illegal, while in Germany a third party may be involved for non-commercial services if the copy is made for private purposes²²⁴.

Moreover it has been identified that the Copyright Directive does not address the question of whether private copying exemptions can be contractually overridden²²⁵. This issue is also closely related to the variety in the national implementation, which has also resulted from the complexity of the rules of the Directive regarding DRM and their interplay with the freedom to make private copies²²⁶.

Illustration for teaching purposes – One characteristic example of the different implementation of the limitations in the Member States, is article 5.3.a regarding "illustration for teaching purposes". This exception refers to the "use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved". Only Cyprus, France, Latvia, Luxembourg, Malta, the Netherlands and Spain reflect article 5.3.a in a single provision, though not all those Member States concurrently permit uses consisting communication to the public²²⁷. Slovakia and Slovenia lack specific provisions dealing with educational and scientific research purposes²²⁸. Furthermore; even between those countries that have either implement 5.3.a or adopted a similar provision, deviations can be found²²⁹. Moreover, not all Member States extend article 5.3.a to acts of communication to the public²³⁰. In Belgium, for example, a specific provision to cover the communication to the public for purposes of illustration for teaching or research by officially recognised establishments was adopted, whilst less restrictive requirements apply with regard to reproductions made for such purpose. In both cases, however, a levy is payable²³¹. Hence, while in some Member States communication to the public for educational and research purposes is subject to fair compensation like in

²²⁰ *Ibid.*, p. 18

²²¹ *Ibid.*, p. 18

²²² *Ibid.*, p. 19

²²³ *Ibid.*

²²⁴ *Ibid.*

²²⁵ N. HELBERGER and P.B. HUGENHOLTZ, *Ibid.*, p.1065

²²⁶ *Ibid.*

²²⁷ The implementation of the Directive 2001/29/EC in the Member States, part II, February 2007, Queen Mary Intellectual Property Research Institute, p. 32

²²⁸ *Ibid.*

²²⁹ *Ibid.*

²³⁰ The implementation of the Directive 2001/29/EC in the Member States, part II, February 2007, Queen Mary Intellectual Property Research Institute, p. 34

²³¹ *Ibid.*

France (since 2009), in others like Spain communication to the public is restricted only to school teaching.²³²

Exception for publicly accessible libraries – Article 5.2.c of the Copyright Directive (exception to the reproduction right for publicly accessible libraries, educational establishments and museums) is also a good example of the implementation differences that exist in the Member States²³³. In some Member States, this exception has been transposed as a limitation used by libraries or archives for all types of works and for purposes of restoration and preservation of the material, while in other Member States it was restricted in specific types of material only by limited institutions. In other Member States, however, these limitations were not incorporated at all in national legislation²³⁴.

Dedicated terminals – Another example is article 5.3.n of the Copyright Directive, for communicating or making available a work "by dedicated terminals" for the purpose of research or private study, in publicly accessible libraries and the like. The discretionary margin allowed to the Member States has resulted in a situation where some countries²³⁵ did not implement the provision, some others did adopt the provision²³⁶ whereas others²³⁷ implemented it in such a way so as to be partially covered by communication to small groups of researchers. According to the Green Paper on copyright in the knowledge economy²³⁸, the exception does not cover electronic delivery of materials to end users. Other commentators do not seem to agree with this point of view²³⁹.

4.1.2. Other implementation issues

TPMs – A further example on how Member States deal with the discretionary margin allowed by the Copyright Directive, is the implementation of article 6 Copyright Directive regarding TPMs. Whilst most of the countries have implemented this article, Cyprus has not implemented article 6.1, and Austria has not transposed subsection 4. Although France has implemented the article, it has used nonetheless different wording than the one included in the Directive, using complex definitions for the acts of circumvention, the permitted circumvention for research purposes and the allowance of devices manufactured for circumvention which have other purposes. On the other hand, Greece and Malta have implemented article 6 as it is²⁴⁰.

The Information right – The exercise of the information right in the Enforcement Directive has been difficult in some cases, due to the discrepancies of the national legal regimes of different Member States.

²³² More on the implementation of the Directive 2001/29/EC can be found in the "Study on the implementation and effect in Member States' laws of the directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society", Institute for Information Law, February 2007, p. 63

²³³ Study on the implementation and effect of the Copyright Directive, o.c., p. 78

²³⁴ *Ibid.*

²³⁵ among which Austria, Ireland, Latvia, Sweden and the United Kingdom

²³⁶ among which Belgium, Italy and Luxembourg

²³⁷ such as Germany

²³⁸ p. 7: "This exception would arguably not cover the electronic delivery of documents to end users at a distance. As regards electronic delivery of materials to end users, recital 40 of the Directive states that the exception for libraries and archives should not cover "uses made in the context of online delivery of protected works or other subject matter"."

²³⁹ They argue that online delivery is possible, provided that appropriate technological measures are applied to achieve truly restricted availability. See L. GUIBAULT, "The nature and scope of limitations and exceptions to copyright and neighbouring rights with regard to general interest missions for the transmission of knowledge: prospects for their adaptation to the digital environment", available at <http://unesdoc.unesco.org/images/0013/001396/139671e.pdf>, p. 23.

²⁴⁰ The implementation of the Directive 2001/29/EC in the Member States, o.c., p. 95- 101

For example, in many Member States, internet addresses ("IP addresses") qualify as personal data²⁴¹. Therefore their collection must abide by the rules of the data protection law, according to which personal data can be revealed only in criminal cases involving serious crimes (such as a felony). However, the processing of personal data – even in cases of copyright infringement – is problematic²⁴² in several Member States, including Greece and Italy. In some Member States, rightholders cannot obtain the identity of a user through civil proceedings, as this information can only be disclosed to the police or to the Court in criminal actions²⁴³.

The use of the three steps test – As pointed out above, incidents of digital copyright infringements have exponentially increased, while at the same time technological measures allow the monitoring of access and use of copyrighted content. This has resulted in a disturbed balance of interest between the parties involved.

When investigating how the balance can be restored, it is sometimes said to be useful to rely upon the "three steps test", which aims to prevent copyright limitations from encroaching upon rightholders' rights²⁴⁴. At the same time, the three steps test is considered as a crucial attempt to harmonise the exceptions and limitations between the diverse implementations of the different Member States²⁴⁵.

Nonetheless, in the Study on the Implementation of the Directive 2001/29²⁴⁶, it was observed that *"the test is perceived as a matter of legislative compliance with international prerequisites rather than a rule of interpretation of domestic law; it remains however blurred whether the test only constitutes a guideline for legislative action or for interpretation of exceptions by national judges"*. In practice, the "three step test" is indeed used in most Member States as a norm to be applied by the Courts in the interpretation of the limitations on copyright recognised in the national copyright laws²⁴⁷. It functions as a control mechanism to reassure the balance between the rights and limitations of copyright²⁴⁸.

It has also been suggested, however, that the direct enforceability of the test by the Courts is problematic in so far as it equals to a quantitative assessment of the three factors²⁴⁹ that – according to article 5.5 and in line with the Berne Convention and the TRIPs Agreement – should be met cumulatively. In addition it has been also commented that the test cannot be used effectively if there are no directions determining where the line between grants and reservations of copyright should be drawn. Hence this lack of guidelines has resulted in different interpretations within the Courts of different Member States.

²⁴¹ See also Chapter 4 - privacy and data protection

²⁴² The implementation of the right of information and civil measures, in particular injunctions: best and worse national practices from rightholders' point of view. Workshop on the state of implementation of Directive 2004/48/EC on the Enforcement of Intellectual Property Rights in the Member States 26 June 2008, available at www.europarl.europa.eu/document/activities/cont/200809/20080926ATT38306/20080926ATT38306EN.pdf

²⁴³ *Ibid.*

²⁴⁴ M.R.F SENFTLEBEN, *Copyright, limitations and three step test*, Kluwer Law International, p. 5

²⁴⁵ G. MAZZIOTTI, *EU Digital Copyright Law and the End-User*, Springer, 2008, p. 84

²⁴⁶ The Implementation of Directive 2001/29/EC in the Member States, Queen Mary Intellectual Property Research Institute, 2007, p. 48 available at http://ec.europa.eu/internal_market/copyright/docs/studies/infosoc-study-annex_en.pdf

²⁴⁷ 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, 2007, p. 71

²⁴⁸ Copyright, limitations and three step test, Martin R.F Senftleben, Kluwer Law International, p. 5

²⁴⁹ EU Digital Copyright Law and the End-User, Giuseppe Mazziotti, Springer, 2008, p. 303

4.1.3. Case law and legal doctrine

In this section, some indicative cases are presented as examples of how different jurisdictions have ruled in some important issues related to digital content trends that have recently risen.

a) District Court of Munich

This case concerns the first court case in the EU regarding open source Software, and concerned the alleged violation of the GNU General Public License (GPL). The case was presented before the District Court of Munich I^{250 251}.

Background – The plaintiff was a member of the "netfilter/iptables" open source project, and asserted a claim for injunctive relief against the defendant, a German company selling network products. The plaintiff made the source code of the "netfilter/iptables" software available under the GPL licence, so that the software could be downloaded, used and further improved by anyone. However, according to the term of the GPL licence, any further distribution of the software (whether or not modified) should again be accompanied by the source code. Although the defendant had used the software in its network products, the website of the defendant did not include any reference to the fact that the "netfilter/iptables" software was used, and did not make available the source code²⁵².

Decision – On the 2nd of April 2004, the District Court of Munich upheld a temporary injunction, according to which *"the defendant was enjoined from distributing and/or copying and/or making available to the public the software netfilter/iptables without at the same time in accordance with the license conditions of the GNU General Public License, Version 2 (GPL) – making reference to the licensing under the GPL and attaching the license text of the GPL as well as making available the source code of the software "netfilter/iptables free of any license fee"*²⁵³.

Evaluation – The ruling of the Court was accepted with great enthusiasm by all the members of the open source community. It was considered *"the first sign of case law regarding the development of non proprietary software and various forms of content which is based on the circulation of licenses that tend to weaken standard copyright"*²⁵⁴.

Even so, the decision has also been criticised. This criticism was targeted at *"the strict approach of the decision to the German methodology and the lack of the US approach, as this issue was deemed to have deep legal roots to the US Law and the US Open Source Mentality"*²⁵⁵. Moreover it has been argued that the Munich ruling could possibly be opposed to the principle of exhaustion. Prof. HOEREN has commented that the Court was ignorant of what is called the *"opinio communis"*²⁵⁶: *"if the GPL licence is considered binding in cases of transfer of software to a third party, this could be considered as a possible violation of the principle of exhaustion which applies to the first sale of the copy in the Community with the consent of the right holder"*²⁵⁷. According to the GPL licence, contrary to what is set

²⁵⁰ District Court of Munich I, Judgement of 19/05/2004 – file reference: 21 0 6123/04 (Open Source – effectiveness of GPL)

²⁵¹ Harald Welte vs S. Deutschland GmbH, District Court of Munich, available at www.jbb.de/judgment_dc_munich_gpl.pdf

²⁵² *Ibid.*

²⁵³ *Ibid.*

²⁵⁴ Introduction to GPL and Creative Commons, Ahlert Christian available at www.oii.ox.ac.uk/resources/feedback/OIIFB_GPL1_20040903.pdf

²⁵⁵ T. HOEREN, "The first- ever ruling on the legal validity of GPL- A critique of the case", available at www.oii.ox.ac.uk/resources/feedback/OIIFB_GPL3_20040903.pdf

²⁵⁶ *Ibid.*

²⁵⁷ *Ibid.*

by the European Software Directive, once the author has "sold" a copy of the work with his/her consent he/she still retains his/her exclusive distribution right regarding that work. German law does not allow to override this exception with a contract.

Nevertheless, this case is of crucial importance. First, because it ruled for the first time that open source licences are valid, and second because – although it was a clear judicial decision in favour of the validity of open source licensing – it held that not all terms included in the licence may be valid.

b) Peppermint's case

Another interesting case is the so called "Peppermint's case"²⁵⁸, regarding the conflict between personal data and IP infringement.

Background – In this case, a German music label (Peppermint Jam Records GmbH), had sent 3.636 notices of copyright infringement to alleged Italian copyright infringers. With these notices, Peppermint informed the alleged infringers that they were suspected of illegally uploading copyrighted songs. These notices also included a request drafted by an Italian law firm, asking from the infringers to stop their illegal actions and, additionally, to remove from their computers all songs that belonged to the music label²⁵⁹. In addition, they invited the alleged infringers to deposit an amount of 300 Euros to the account of the law firm, in order to avoid being subject to civil and criminal lawsuit brought against them. At the same time, a draft agreement was attached to the notice to be signed and returned to the Italian law firm.

The proceedings before the Court of Rome begun when Peppermint sued an Italian internet access provider in order to obtain the names and addresses of the users that had allegedly shared the files whose copyright belonged to Peppermint²⁶⁰. This claim was supported by a report that indicated that copyrighted songs from Peppermint were offered by file-sharing programs through the Internet.

There were a number of other similar proceedings brought by Peppermint and a Polish videogame publisher, Techland.

Decision – On the basis of the evidence provided in this report, the Court of Rome issued an interim decision ordering the access provider to provide Peppermint with the personal details of its customers. The legal basis for the decision of the Court of Rome was section 156~~ter~~ of the Italian Copyright Law, according to which a party is entitled to ask a Court to order the other party to communicate information in its possession. In addition, the Court decided that it is possible for the rightholder of copyright to start civil actions against any person deemed to have been involved in the infringement if the infringer is unknown²⁶¹. For that reason, it ordered the ISP to disclose the personal data of its clients. While the Rome Court initially sided with the rightholders, in a later injunction proceeding, after intervention by the Data Protection Authority, the Court reversed its ruling and denied the rightholders' requests. This eventually led to the March 2008 rule by the Authority that held that *"the use of such software violated the Italian Privacy Code and the EU Privacy Directive and as such the resulting names could not be disclosed"*²⁶².

²⁵⁸ L. LIGUORI, "Peppermint's Case: Lawful Copyright Protection Or Data Protection Breach?", 13 July 2007, available at www.mondaq.com/article.asp?articleid=50310

²⁵⁹ *Ibid.*

²⁶⁰ L. LIGUORI, "Peppermint's Case: Lawful Copyright Protection Or Data Protection Breach?", 13 July 2007, available at http://goliath.ecnext.com/coms2/gi_0199-6800461/Peppermint-s-Case-Lawful-Copyright.html

²⁶¹ L. LIGUORI, *Peppermint's Case*, o.c.

²⁶² International Intellectual Property Alliance (IIPA) 2009 Special 301: Italy.p.218

Evaluation – This case triggered discussions as to whether the activities of Peppermint and Logistep (the company that drafted the report) to gather data of internet users were compatible with the Italian Data Protection Law²⁶³.

c) Mulholland Drive case

This case concerned the legal nature of the private copying exception as opposed to the restrictive power of digital anti-copying devices²⁶⁴.

Background – Legal action was initiated by a French user who wanted to make a private analogue copy of a copy-protected DVD film distributed in France. The DVD had no indication informing users that it could only be used on specific devices. The user's claim was that he wanted to copy this film from the DVD to a VHS format, so that he would be able to watch it at his parents' home where no DVD player was available. The user argued that the copy-protection device installed on the digital medium impeded this purpose²⁶⁵. The French consumer union "UFC-Que Choisir" joined the French user's claim, declaring that the right of private copying of the user was violated. The plaintiffs claimed that under French law *"holders of copyright and related rights cannot prohibit copies or reproductions that are strictly reserved to a private use by the copier and are not used collectively"*²⁶⁶.

Decisions – The Paris High Court ruled that the existence of an exception of private copy was *by nature* detrimental to the normal exploitation of films²⁶⁷. The Paris Court of Appeal on 22 April 2005, however, declared that the private copying regime did not constitute a consumer's right, but rather an exception to the rightholders' monopoly²⁶⁸. Next, the Supreme Court held that technical measures implemented to protect the exclusive right of reproduction should always be construed as prevailing upon private exceptions, even if the enforcement of such exceptions takes preference over the protection of technical measures²⁶⁹. The new decision of the Court of Appeal in Paris in April 2007 laid down that the right to private copying cannot forbid the application of DRMs. Nevertheless, private copying can be considered as an argument for defence in counterfeiting cases^{270 271}. In this context, the Court decided that the private copy of a work is not a right but *"a legal exception to the principle of copying the entire work without the consent of the copyright holder"*²⁷² and as such an exception can not be considered a basis of a legal action.

Evaluation – The history of this case shows that international copyright treaties (like the Berne Convention) and the European Directives are of direct applicability in France and prevail over internal law in the hierarchy of rules: the private copying rule found in the French Intellectual Property Code *"has to comply with higher international laws"*²⁷³. The decision of the Supreme Court portrayed that the

²⁶³ *Ibid.*

²⁶⁴ UFC Que choisir, Stephane P. / Films Alain Sarde et autres, Cour d' Appel de Paris 4eme chambre, section A Arret, du 4 Avril 2007, available at www.legalis.net/jurisprudence-decision.php3?id_article=1909

²⁶⁵ G. MAZZIOTTI, *EU digital copyright law and the end-user*, 2008 Springer, p.201

²⁶⁶ Translation based on Giuseppe Mazziotti, o.c., p.202

²⁶⁷ Case law available at www.legalis.net/breves-article.php3?id_article=722

²⁶⁸ www.legalis.net/jurisprudence-decision.php3?id_article=1909

²⁶⁹ G. MAZZIOTTI, *EU digital copyright law and the end-user*, 2008 Springer, p.206

²⁷⁰ Private copy explained by Court of Appeal in Paris available at www.edri.org/edriagram/number5.7/private-copy-france

²⁷¹ Case law available at www.legalis.net/jurisprudence-decision.php3?id_article=1909

²⁷² As found in Private copy explained by Court of Appeal in Paris, available at www.edri.org/edriagram/number5.7/private-copy-france

²⁷³ www.europeanbusinesslawyers.com/cache/article/file/Mulholland_Drive.doc

adoption of a normal exploitation regarding markets for copyrighted digital works might have the negative consequence of outlawing all types of digital private reproductions of copy-protected content, regardless of whether these reproductions are carried out by analogue or digital means²⁷⁴.

Although this case was brought to Court before the implementation of the Copyright Directive Directive in France, it has highlighted the issue that technological measures can prevent permitted acts from lawful users. This issue has become even more obvious with the implementation of the Copyright Directive.

d) The Pirate Bay case

Background – Between 1 July 2005 and 31 May 2006, the Pirate Bay website offered "BitTorrent" files to facilitate the peer-to-peer exchange of data.

In January 2008, the Swedish District Prosecutor indicted four persons for complicity in breach of the Copyright Act (1960:729), since, *"jointly and in collusion with each other and another person, they had been responsible for the operation of the file-sharing service [called] The Pirate Bay"*²⁷⁵. According to the Prosecutor, through this website they aided and abetted other individuals who made recordings and software available to the general public via the Internet, as well as computer software and computer games. In addition, the Prosecutor claimed that these persons aided and abetted others in the production of copies of the recordings and of the computer software. According to the Prosecutor, the acts of "aiding and abetting" referred to the fact that the defendants, through the file-sharing service, provided others with the opportunity to upload torrent files to the service, provided others with a database linked to a catalogue of torrent files, provided others with the opportunity to search for and download torrent files, and also provided the functionality with the assistance of which individuals wishing to share files with each other could contact each other through the file-sharing service's tracker function.

The Prosecutor also claimed that the defendants were guilty of preparation for breach of the Copyright Act, during the period 1 July 2005 to 31 May 2006, in that, in connection with the operation and through the functionality of the file-sharing service, they received and stored the BitTorrent files in a specially prepared database with associated catalogue. These files were specifically intended to be used as an aid in breach of the Copyright Act.²⁷⁶

Decision – The verdict of the Swedish court in the Pirate Bay trial was given on 17 April 2009, with the four defendants found guilty of complicity in breach of the Copyright Act. The Court sentenced each to one year in prison and to pay together about 2.7 million euro in damages²⁷⁷. However, the defendants have expressed their intention to appeal to the decision.

This case also contains an interesting application of the special liability regime (set forth in the eCommerce Directive, and discussed in detail in Chapter 6). According to the Swedish court, the Pirate Bay does qualify as a "hosting provider" (article 14 of the eCommerce Directive), as it offered server space to third parties to store BitTorrent files. However, the court ruled that the Pirate Bay was not actually protected by the special liability regime, because hosting providers are only protected to the extent that they have no actual knowledge of the illegal information on their systems, and take down any illegal information as soon as they gain actual knowledge. According to the court²⁷⁸, "It must have been

²⁷⁴ G. MAZZIOTTI, o.c., p.208

²⁷⁵ STOCKHOLM DISTRICT COURT, Division 5, Unit 52, VERDICT B 13301-06, 17 April 2009, handed down in Stockholm, Case no B 13301-06, www.ifpi.org, p.15

²⁷⁶ *Ibid.*

²⁷⁷ The Pirate Bay Decision : www.edri.org/edri-gram/number7.8/the-pirate-bay-court-decision

²⁷⁸ Unofficial English translation of the decision, p. 56, available at www.wired.com/images_blogs/threatlevel/2009/04/piratebayverdicts.pdf

*obvious to the defendants that the website contained torrent files which related to protected works. None of them did, however, take any action to remove the torrent files in question, despite being urged to do so. The prerequisites for freedom from liability under [§ 18 of the Swedish eCommerce Act] have, consequently, not been fulfilled."*²⁷⁹

Following this decision, the music industry has decided to use all possible legal means against Pirate Bay, and already initiated legal action in Denmark, Netherlands, Norway and Sweden. As a result, the Pirate Bay's services were unaccessible in August 24th 2009, because its hosting provider was obliged by a Swedish Court order to disconnect the website from the Internet at the threat of significant daily penalties²⁸⁰ (even so, The Pirate Bay had prepared a backup solution and came back online soon). Meanwhile, in Ireland, internet access provider Eircom has cut off access to The Pirate Bay as from 1 September 2009. In Norway, the hearing between the movie and music industry and access provider Telenor to block the Pirate Bay will take place on October 2009. In the Netherlands, the anti-piracy organisation BREIN obtained a default judgement to block The Pirate Bay²⁸¹.

Evaluation – This case concerns the issue of criminal complicity in copyright infringement specifically by individuals who are alleged to have provided a file-sharing service within a computer network. Additionally, it concerns the liability of those involved to pay damages under the terms of the Copyright Act. Furthermore, it is of crucial legal importance not only because it practically describes the way that copyrighted works were made available to the public through the use of the file-sharing technology, but also because there is a belief that the verdict may have implications for all file-sharing platforms starting a "legal battle" between them and the recording industry. At the same time, it is one of the most indicative examples of the copyright infringements phenomenon and it has an important societal influence. Protests attended by a number of people in big European cities against the decision indicated once more that everyday users do not consider the phenomenon of copyright infringements as an unethical activity.

5. Practical example: Europeana

5.1. Introduction

In November 2008, the online library *Europeana* was made available to the public²⁸². The aim of the platform, which is operated by the European Digital Library Foundation, is to gather Europe's cultural and scientific resources and to make those resources accessible through the Internet²⁸³. Today, the Europeana project, which was initiated by the European Commission and is funded by the Commission and the Member States, gathers 4,6 million digital items on its website²⁸⁴. More than 1.000 cultural institutions, such as libraries, museums and universities, have contributed content and more than 150 institutions are part of Europeana's partner network²⁸⁵. The collection consists of a broad set of objects,

²⁷⁹ See also H. NILSSON, "The Pirate Bay verdict – the end of the beginning?", *World Media Law Report*, April 23 2009; M. YOUNG, "The Pirate Bay case: repercussions beyond Sweden?", *IT Law Today*, June 2009, p. 6-7

²⁸⁰ The Pirate Bay: Public Enemy Number One, www.edri.org/edri-gram/number7.16/pirate-bay-isp-sweden

²⁸¹ *Ibid.*

²⁸² www.europeana.eu

²⁸³ See http://ec.europa.eu/information_society/activities/digital_libraries/doc/letter_1/index_en.htm

²⁸⁴ See www.europeana.eu/portal/aboutus.html

²⁸⁵ Communication on Europeana: next steps, (COM (2009) 440 Final), p. 3, available at http://ec.europa.eu/information_society/activities/digital_libraries/doc/communications/next_steps_2009/en.pdf

such as pictures of museum objects, paintings, newspapers, radio broadcasts and films. The policy target is to gather 10 million objects on the platform by 2010²⁸⁶.

Europeana is an unprecedented effort to digitise Europe's cultural and scientific heritage. However, the progress of Europeana has also brought to light a number of significant challenges and problems with regard to the process of digitising and distributing content on a Europe-wide scale. These issues currently limit the potential of Europeana and constitute a barrier to the dissemination of its contents. Also, the problems identified within the framework of Europeana are not unique to this project, and retain their relevance in relation to the wider subject of digitising and distributing content online. In view of the increasing importance of digital content models, addressing these issues is crucial for the further development of a European legal framework that balances the interests of rightholders and the public at large. As pointed out by Commissioner Reding in a recent speech:²⁸⁷

"Let us be very clear: if we do not reform our European copyright rules on orphan works and libraries swiftly, digitisation and the development of attractive content offers will not take place in Europe, but on the other side of the Atlantic. Only a modern set of consumer-friendly rules will enable Europe's content to play a strong part in the digitisation efforts that has already started all around the globe."

This section 5 therefore applies the issues identified in the previous sections to the Europeana project, and delves further into some of the specific problems encountered within the framework of the project.

5.2. Licence restrictions

At present, much of the material accessible through Europeana is in the public domain, *i.e.* free from intellectual property rights (in particular copyright). However, Europeana explicitly aims to also include copyrighted material, which is necessary if the platform is also to provide access to contemporary information of cultural and scientific importance²⁸⁸. A significant issue in this respect is the variety in licence conditions applicable to copyrighted works. This is exemplified by the (provisional) terms of use of Europeana, which state that:

*"All third-party material presented within this website are subject to individual Intellectual Property Rights (IPR) conditions and licences. Providing details of such IPR and licensing is the responsibility of third-party sources and should be either presented within this website or available from the originating sources of the third party material"*²⁸⁹.

Licence agreements often contain restrictions with regard to the cross-border distribution of the content, thus excluding the possibility to distribute the digitised content on a Europe-wide basis. For example, one Europeana contributor had to withdraw a number of photographs from Europeana, because the applicable licence agreement prohibited distribution outside of France²⁹⁰. While it is technically possible to restrict access to content based on the geographic location of the end-user²⁹¹, such an approach

²⁸⁶ COM (2009) 440 Final, p. 4

²⁸⁷ V. REDING, EU Commissioner for Telecoms and Media Digital Europe - Europe's Fast Track to Economic Recovery, The Ludwig Erhard Lecture 2009 Lisbon Council, Brussels, 9 July 2009

²⁸⁸ COM (2009) 440 Final, p. 5

²⁸⁹ www.europeana.eu/portal/termsofservice.html

²⁹⁰ COM (2009) 440 Final, p. 5

²⁹¹ Such approach is followed by several services that distribute audiovisual content online, such as the BBC iPlayer and the video player on Fox.com

contradicts with the goal of Europeana to *make Europe's cultural and scientific resources accessible for all*²⁹².

In part, the fragmentation of the right to disseminate content within certain territories is the result of financial considerations. For rightholders, it may be more financially interesting to restrict the scope of a licence to one country, allowing them to re-license the content in other countries and to receive royalties in each separate country. However, such licensing policies are hard to reconcile with the ubiquity of the online environment²⁹³. In this context, the encouragement of the adoption of multi-territorial licensing agreements is crucial in creating a balance between rightholders interests and public benefit. In addition, the legal uncertainty that exists with regard to the current legal framework may prove to be an additional barrier for the conclusion of pan-European licence agreements. The gaps and ambiguities identified in this report may prove useful in this respect²⁹⁴.

5.3. Orphan works

A second problem faced by Europeana is the inclusion of orphan works, *i.e.* copyrighted works of which the rightholders cannot be identified (see section 3.7.5 above). As a result, actions such as the digitisation, reproduction and dissemination of orphan works are not allowed, because they require the consent of the rightholders²⁹⁵. In addition, any commercial interest in these works is undermined by the concomitant legal uncertainty.

In the United States, the topic of orphan works has received significant attention in the context of the Google books settlement²⁹⁶. Through the Library Project, which is part of the larger Google Books project, Google has scanned thousands of books from university and civic libraries. A large number of these books are in-copyright, but are out of print or actual orphan works. Regardless of intellectual property concerns, Google has scanned these books and made them available in snippets. This has led to a claim from the US Authors Guild, which in turn has led to the proposed settlement. Under the settlement, Google would be released from liability for scanning, searching and displaying books, in exchange for 63% of the advertising revenues arising from Google Books²⁹⁷. More significantly, the deal would allow Google to continue making available out-of-print and orphan works, while holding a share of the revenues in trust for the rightholders. A new entity, the "Book Rights Registry", would be responsible for passing along payments to authors and publisher. The settlement process was put on hold as a result of the significant number of objections that has been raised, including by the US Department of Justice²⁹⁸. However, lately, a Federal Judge gave the parties time to negotiate a new deal addressing some objections that were filed from implicated groups²⁹⁹. Judge Chin mentioned that it made no sense to hold a hearing on the settlement when there are indications that the parties are still negotiating changes in it³⁰⁰.

²⁹² www.europeana.eu/portal/aboutus.html

²⁹³ See Section 5.2

²⁹⁴ See Section 3.1 and 3.2.

²⁹⁵ See Section 3.7.5

²⁹⁶ See Proposed Settlement, Authors Guild v. Google Inc., No. 05 CV 8136 (S.D.N.Y. filed Oct. 28, 2008)

²⁹⁷ J. GRIMMELMANN, "How to Fix the Google Book Search Settlement", *JILL*, vol. 12, nr. 10, p. 11

²⁹⁸ The decision to postpone the planned fairness hearing is available at http://thepublicindex.org/docs/case_order/20090924.pdf

²⁹⁹ <http://bits.blogs.nytimes.com/2009/09/24/google-books-settlement-delayed-indefinitely/?partner=rss&emc=rss>

³⁰⁰ *Ibid.*

5.4. Consequences of format shifting

A third issue is the uncertainty about whether the digitisation of public domain works creates new intellectual property rights. This question results from the fact that some Europeana contributors claim rights on materials in their collection that are in the public domain, but have been converted to a digital format. Such claims take the form of watermarks and charging for downloading the works or viewing them in a higher resolution³⁰¹.

From a legal point of view, the question is whether a digitised work can be regarded as an "original" work. Although article 2 of the Berne Convention does not explicitly mention it, the criterion against which the copyrightability of literary and artistic works needs to be checked is "originality"³⁰². As noted above, no common definition of the standard of originality has been adopted by Copyright Directive³⁰³. As a result, each Member State is free to uphold its own regime of originality standards for copyright protection, which may result in discrepancies. In particular, these standards may vary in function of the type of work that is digitised³⁰⁴.

Despite the dissimilarities in interpretation throughout the Member States, the notion of originality usually requires some form of intellectual, creative or personal input³⁰⁵. Therefore, simple, straightforward digital reproductions of a work may not achieve the required standard of originality.

In addition, marking digitised public domain works as original, threatens to nullify much of the benefits of the making physical works in the public domain easily accessible in a digital form. The Commission has also stressed the importance of keeping public domain works within the public domain after a format shift³⁰⁶. However, it is clear that fair compensation mechanisms which take into account the nature of the digitised work should be put in place to incentivise the digitisation of public domain works. Therefore, it should be considered which public or private funding mechanisms can be put in place to compensate institutions for their efforts in this respect, without connecting such compensation with the establishment of new intellectual property rights.

5.5. Public domain works

A fourth factor limiting the content available on Europeana is the difference between European and United States copyright legislation with regard to what constitutes a public domain work. Both in Europe and the US, the duration of copyright protection is set at 70 years after the death of the author³⁰⁷. After this period, copyright expires and works fall into the public domain. However, in the US, works that were published before 1923 are in the public domain, regardless of the date of decease of their author. The

³⁰¹ COM (2009) 440, p. 7

³⁰² T. DREIER, B. HUGENHOLTZ, *Concise European copyright law*, Kluwer Law International, 2006, p. 30

³⁰³ See Section 3.1

³⁰⁴ As noted in COM (2009) 440, p. 7, the difference in digitisation cost of various types of work (such as books and three-dimensional objects) subject to copyright, may influence the decision of what constitutes originality.

³⁰⁵ For an overview of the interpretation of the notion in various Member States, see G. KARNELL, *European originality: A Copyright Chimera*, available at www.cenneth.com/sisl/pdf/42-5.pdf, p. 76 - 77

³⁰⁶ Europe's cultural heritage at the click of a mouse: Progress on the digitisation and online accessibility of cultural material and digital preservation across the EU, 11.8.2008, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0513:FIN:EN:PDF>, p. 7 (COM (2008) 513)

³⁰⁷ In Europe the term was harmonised by Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights, OJ no. L290 of 24 November 1993, pp. 9–13. In the United States, the extension was established by the *Copyright Term Extension Act (CTEA) of 1998*. The Act can be consulted at www.copyright.gov/legislation/s505.pdf

result is that European copyrighted works from before 1923 can be digitised and made available to consumers in the US, while they may not be available in Europe³⁰⁸.

In its 2009 Communication on Europeana, the Commission has stated that solutions involving rightsholders and cultural institutions should be considered to redress this situation³⁰⁹.

- A first possible solution is creating registries for orphan works and out of print works. While this approach would allow stakeholders to obtain a better view on the copyright restrictions applicable to a particular work, and possibly to allow the use of the work under one of the rights clearance mechanisms mentioned above, it would not remedy the discrepancy between the US and Europe created by the 1923 US cut-off date.
- The second suggestion entails implementing a similar cut-off date in Europe, following which a lower threshold for diligent search may be applied. However, as mentioned above, compliance with the standards of diligent search will only result in the provision of a licence if no rightholder has been identified. Consequently, where a rightholder is identified for a work created before 1923, Europe will still have a more limited number of works in its public domain. Therefore, in order to remove the existing disparity, Europe should consider adopting a cut-off date following the example of the United States.

6. Conclusions

1. Over the years, many Community legal instruments and policy documents have been enacted in the field of copyright. The most important legal instruments are the Copyright Directive and the Enforcement Directive.
2. While the Copyright Directive and Enforcement Directive take into account some broad **characteristics of the online environment**, many specific characteristics are not considered. For example, the Copyright Directive contains a long list of exceptions and limitations to the exclusive rights of authors, but few of these exceptions and limitations fit properly in the digital environment, and many are not technologically neutral.
3. Furthermore, the general terms used in the Copyright Directive are drafted in a rather **general language** and are vague and are open to different interpretations. For example, the exception on temporary acts of reproduction does not specify what qualifies as an act without "economic significance" (article 5 Copyright Directive). Similarly, it is unclear what constitutes "adequate legal protection" in article 6 Copyright Directive.
4. In addition, there are some **gaps** in both legal instruments, such as the lack of a single standard of originality, the absence of segmentation-preventing measures outside online music and the lack of a uniform criterion to determine the applicable law and the competent court.
5. Due to the diverging implementations of the EU-level instruments and the lack of a harmonised method of copyright management, there is significant **market fragmentation**. The difficulty to get legal certainty on the reuse of content and on clearing rights also contributes to this issue. Several Commission initiatives (such as the Commission Recommendation of 2005, the Green Paper on Copyright in the Knowledge Economy and the Communication on Creative Content Online in the Single Market) try to alleviate these concerns, but have not yet solved them.
6. Another important issue is the lack of a harmonised set of mandatory **exceptions and limitations** to the exclusive rights of authors. As a result, Member States can decide if and how to implement the

³⁰⁸ COM (2009) 440, p. 6

³⁰⁹ COM (2009) 440, p. 6

exceptions and limitations. The list of exceptions also exhibits many ambiguities and leaves ample discretionary room to Member States. Consequently, the exceptions and limitations have become a cluttered chaos on the Member States level.

7. **Technological protection measures** (TPMs) also entail many legal issues. The Copyright Directive legally protects TPMs – which shifts the focus of the legal protection from the copyrighted work to the technology that protects its – but does not provide specific guidelines on the *implementation* of TPMs. In addition, the Copyright Directive does not allow circumvention of TPMs not even if it is made for legitimate purposes. Further, the use of TPM technologies could conflict with a user's data protection and privacy rights.
8. Furthermore, the Copyright Directive and Enforcement Directive are **unbalanced**. The reproduction rights are overly broad and overlap with the right of communication to the public. Also, the IP enforcement regime of the Enforcement Directive is broad covering even minor and unintentional infringing acts.
9. As a result, the current legal instruments in the field of copyright are **insufficient**. They do not satisfy rightholders (which face a fragmented and pirated market) and do not satisfy users either (who face a list of ambiguities and a limited list of exceptions that does not take into account their daily concerns). A fundamental reform has become necessary.

7. Recommendations

7.1. Responding to the changed role of users

7.1.1. *New provisions to cover the "user created content" phenomenon?*

Definition – *"There is a significant difference between user created content and existing content that is simply uploaded by users and is typically protected by copyright"*³¹⁰. In a recent OECD study, user created content (UCC) is defined as content that is made publicly available over the Internet, which reflects a certain amount of creative effort, and is created outside of professional routines and practices³¹¹. In this definition, no distinction is made between original or derivative works. The only criterion is that this works stems out from the effort of a person (natural or legal) *outside of the course of its trade*.

This definition reflects also the beliefs of those that support the proliferation of the UCC phenomenon that argue that *"non-commercial users have different incentives to create, use, and to share than established professional content holders; [...] these incentives should be preserved due to their social and cultural impact"*³¹². In the i2010 Mid Term Review it has been observed that *"user created content experienced especially rapid take up, confirming the Internet as a medium of two way communication"*³¹³.

New exception? – Some have recommended to create an exception *"for creative transformative or derivative works within the parameters of the Berne Conventions three step test"*³¹⁴. Furthermore there

³¹⁰ Green Paper on Copyright in the Knowledge Economy, COM(2008) 466/3 p. 19

³¹¹ Participative Web: User Created Content, Working Party on the Information Economy, OECD 2007, available at www.oecd.org/dataoecd/57/14/38393115.pdf, p.9

³¹² *Ibid.* p. 82

³¹³ i2010 Mid Term Review, (COM/2008/199). p. 36

³¹⁴ Gowers Review of Intellectual Property 2006, o.c., p. 6

have also been recommendations to introduce a limited private copying exception for format shifting without any accompanying levies for consumers³¹⁵. In the Gowers Review in UK it is suggested to amend the Copyright Directive so as *"to allow for an exception for creative, transformative or derivative works within the parameters of the Berne 'Three Step Test'"*³¹⁶. According to some commentators, the exception adopted in relation to the user generated content must be made mandatory³¹⁷.

However, at the same time, there are others who claim that there is no need to adopt any new rules in relation to the UCC and who argue that there is no evidence that *"further or different rules are necessary"*³¹⁸. According to some business players: *"the current copyright system of protection and limitations can accommodate the new generation of creators that are utilizing new digital technologies"*³¹⁹. In the same vein it has been also supported that there is *"no justification for new exceptions as the market is developing and will continue to develop on the basis of agreement between the parties, based on copyright and facilitated through licensing"*³²⁰. This argument is further elaborated by suggesting that there is no need to change the law since the already existing exceptions and limitations can be *"combined with systems like creative commons, and machine to machine readable permissions such as ACAP"*³²¹ to provide a sufficient environment for the proliferation of the UCC.

In the 2009 Communication on Copyright in the Knowledge Economy, it has been noted that: *"[...] the Commission intends to further investigate the specific needs of non-professionals that rely on protected works to create their own works. The Commission will further consult on solutions for easier, more affordable and user-friendly rights clearance for amateur users."*

Our position – While we appreciate the concerns of the rightholders, at the same time we welcome the suggestion of the aforementioned Communication to further investigate the user created phenomenon. It is our belief that the current legal framework is not sufficiently adapted to the concept of user generated content, if only because the current exceptions and limitations in the Copyright Directive are not mandatory. We think that it is now the time to provide the definition of the user created content to distinguish it from any other forms of generated content in order to further elaborate whether to attribute to those exercising it some lawful uses.

One idea could be to create new exceptions and/or statutory rights for "real" user generated content (*i.e.*, content that reflects a certain amount of creative effort, and is created outside the professional context). User generated content has been the basis of many success stories in the online environment (such as YouTube, Wikipedia and DailyMotion) and promises to be the model of the future. In the context of the reform of the Copyright Directive, we therefore highly recommend to consider such new exception or statutory right according to the definition provided to describe the phenomenon.

³¹⁵ *Ibid.*

³¹⁶ Gower's Review on Intellectual Property, 2006, *o.c.*, p. 72

³¹⁷ ASSOCIAZIONE ITALIANA BIBLIOTHECHE, Comments to the Green Paper on Copyright in the Knowledge Economy at the European Commission, p. 3

³¹⁸ Penguin Group, Comments to the Green Paper on Copyright in the Knowledge Economy at the European Commission, p. 3

³¹⁹ Microsoft, Comments to the Green Paper on Copyright in the Knowledge Economy at the European Commission, p. 2

³²⁰ European Coordination of Independent Producers (CEPI), Comments to the Green Paper on Copyright in the Knowledge Economy at the European Commission, p. 3

³²¹ Automated Content Access Protocol (ACAP), available at www.the-acap.org, as found in European Coordination of Independent Producers (CEPI), Comments to the Green Paper on Copyright in the Knowledge Economy at the European Commission, p. 9

For example, it could be stated that users (iConsumers) must have the right to reuse (digital) content, to the extent that this reuse is not intended to harm the rights of rightholders. On the basis of this right, a user would be allowed to reuse small fragments of commercial music and/or movie when publishing a new home video on a video sharing platform, provided there is indeed a create effort. The user would not be allowed, however, to publish the entire commercial track or the entire movie on the video sharing platform.

AVMS issues – Another important issue for user generate content emanates from the new Audiovisual Media Services Directive. This Directive only applies to service providers that exercise "editorial responsibility" over audiovisual content, which is defined as "*the exercise of effective control both over the selection of the programmes and over their organisation*". It is not clear to which extent a video platform with user generated content (such as YouTube) falls within the scope of this definition, as it is difficult to argue that such platforms exercise "editorial control" over the millions of videos uploaded to its platform (they typically only remove illegal content on request). Instead, it could be argued that "the community" exercises this control. However, the Directive does not take into account such decentralised organisations, and only focuses on traditional, centralised control hierarchies. As the Directive is not yet implemented in all Member States, it is too early to tell how this will be dealt with in practice.

7.1.2. Dealing with consumers

Many of the controversies between consumers and businesses within the digital content market result from "*the consumers' wish to make best and most profitable use of digital generated work and on the other hand the interest of the industry to exercise control over the content's use and distribution to secure a viable business model*"³²². The challenge is to reconcile the conflicting interests and to find a balanced solution that satisfies both parties' reasonable and fair interests.

The current copyright legal instruments do not sufficiently take into account consumers, since general copyright law had been mainly designed to regulate the relationship between authors / rightholders and intermediaries (publishers)³²³. In the current legal instruments, consumers of digital content are generally treated in the same ways as *users* of analogue content. A challenge of the digital environment is therefore to address the complex roles of consumers and users of digital content.

Dealing with "active & passive consumers" – A first recommendation is dealing with the active consumer (further called the "iConsumer"). Indeed, the role of the consumer has changed in the new digital era: nowadays, digital technologies empower consumers to undertake actions that were until previously performed only by professional suppliers. Consumers write blogs, consume media, remix content, and create new content (e.g., as "citizen journalists" on their blogs).

Hence, new statutory provisions must be adopted that allow the iConsumer to undertake some minimum actions on the content³²⁴. At the same time "passive consumers", *i.e.* consumers that do not actively create new context, must be more effectively protected too.

Both active and passive consumers should be able to take advantage of all the basic consumers' rights such as: the right to "technical neutrality"; the right to receive information regarding the technological protection measures used; the right to fair contract terms; the right to redress when products/works are of unsatisfactory quality; the right of interoperability of content and devices; the right of privacy

³²² N. HELBERGER, *Making place for the iConsumer in Consumer Law*, available at www.ivir.nl/publications/helberger/Making_place_for_the_iConsumer.pdf

³²³ *Ibid.*

³²⁴ The word "*prosumer*" (which describes the current active user of digital content) stems from the combination of the words "professional" and "consumer". See A. TOFFLER, *The Third Wave*, 1980, as found in N. HELBERGER, *o.c.*

protection, as well as the right not to be criminalised³²⁵. Additionally, we are in favor of adopting Codes of Conduct or/and minimum contractual clauses that would apply to all standard form contracts (*i.e.*, non-negotiated contracts), since the former type of contracts broadly governs the majority of transactions taking place in the online environment³²⁶.

Moreover, it could be envisaged to adopt a "black list" of unfair clauses, according to which a term in a non-negotiated contract would be deemed unfair if it departed from the provisions of copyright law³²⁷. Another suggestion is to issue a sector specific list of "grey contractual clauses" that are considered as unfair under provisions of unfair contracts terms, acting as a presumption of unfairness³²⁸. In the 2007 European Parliament Resolution on consumer confidence in the digital environment, it has been supported that "*the application of the regime on unfair contract terms should be reinforced in the field of end-user licence agreements and should include technical contract terms*"³²⁹. In this vein, the same document supports that the aim should be to increase consumer confidence in the digital environment. For this reason, among other suggestions it has been proposed to pursue the "*strengthening (of) traditional consumer protection instruments to ensure that they are used effectively in the digital environment as well, especially by broadening the objectives of the European Consumer Centres*"³³⁰.

In addition, in order for the protection to be expanded to more stakeholders (e.g. SMEs), a provision in the general contract law of Member States could be introduced to grant professionals too the right to benefit from a protective measure against the use of restrictive terms³³¹.

In Greece for example, in the general consumer protection law (that implements Directive 93/13/EC into national law), a consumer is defined not only as a natural person but also as a legal person that acts outside of the course of its business. This way SMEs and any other enterprise acting outside of their everyday trade could fall under consumer protection regime. This would also be in line with the OECD definition of user created content that does not distinguish natural or legal persons as long as they act outside of "professional routines and practices". Hence, their trust and legal security could be enhanced so as to participate with greater anticipation in the knowledge based economy.

Enlarge private use exception – The private use exception is difficult to apply to the context of the Internet, where publishing activities can easily reach a global audience. For that reason such activities might not fall under the notion of private use since the Internet by definition is not a private but rather a public tool. In addition it has been argued that the private use exception might fail to pass the "three step test" because the act of copying might not fall under "certain special cases" since over the Internet copying is the rule and not the exception. We therefore encourage to enlarge the private use exception, so that it also covers internet publishing activities undertaken by consumers.

³²⁵ www.beuc.eu/Content/Default.asp?PageID=825

³²⁶ L. GUIBAULT, *Wrapping information in contract: how does it affect public domain?*, p.2

³²⁷ L. GUIBAULT, *Accommodating the needs of i-Consumers: Making sure they get their money's worth of digital entertainment*, p.10, available at

www.ivir.nl/publications/guiibault/Lucie_Guibault_Accommodating_The_Needs_Of_iConsumers.pdf

³²⁸ *Ibid.* It should be noted, however, that these rules currently only apply to consumers (not to legal persons or enterprises)

³²⁹ European Parliament resolution of 21 June 2007 on consumer confidence in the digital environment (2006/2048(INI)), 2006/2048 (INI), recital 38

³³⁰ *Ibid.*, recital 10 (4)

³³¹ *Ibid.*

7.2. Meeting business requirements

7.2.1. Resolving the issue of rights management

In the online world, the principle of territorial exploitation of copyright creates obstacles to an Internal Market in rights management, due to the fact that when exploitation extends to more than one Member States, different rules apply³³². The variety of rules applies both to individual management of rights as well as to collective management. As was clearly mentioned in the 2004 Communication for the Management of Copyright and Related Rights in the Internal Market, a lack of common rules regarding the governance of collecting societies may potentially be detrimental to both users and rightholders as it may expose them through different conditions applying in various Member States as well as to a lack of transparency and legal certainty³³³.

7.2.2. Promoting multi-territorial licensing agreements

In order to foster investments, contractual copyright provisions should guarantee business players a sufficient degree of legal certainty. This could, for example, be achieved through **predetermined contractual terms**, which lead to less time and money spent during the preparatory stage of a transaction. Indeed, as it has also been suggested previously, "so far as it is commercially viable and consumer desirable, content producers should be able to make distribution deals without excessive technical, legislative and regulatory obstacles"³³⁴.

At the same time, commercial players need licensing policies that correspond to the ubiquity of the online environment. It would therefore be appropriate to **further encourage the adoption of multi-territorial licensing** in order to increase legal certainty of commercial users and foster the development of legitimate online services.

An example could be taken from the rules adopted in the Commission Recommendation of 18 May 2008 on collective cross border management of copyright and related rights for legitimate online music services³³⁵. According to this Recommendation, there should be no difference in the treatment of rightholders by rights managers on the basis of the Member State of residence or nationality: rightholders should be able to properly license their works throughout the territory of the European Union. In addition, it has been supported that multi territory licences should follow the general rule that different types of licences and practices apply to different types of content³³⁶.

As was mentioned in the 2004 Communication on the Management of Copyright and Related Rights in the Internal Market³³⁷ an option to the issue of community wide licensing could be to adopt the model chosen for the satellite broadcasting sector under the Directive 93/83/EEC³³⁸ for the rights of communication to the public and making available to the public. According to article 1(2)(b) of this

³³² 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", p.7 (COM (2004) 261 Final)

³³³ *Ibid.*

³³⁴ See *Interactive content and convergence: Implications for the Information Society*, A study for the European Commission, (DG Information Society and Media, Final Report 2006), p. 27

³³⁵ Commission Recommendation of 18 May 2008 on collective cross border management of copyright and related rights for legitimate online music services, O J L 276/54 21.10.2005, recital 11

³³⁶ Creative content online in Single market, as above, p.6 (COM 2007) 836)

³³⁷ COM (2004) 261 Final, p. 9

³³⁸ 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", Official Journal L 248, 06/10/1993, p. 15- 21

Directive, the relevant act of communication to the public “occurs solely in the Member State where, under the control and responsibility of the broadcasting organisation, the programme - carrying signals are introduced into an uninterrupted chain of communication leading to satellite and down towards the earth”³³⁹. However, in the same Communication it has been also stressed that if this model is applied to copyright and related rights without limiting the contractual freedom of the parties, as was done under Directive 93/83/EEC, it does not necessarily yield the desired result of multi-territorial licensing, as it only determines the applicable law and does not by itself result in extending the license to the area.

7.2.3. *Fostering security in the relationship between rightholders and collective rights managers*

In most Member States, there is only one collecting society for each group of rightholders in each territory in respect of the collective management of their rights. For this reason, it is necessary that the principles of good governance, non-discrimination, transparency and accountability of the collecting society are followed and respected³⁴⁰. As was underlined in the 2004 Communication, these principles should apply to the acquisition of rights, the conditions of membership, of representation and to the position of the rightholders within the society³⁴¹.

Several interesting ideas to counter the currently fragmented Internal Market can also be found in Directive 93/83/EEC³⁴². This Directive sets forth several important provisions on licensing, some of which could be used as an example for general copyright licensing issues. If adopted under a technological neutral wording, they could be used as the basis to deal with important licensing problems of digital content. They could be also used as a useful tool to confront the lack of actual harmonization of the rules on collecting societies.

This position is also shared by the European Commission: in a recent speech³⁴³, Commissioner Reding stated, with respect to the issue of fragmented licensing: "We had a similar problem when commercial satellite TV started more than 30 years ago. As right clearance for this per se cross-border service became increasingly complex, Europe developed the Cable and Satellite Directive and introduced a simplified system of rights clearance for the whole of Europe. I believe it is now time to develop similar solutions for the evolving world of online content."

A first useful element is the **extension of a collective agreement** between a collecting society and broadcasting organisations concerning a given category of works, to other rightholders of the same category which are not represented by the collective society³⁴⁴. This could facilitate licensing mechanisms by extending their positive achievements to more rightholders. The underlying idea is to avoid a situation where rightholders of broadcasts programs not represented by a collecting society would be enabled to individually enforce their rights thus creating interruptions in retransmitted programs. This reasoning too could be used as a general rule to be followed in other licensing models as well^{345 346}.

³³⁹ COM (2004) 261 Final, p. 9

³⁴⁰ *Ibid.*

³⁴¹ *Ibid.* p.19

³⁴² Official Journal L 248, 06/10/1993, p. 15- 21

³⁴³ V. REDING, EU Commissioner for Telecoms and Media Digital Europe - "Europe's Fast Track to Economic Recovery", The Ludwig Erhard Lecture 2009 Lisbon Council, Brussels, 9 July 2009

³⁴⁴ Articles 3 and 9 of the Directive

³⁴⁵ T. DREIER and P.B. HUGENHOLTZ, *Concise European Copyright Law*, p. 280

³⁴⁶ See also the Creative Content in a European Digital Single Market: Challenges for the Future - A Reflection Document of DG INFSO and DG MARKT, 22 October 2009, available at http://ec.europa.eu/avpolicy/docs/other_actions/col_2009/reflection_paper.pdf, p. 14

Another useful element is art. 11 of this Directive, which introduces the establishment of a **mediation system** when an agreement or an authorization of the cable retransmission of a broadcast is not reached. This can be considered as a measure to facilitate contractual solutions further introduced to avoid deadlocks of contractual procedures.

A third element is that the relationship between rightholders and collective rights managers, whether based on contract or statutory membership rules, should include a **minimum protection for rightholders** with respect to all categories of rights that are necessary for the provision of legitimate online services.

Relation between collecting societies and the end users – The fact that collecting societies usually have a wide repertoire and dispose an exclusive mandate for the administration of rights in relation to each field of activity brings them in a stronger position if compared to users. As a response to users' complaints regarding the tariffs and the licensing conditions, we endorse the 2004 Communication's suggestion that societies should be obliged to publish their tariffs and grant a license on reasonable conditions. Additionally, it is important for the users to be able to contest the tariffs through different methods (courts, mediation tribunals, public authorities)³⁴⁷.

As it was stated in the aforementioned Communication, *"for both the off-line and on-line exploitation of intellectual property, more common ground on several features of collective management is required"*³⁴⁸. In any case more efficiency and transparency should be achieved in the field of collective management.

7.2.4. Adopting codes of conduct

Copyright protection bestowed to the rightholder is regulated both by the legal provisions and the terms and conditions of the licensing agreements between the parties. In a digital context, those contracts are typically standard contracts that contain clauses that are predefined by the rightholder and refer to an unidentified number of recipients/users. Accordingly, users are "obliged" to accept the terms without previously negotiating with the rightholder (*"take it or leave it"*).

Promoting codes of conduct – The European Commission and the Member States should encourage the creation of codes of conduct (or of standard (sector-specific) licensing clauses) tailored to the needs of both the rightholders and the users in those market sectors that these codes are required by the stakeholders. Such codes of conduct can address issues such as transparency and fairness of contractual terms, and they could act as an incentive for all stakeholders to voluntarily comply with contractual terms regarding digital content.

Moreover, codes of conduct can increase trust between the sector specific digital content players. The creation of codes of conduct and of standard terms would bring together all stakeholders to discuss and to decide on the most crucial issues and problems related to the protection of digital content.

Viability – Obviously, the success of such measures depends on the active involvement of all stakeholders in the creation of the codes of conducts. However, stakeholders in the private sector will often be incentivised to develop codes of conduct, as they generally consider self-regulation to be more

³⁴⁷ "The Management of Copyright and Related Rights in the Internal market", p.18 (COM (2004) 261 Final)

³⁴⁸ *Ibid.* p. 19

efficient, more convenient and better adapted to their needs, while at the same time reducing enforcement costs³⁴⁹.

In this vein, some business stakeholders have explicitly expressed the opinion that it is necessary to permit the market to self-regulate. During the public consultation of the Communication on "Creative Content Online in the Single Market" in July 2006 among the comments received, emerged the argument that *"there exist an absence of Commission's premature intervention with legislation in a nascent and fast evolving market, raising questions on the necessity of adapting legislation instead of permitting market models evolve themselves"*³⁵⁰. In line with the above, there were also contributions calling the Commission to encourage cooperation between industry, right-holders and consumers³⁵¹.

As analysed above, it is perceived that the law has in several occasions adopted generic legal notions that are not always easy to construe. It has been also commented that some stakeholders feel that certain of the provisions adopted by the Copyright Directive are not suitable to meet their current needs. For this reason, sector-specific codes of conduct with precise updated provisions that tackle the current needs and requirements of each different category of digital content, could be more suitable and could provide an effective solution to tackle with the different sector specific problems that appear.

Common acceptance – In order to achieve maximum acceptance of the codes of conduct, it is necessary that all the sector-specific stakeholders agree on the basic rules set out in those codes, and feel secure and able to participate in the digital content chain: *"creating a secure environment through contractual agreements that incorporate shared values of the contracting parties is the way to promote self enforcement into the contract"*³⁵². Fairness of the contract is likely to lead to voluntary compliance which could be the most fruitful long term practice for the protection of copyright throughout the Single Market.

*They could, for example, agree on issues such as pre-contractual information required in relation to the technical features of the products and services, the compatibility and the playability of files devices, the issue of on line contracting on copyrighted material, issues of multi-territorial licensing, etc. For instance, some players in the market have already expressed their willingness to enter into a dialogue with other stakeholders on the basis of the points raised by the Communication on Creative Content Online in the Single Market*³⁵³.

7.2.5. Promoting the adoption of registration formalities for digital content copyright?

Issue – The user-created content phenomenon and the orphan work issue greatly influence business players. For example, due to the lack of formalities to receive copyright protection, it is complicated for someone who wants to use an existing work to find the rightholder and to obtain the permissions required³⁵⁴. This could cripple creativity, since those willing to develop digital content may find it difficult

³⁴⁹ L. GUIBAULT, *Accommodating the needs of iConsumers: making sure they get their money's worth of digital entertainment*, p.13, available at www.ivir.nl/publications/guibault/Lucie_Guibault_Accommodating_the_Needs_of_iConsumers.pdf

³⁵⁰ On Creative Content Online in the Single market, 3/01/2008, p.3 (COM (2007) 836)

³⁵¹ *Ibid.*

³⁵² Promoting innovation and economic growth: the special problem of digital intellectual property a report by the digital connections council of the committee for economic development, 2004, p. 74

³⁵³ Google contribution on Creative Content Online, available at http://ec.europa.eu/avpolicy/docs/other_actions/col_2008/comp/google_en.pdf

³⁵⁴ See section 3.7.5 above

to build upon previous works that are not registered or recorded in any repository³⁵⁵. For that reason there have been some arguments claiming that new ways to license copyright or new technologies to facilitate licensing could be explored in order to provide solutions for this matter.

Repository – According to the 2007 OECD study: *"this could, for example, involve the creation of clearing houses/centres for the attribution of rights to UCC and other creators"*³⁵⁶. In line with the above, Prof. LESSIG uses the example of the decentralised domain name system to propose a similar system which could be created for the registration and renewal of copyrights. This idea – which would require an amendment of the TRIPS treaty and the Berne Convention – resides in creating a "repository" where only work that is considered by its author(s) as valuable would be registered and as such protected by economic copyright rules, whereas work that is not registered would be free content (governed by the rule of freedom of access at no cost) where only moral right rules would apply (or even not)³⁵⁷. In a similar vein, the Gowers Review in Great Britain has suggested that the local Patent Office should establish a voluntary register of copyright either on its own, or through partnerships with database holders³⁵⁸.

Hence, according to these proposals, by introducing these formalities much of the uncertainty found in the digital content could be overcome. It would enable those who wish to create and/or re-use content by using digitally accessed works to identify whether the content is free or not, to locate the rightholder, to assert those rights and to renew the declaration of rights when necessary³⁵⁹.

Evaluation – The 2007 OECD study stresses that these kind of suggestions *"rely on drawing a dividing line between commercial and non-commercial work which may however be difficult to establish taking into account the diversity of UCC services and related business models. Moreover, the suggested benefits from such new approaches would have to be weighed very carefully against their costs, including, for example, to the established commercial content industry which produces significant economic value"*³⁶⁰. The copyright system as it is in force today in most of the countries worldwide (where no formalities are required) has been established following International Treaties and international consensus on the matter. More specifically, art. 5 par. 2 section a) of the Berne Convention lays down that *"the enjoyment and the exercise of these rights shall not be subject to any formality"*³⁶¹. It is thus understood how fundamental the principle of lack of formalities regarding the protection of the work under copyright is and how the existence of a repository would be equal to a well structured formality. Hence, we realise that this suggestion can only be implemented in the long term. Nonetheless, this seems like an interesting idea for further discussion, provided that a proper balance is achieved.

Alternative – In addition, or as an alternative to, the idea to install a repository for copyrighted works, we recommend to include an exception where the use of an orphan work would not lead to copyright infringement when a diligent, good faith search has been conducted to find the rightholder (see the detailed analysis above). When the rightholder of the alleged orphan work would then show up, only a fair and reasonable compensation would be necessary.

³⁵⁵ L. LESSIG, *Free culture: How big media uses technology and law to lock down culture and control creativity*, 2004, Penguin Press, p. 286 - 291

³⁵⁶ Participative Web and User Created Content, OECD 2007, p. 82

³⁵⁷ L. LESSIG, *Free culture, o.c.*, p. 286 - 291

³⁵⁸ Gowers Review of Intellectual Property 2006, *o.c.*, p. 6

³⁵⁹ L. LESSIG, *Free culture, o.c.*, p. 286 - 291

³⁶⁰ Participative Web and User Created Content, OECD 2007, p. 82

³⁶¹ The Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886 available at www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html

7.2.6. Clarifying the role of online intermediaries

The role of intermediaries should be clarified, in particular with respect to the possibility to issue injunctions. We refer to our recommendations in Chapter 6 (liability of online intermediaries) for more information on this subject.

7.2.7. Adoption of effective enforcement measures

Enforcement mechanisms are of paramount importance for the success of the Single Market³⁶². Although some progress to reach that goal has been made by the Enforcement Directive, however several issues remain unresolved.

One of the most important challenges is to define which law applies in case of a copyright infringement. It should be envisaged to adopt measures that indicate the application of a single law to all acts of infringement. Although there are no clear answer to this matter, the legal doctrine has mentioned some points of attachment that could be useful for further discussions³⁶³:

- the normal rule should be that the law applicable in an infringement issue should be the law of the country in which the server that hosts the infringing content is located
- if the application of the normal rule does not meet the minimum standards laid down by the Berne Convention and TRIPs, the law of the country where the operator of the website with the infringing content has its residence or principal place of business can be used;
- in other cases, the law of the forum can be applied; provided it meets the minimum standards of the Berne Convention and TRIPs Agreement.

7.3. Promoting the fair balance of rights between the interested parties

As it has been stated in the 2009 Communication on "Copyright in the Knowledge Economy", the dawn of the online culture of sharing and swapping, data mining and interactive learning, has exposed a difference of views between those who wish to move toward a more permissive system of copyright and those who wish to preserve the status quo. The challenge is to reconcile these interests³⁶⁴. In addition, according to the Corrigendum to the Directive 2004/48/EC *"the demand for quality digital content in Europe with balanced access and user rights, by a broad community be they citizens in society, students, researchers, SMEs and other business users, or people with special needs wishing to augment their knowledge, or 're-users' wishing to exploit digital content resources to create services, is increasingly apparent"*³⁶⁵. Hence, the fair balance of interests and rights between the distinct participants to the digital content environment is a necessity that has to be reached. For that reason, among others, the following important issues must be considered.

7.3.1. Dealing with copyright infringements

The topic of digital copyright infringements is very difficult to deal with, as it touches the very core of the digital copyright debate.

³⁶² Corrigendum to Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, O J L 195/16 02.06.2004, recital 3

³⁶³ *Ibid*, p. 245

³⁶⁴ COM (2009) 532 final, p.4

³⁶⁵ Recital 5 of the Decision no 456/2005/EC of the European Parliament and of the Council of 9 March 2005 establishing a multi-annual Community programme to make digital content in Europe more accessible, usable and exploitable, O J L 79/1 24.03.2005

Distinction between different types of infringements – A clear distinction should be made between consumer-level copyright infringements and commercial-scale copyright infringements. Recital 14 of the Enforcement Directive already contains a first step in this direction, by distinguishing between commercial and non commercial acts of infringement: *"acts carried out on a commercial scale are those carried out for direct or indirect economic or commercial advantage; this would normally exclude acts carried out by end-consumers acting in good faith"*.

Countering consumer-level copyright infringements – While consumer-level copyright infringements are widespread (particularly among minors/digital natives), sincere caution must be taken into account when adopting measures, because many of these infringements do not have any profit motivation, as they are conducted by private users for personal use. We are convinced that the long-term solution towards consumer-level infringements does not lie only with the adoption of legal instruments, but should also be found in a combination of education and user awareness, making available legal content (in part by adopting new business models), and balanced DRM measures.

This aligns with the Digital Britain report³⁶⁶, which stated that "The civil infringement of taking someone else's intellectual property or passing it on to others through file-sharing without any compensating payment is, in plain English, wrong. However, the Government also believes, and the evidence suggests, that most people, given a reasonable choice, would much prefer not to do wrong or break the law. The objective of the Government's policy is therefore three-fold. Firstly, to provide a framework that encourages the growth of legal markets for downloading that are inexpensive, convenient and easily accessible to consumers."

The Commission must encourage the creation of policies and business models that aim at *"discouraging piracy and increasing incentives to purchase content – while maintaining the balances inherent in copyright law"*³⁶⁷. In this vein, the adoption of Codes of Conduct and of standard licensing clauses based on principles such as fairness, transparency and fair balance of the parties' rights could be a useful tool. This way all parties would know and accept their rights and obligations in advance and would interact within a secure and trustworthy environment. We believe it is better to rely on consumers' acceptability of the rights and obligations set in specific licensing agreements than drafting unilateral licenses with strict rules that would be impossible to enforce and to impose to non complying users.

At the same time, we do not believe that new legal provisions should be undertaken to attack consumer-level copyright infringements with civil and/or criminal sanctions that could undermine the fundamental human rights. This was also recognised by the ECJ in the *Promusicae v. Telefonica* case³⁶⁸ for privacy issues³⁶⁹.

³⁶⁶ See the Digital Britain report, Executive Summary of the final report, nr. 45, available at www.culture.gov.uk/what_we_do/broadcasting/6216.aspx

³⁶⁷ Confronting Digital Piracy, Intellectual Property Protection in the Internet Era, Shane Ham and Robert D. Atkinson, Progressive Policy Institute, available at www.ppionline.org/documents/Digital_Copyright_1003.pdf, p. 10

³⁶⁸ Case C- 275/06, Productores de Musica de Espana (Promusicae) v. Telefonica de Espana SAU

³⁶⁹ Promusicae made an application to the Commercial Court No 5 of Madrid for preliminary measures against Telefonica asking for an order of disclosure of identities and physical addresses of several customers that were found to illegally exchange copyrighted materials through peer-to-peer software. The Court referred to the ECJ for a preliminary ruling asking *"whether Community law, in particular Directives 2000/31, 2001/29 and 2004/48, read also in the light of Articles 17 and 47 of the Charter, must be interpreted as requiring Member States to lay down, in order to ensure effective protection of copyright, an obligation to communicate personal data in the context of civil proceedings"* (nr. 41)

The ECJ answered that *"the Member States must, when transposing the directives mentioned above, take care to rely on an interpretation of the directives which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order. Further, when implementing the measures transposing those directives, the authorities and courts of the Member States must not only interpret their national law in a manner consistent with those directives but also*

Furthermore, the controversial relationship between anti-infringement measures and the right to freedom of speech has also been repeatedly pointed out³⁷⁰. While copyright is considered as one of the means to secure freedom of expression at the same time, it is also considered as antithetical to the freedom of expression since it prevents all but the rightholder from expressing information in the form protected under copyright law³⁷¹. Therefore, an equilibrium must be reached so that copyright will be used in a way that will reward the labor of the author, but at the same time promote the freedom of expression and the progress of science, respect the user's privacy and personal data and cultivate creativity of digital content.

In addition, any legal provisions against consumer privacy that do not restore the fair balance between rightholders and users would strengthen the ongoing "copyright war" on consumers — particularly minors. As pointed out by Prof. LESSIG³⁷²:

"Thus we must keep in mind the other values or objectives that might also be affected by this war. We must make sure this war doesn't cost more than it is worth. We must be sure it is winnable, or winnable at a price we're willing to pay. I believe we should not be waging this war. I believe so not because I think copyright is unimportant. Instead, I believe in peace because the costs of this war wildly exceed any benefit, at least when you consider changes to the current regime of copyright that could end this war while promising artists and authors the protection that any copyright system is intended to provide. (...)

In a world in which technology begs all of us to create and spread creative work differently from how it was created and spread before, what kind of moral platform will sustain our kids, when their ordinary behavior is deemed criminal? Who will they become? What other crimes will to them seem natural?"

At the same time we consider that the direct attack of consumer pirates is not efficient for the rightholders too since it is very costly and time consuming to turn against individuals that reside in different Member States. Additionally Court decisions are not easy to enforce against individual users. For all these reasons, we reject the increasing trend to thwart consumer privacy by directly attacking consumers.

Countering commercial-level infringements – Commercial-level infringements, on the other hand, should be tackled from an entirely different perspective. The current legal instruments must be reinforced to better tackle these infringements. Under the current legal framework, it is still too difficult and too costly for rightholders to fight these types of infringements, and it is too easy for these "pirates" to get away with their activities. We therefore strongly recommend the Commission to encourage Member States to take these infringements very seriously, to increase cross-border cooperation and to strengthen current criminal and civil sanctions. In this vein, the most recent legislative initiative was a proposal for a

make sure that they do not rely on an interpretation of them which would be in conflict with those fundamental rights or with the other general principles of Community law, such as the principle of proportionality" (nr. 68). In other words, while the Member States have some discretionary margin to decide how the fundamental rights must be reconciled, they must be very careful to avoid undermining the fundamental human value of data protection.

³⁷⁰ T. LOVERDOU, *Copyright and freedom of expression : confluences and conflicts – a general overview abstract*

³⁷¹ *Ibid.*

³⁷² L. LESSIG, *Remix – Making Art and Commerce Thrive in the Hybrid Economy*, 2008 (preface)

Directive³⁷³ that would fill the gap created by the implementation of the Enforcement Directive. Although the latter Directive provided measures, procedures and civil and administrative remedies, it lacked the penalties to make enforcement procedure complete. The new proposal for a Directive regarding criminal measures stipulates in article 3 that Member States must consider all intentional infringements of intellectual property rights on a commercial scale as criminal offences. Although this proposal has been criticised for being too vague and too wide, it promised to be an important instrument against the worst infringements. However, the proposal has not yet been adopted.

Furthermore, we recommend that data protection legislation should be adapted in such a way that alleged privacy and data protection infringements can no longer be invoked by commercial copyright infringers as a procedural defense to escape their responsibility. The further refinement and adoption of the Directive regarding criminal measures (see section 1.2.2) should therefore be undertaken.

Care should be taken, however, to not confuse real commercial-level infringements with new online business models, for which the legality lies within a "grey area". If those new business models would be treated as a type of commercial-level infringements, the further uptake of online service provision may become endangered. Therefore, the threshold towards qualification as commercial-level infringements should be sufficiently high.

7.3.2. *Correct adjustment of the interpretation of the "three step test"*

Issue – The "three step test" and its interpretation have been the object for discussions in legal circles. As argued above (section 4.1.2), the test suffers from a lack of direction as to where the line between grants and reservations of copyright should be drawn.

Solution – The correct adjustment of the test seems to be the only way to balance the confronting interests of excessive rightholders protection on the one hand, and infringements that are exercised under the pretext of new privileges granted to content users on the other hand. As it has been pointed out *"a proportionate balance between grants and reservations can serve as a reference point for the application of the three step test"*. To achieve this, a solution could be to *"work on transitory measures to improve the understanding of the three step test to ensure that exceptions have broadly similar impact at national level and are interpreted with sufficient permissiveness to promote innovation"*³⁷⁴. Some commentators argue that the European legislator should provide some guidance regarding the proposed role of the court in the interpretation of the test as well as in the function of the test itself as an interpretative tool^{375 376}. According to those arguments, *"clarification would probably equal to flexibility in the application of the 'three step test' by avoiding a narrow interpretation of the first and second steps while making the third step which enables balancing of the interest of the owners and of public policy, a focal point of the interpretation"*³⁷⁷.

³⁷³ Amended proposal for a Directive of the European Parliament and of the council on criminal measures aimed at ensuring the enforcement of intellectual property rights, (COM (2006)168, final)

³⁷⁴ GOOGLE, Comments to the Green Paper on Copyright in the Knowledge Economy at the European Commission, p. 8

³⁷⁵ 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, 2007, p. 73

³⁷⁶ Some stakeholders even urge the Commission to introduce *"a further step to the three-step principle"*. According to this opinion *"the fourth step should be that the legitimate interests of the right holder should not be detrimental to the world-wide progress of knowledge and to the information needs of the public"*: AIB, Comments to the Green paper on copyright in the knowledge economy of the European Commission, p. 4

³⁷⁷ *Ibid.*

7.3.3. Adoption of mechanisms to deal with orphan works

Issue – Orphan works, *i.e.* copyrighted works of which the rightholders cannot be identified, cannot be digitised, reproduced or disseminated, because these actions require the consent of the rightholders.

Solution – Sector-specific criteria for diligent search should be established in the Member States to enable tracing of rightholders. Such searches should be made subject to the principle of mutual recognition. Databases of orphan works should be created to allow interested parties to easily assess the copyright restrictions resting on a particular work. In addition, a rights clearance mechanisms should be developed to allow for the grant of non-exclusive licences of orphan works.

The rights clearance mechanism could take the form of an extended collective licensing mechanism, an independent body responsible for granting the licences or a copyright exception permitting the use of genuine orphan works.

Regardless of the option chosen, national solutions will need to take into account issues of mutual recognition in Member States to achieve the necessary cross-border effects. Such efforts can be supported by creating databases, shared at European level, of declared orphan works. To simplify such centralisation efforts, it could be considered to encourage Member States to adopt harmonised solutions to the problem of orphan works in their national legislation.

7.3.4. Modifying the exceptions and limitations of the Copyright Directive

As it has been analysed previously in section 3.3, the optional character of article 5 of the Copyright Directive creates difficulties in the Single Market. It should be recognised, however, that this is a highly controversial subject since a lot of different views exist between the various stakeholders.

a) On the one hand, there are those stakeholders that argue to **modify the current exceptions and limitations system**.

From the **consumer's perspective** it has been proposed that *"(copyright exceptions) should at least become mandatory in order to shield them from contractual overrides"*³⁷⁸, while the lawful uses should be "fortified" in such a way that the rightholders would not be able to circumvent the rights or/and exceptions to the reproduction right. The mandatory list of exceptions and limitations would then become obligatory for all Member States, in order to enhance harmonisation and legal certainty within the Single Market and to set the requirements for a more business-friendly environment.

Some **professional organisations** also plead to modify the current exceptions systems. For example, the Italian Association of Bibliothèques, (Associazione Italiana Biblioteche) supports that *"the full balance of interests of equal importance, the full harmonization of national laws, as well as the fundamental purpose of the Directive, namely the affirmation of an open and competitive European market, will be realized only when the exceptions will become mandatory, and they will be clarified and/or enlarged to prevent misunderstandings or narrower implementations"*³⁷⁹. It has also been argued that *"it is important not to construe the protection of copyright and promotion of copyright exceptions as contradictory objectives, or the interests of sectors relying on exceptions as opposed to the interest of sectors relying on protection. On the contrary, these are complementary objectives and interests that are both fostering the development of knowledge and creation and their dissemination"*³⁸⁰. In addition, some stakeholders

³⁷⁸ G. MAZZIOTTI, *o.c.*, p. 88

³⁷⁹ ASSOCIAZIONE ITALIANA BIBLIOTECHE, Comments to the Green Paper on Copyright in the Knowledge Economy at the European Commission, p. 3

³⁸⁰ GOOGLE, Comments to the Green Paper on Copyright in the Knowledge Economy at the European Commission, p. 3

claim that due to the non mandatory approach of the limitations and the exceptions *"the [Copyright Directive] has failed to open the Internal Market to copyright products as was intended"*³⁸¹.

At the same time others argue that: *"there is an integral link between limitations and exceptions and fundamental human rights as expressed in the United Nation's Universal Declaration of Human Rights"*³⁸². Hence, they recommend that the **fundamental human rights** that are expressed by some of the limitations and exceptions³⁸³ should be mandatory.

Some stakeholders attack the fact that the list of exceptions and limitations is **exhaustive**, since they are of the opinion that *"it keeps the exceptions firmly in the twentieth century by limiting those available to provisions that have been found useful in the past"*³⁸⁴. Hence, according to this argument, the exhaustive character of the list could hamper future developments by forbidding the adoption of new limitations that could abide by the new technological trends. For that reason, it has been also proposed that the law can introduce *"an obligatory, non-limited list of exceptions, leaving Member States the possibility to add 'national' exceptions which they deem necessary and which can be reconciled with the 'three step test'. That way, the rights of users and of right holders are both kept in balance"*³⁸⁵. In the same vein, another proposal recommends that *"Member States ought to be free to add exceptions which comply with the 'Three Step Test'"*³⁸⁶.

Other commentators argue that the current exceptions should be replaced by **subjective rights**, which would even be enforceable through court action. Speaking of "rights" instead of "exceptions" would place more emphasis on the fact that, in order to be effectively protected against access and usage restrictions, uses covered by copyright exceptions should be completely and effectively enforceable³⁸⁷.

b) On the other hand there are others that claim that there is **no need for any change** to take place, as the current system created by the Copyright Directive is satisfactory.

For instance, there are those who argue that *"restrictions should not be introduced to benefit economic interests regardless of whether these are public or private; when for practical reasons exceptions appear necessary [...] the legislator is better commanded to let stakeholders find practical solutions with negotiated agreements rather than by interfering in copyright law"*³⁸⁸.

In addition; the Designs and Artists Copyright Society points out that *"copyright, though partially harmonised, remains an intellectual property right which is strongly influenced by the culture and tradition of the respective Member State [...]; the current system of non mandatory exceptions accurately reflects this understanding and constitutes the correct instrument to provide for sufficient flexibility for the Member States while guaranteeing a certain degree of harmonisation and security for users of copyright"*

³⁸¹ FOBID, Comments to the Green Paper on Copyright in the Knowledge Economy at the European Commission, p. 6

³⁸² Green Paper – Copyright in the Knowledge Economy Response of the Conference of European National Librarians (CENL), p. 6

³⁸³ for example in articles 5.2.b, 5.3.a, 5.3.b, 5.3.c and 5.3.d

³⁸⁴ *Ibid.* p. 2

³⁸⁵ INTERDISCIPLINARY CENTRE FOR LAW AND ICT (K.U.Leuven), Comments to the Green Paper on Copyright in the Knowledge Economy at the European Commission, p. 3

³⁸⁶ UNIVERSITY OF LODZ, Comments to the Green Paper on Copyright in the Knowledge Economy at the European Commission, p. 4

³⁸⁷ MAZZIOTTI, o.c., p. 288

³⁸⁸ CEPIC e.e.i.g. (Co-ordination of European Picture Agencies Press Stock Heritage), Comments to the Green Paper on Copyright in the Knowledge Economy at the European Commission, p. 2

protected work." ³⁸⁹. In the same vein, others claim that this "**local approach**" *"has many benefits, with lower costs of enforcement and review via member states' own domestic legislatures and courts"* ³⁹⁰.

It has also been stressed that *"an exhaustive list of mandatory exceptions would have achieved an impression of harmonization, but the satisfaction would have been short lived and merely intellectual [...] such method would have inevitably sacrificed the principle of subsidiarity."* ³⁹¹ The proponents of this argument underscore that *"the regime of copyright exceptions established in article 5 of the Copyright Directive works well in practice"* ³⁹². At the same time they emphasise that *"in any case, any discussion concerning exceptions and limitations, even if only with reference to their application and interpretation, must take place with full respect for the 'Three-Step-Test' principle"* ³⁹³.

c) Evaluation

The previous arguments are only an indicative list of the various opinions that have been expressed by the diverse market players regarding the matter of the exceptions and limitations of the Copyright Directive. They reveal the profound differences that exist between the stakeholders on this issue. All the points raised however should be taken into account as the starting point of a discussion on the issue at stake (see below), since it is essential for the efficient functioning of the Single Market that all those that participate in it feel secure and satisfied.

From the point of view of the Single Market, a set of fully harmonised exceptions and limitations would enhance legal certainty for both the rightholders and the users ³⁹⁴. In addition it would limit the costs of licensing drafting for those who wish to uphold cross border on line digital content trade and/or for those who wish to use their DRM systems to protect their work within all the Member States of the Single Market. At the same time it would improve the co-operation between the different Member States in the effort to tackle digital copyright infringements and to deal with all the issues related to copyright infringements. All of the above are in line with article 118 of the Lisbon Treaty which as it has been already stressed in the introduction of the present chapter, stipulates that *"in the context of the establishment and functioning of the internal market, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish measures for the creation of European intellectual property rights to (emphasis added) provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements."*

³⁸⁹ DACS (Designs and Artists Copyright Society), Comments to the Green Paper on Copyright in the Knowledge Economy at the European Commission, p. 2

³⁹⁰ ALLIANCE AGAINST IP THEFT, Comments to the Green Paper on Copyright in the Knowledge Economy at the European Commission, p. 1

³⁹¹ ICMP (International Confederation for Music Publishers), Comments to the Green Paper on Copyright in the Knowledge Economy at the European Commission, p. 2

³⁹² BSA (Business Software Alliance), Comments to the Green Paper on Copyright in the Knowledge Economy at the European Commission, p. 2

³⁹³ ASSOCIAZIONE ITALIANA EDITORI, Comments to the Green Paper on Copyright in the Knowledge Economy at the European Commission, p. 1

³⁹⁴ See also the Creative Content in a European Digital Single Market: Challenges for the Future - A Reflection Document of DG INFSO and DG MARKT, 22 October 2009, available at http://ec.europa.eu/avpolicy/docs/other_actions/col_2009/reflection_paper.pdf, p. 15

7.4. Dealing with TPMs

7.4.1. Statutory provisions to encourage the development of PETs

The Copyright Directive does not make the use of PETs mandatory, and does not instruct their direct use³⁹⁵. Consequently, PETs are not enforced by legislation and are not widely used. Although TPMs are a method to protect rightholder's legitimate interest nevertheless, these technological measures must not be used in a way that circumvents provisions regarding data protection. For that reason, statutory rules can be envisaged to protect a user's personal data, in order to enhance security of the user's privacy and avoid possible manipulation of his/her personal data³⁹⁶. It could be considered, for example, to impose statutory provisions for the protection of personal data when using TPMs. Direct instructions about their enforceability should be adopted, so that Member States would be obliged to adopt privacy protective measures in their TPMs regimes. This would also enhance user's security and willingness to accept TPMs/DRMs.

7.4.2. TPMs and minimum uses

Enforcement mechanisms and technological measures related to copyright protection should be flexible and effective without however affecting the user's lawful uses. The measures applied to secure access to the content should enable rights holders to protect their works, without disregarding the lawful uses bestowed to the user of the content. As pointed out in section 3.1, DRMs may deprive users from lawful uses permitted under the exceptions and limitations to the reproduction rights, effectively limiting various personal and transformative uses³⁹⁷. Current DRM technology is unfit to accommodate the myriad of possible transformative uses that copyright exceptions may prove to allow³⁹⁸.

For example, persons with disabilities should enjoy equal access to information products, publications and cultural material in accessible formats³⁹⁹. The immediate goal is to encourage publishers to make more works in accessible formats available to disabled persons⁴⁰⁰. For this reason, TPMs should not prevent the conversion of works legally acquired into accessible formats and additionally, contractual licensing should abide by statutory exceptions for persons with disabilities⁴⁰¹.

It could therefore be envisaged to adopt rules that would narrow force technical measures to take into consideration that consumers in the online environment should be able to interact with the content. *"Right holders and DRMs creators should not use DRMs to lock out disfavoured digital media device and software creators by refusing those licenses"*⁴⁰². In this regard, rightholders should be obliged to adopt a "fair use by design" approach for TPMs⁴⁰³.

³⁹⁵ See section 3.1

³⁹⁶ Copyright Law and Consumer Protection, o.c., p.23

³⁹⁷ Content and control: Assessing the impact of policy choices on potential online business models in the music and film industries, Berkman Center for Internet Society, p.11

³⁹⁸ MAZZIOTTI, o.c., p. 228

³⁹⁹ COM (2009) 532 final, p.8

⁴⁰⁰ *Ibid.*

⁴⁰¹ *Ibid.*

⁴⁰² MAZZIOTTI, o.c., p. 228

⁴⁰³ MAZZIOTTI, o.c., p. 292

7.4.3. Interoperability of TPMs

The notion of interoperability bears different meanings: for *consumers*, interoperability is the enabler that allows them to choose/use different devices that still would not impede them from downloading different services⁴⁰⁴. For *rights holders*, on the other hand, interoperability means the ability to use more than one channel for distributing their content. For *device developers*, interoperability means that they are able to extend their market to several and different content services⁴⁰⁵. Even so, interoperability can at the same time, serve both the rightholder's and the user's interests.

Therefore, it is necessary for all stakeholders to reach to a consensus on the basic framework in order for interoperability to be developed. In this context, some have suggested that *"DRMs should not become a commercial or technology licensing control point, thus stakeholders should continue to work on open cross platform DRM systems and standards and member states should be encouraged to foster open standards so that the security of DRM is not undermined"*⁴⁰⁶.

The viability of TPMs is closely related to their acceptance by users. If a copyrighted work is protected by TPMs that are not user-friendly, users will be discouraged to use the work⁴⁰⁷. This fact should urge rightholders to adopt user friendly TPMs, which allow the normal processing of the work, secure its future readiness, promote its technological neutrality and at the same time allow technological interoperability. Apart from legislative intervention, technical standardisation should be used to improve technological interoperability. Open standards in TPMs marketplaces should be established that would allow different entities to create technically compatible equipment and services⁴⁰⁸. In addition, the European Parliament Resolution on consumer confidence in the digital environment⁴⁰⁹ *"[...] considers that consumers - in order to profit fully from such (on line) services and have their expectations fulfilled - need clear information on what they can and cannot do with regard to digital content, digital rights management and technological protection matters; is convinced that consumers should be entitled to interoperable solutions."*

Furthermore, it could be envisaged to create a third party (e.g., a public agency) who could mediate between rightholders and consumers, and who could even be assigned the task to hand over a technically unrestricted copy of the requested work when rightholders refuse to cooperate⁴¹⁰.

Finally, another recommendation is to specify in the Copyright Directive that the legal protection of TPMs does not apply to the extent that a TPM does not grant users the right to exercise all their statutory exceptions. In this way, similar to the way the Software Directive allows reverse engineering to ensure compatibility, the Copyright Directive should not sanction users who deliberately circumvent TPMs in order to exercise their statutory exceptions⁴¹¹.

⁴⁰⁴ Com (2007) 836 Creative content online in Single market, as above, p. 7

⁴⁰⁵ *Ibid.*

⁴⁰⁶ Intellectual property rights and digital rights management systems, available at www.sub.uni-goettingen.de/frankfurtgroup/drms/commission_factsheet020.pdf

⁴⁰⁷ *Ibid.*

⁴⁰⁸ High Level Group on Digital Rights Management, Final report, March- July 2004, p. 7

⁴⁰⁹ European Parliament resolution of 21 June 2007 on consumer confidence in the digital environment (2006/2048(INI)), 2006/2048 (INI), recital 27

⁴¹⁰ MAZZIOTTI, o.c., p. 229

⁴¹¹ MAZZIOTTI, o.c., p. 286

7.4.4. Incorporating basic consumer protection in TPMs

In line with the aforementioned Resolution of the European Parliament, consumer protection rules increase the information provided to consumers and grant protection against unreasonable one-sided contractual terms⁴¹². It could be envisaged to develop legal obligations to clearly mark goods protected by TPMs with visible information regarding the TPMs used, and to explicitly inform users on the interoperability of the TPMs.

Some of these suggestions have already been adopted by the European Consumer Law Group⁴¹³ with respect to the design and use of DRMs. It was held that copyright contractual provisions should promote a consumer friendly design of DRMs, so that DRMs will not conflict with the legitimate rights and interests of consumers, notably privacy rights⁴¹⁴. In addition, DRMs should be designed to avoid impeding normal processing of the content and consumer's ability to benefit from innovations and technological progress. The Group also held that legislation must be drafted in such way to force rightholders to design DRMs to satisfy also the needs of persons with special requirements. Finally, it was proposed that when DRMs cause damage to the property of consumers, the controllers of the DRMs should be considered liable for that damage⁴¹⁵.

7.5. Start a fundamental copyright debate

Statutory provisions with regards to copyright protection must focus on the true balance of interest of the participating parties. As emphasised in the 2008 Green Paper, *"technologies and social and cultural practices are constantly challenging the balance achieved in the law, while new market players such as search engines, seek to apply these changes to new business models"*⁴¹⁶. Thus the balance provided by the law must stay in line with the ongoing changing digital environment. This is a difficult goal to achieve, since in many occasions the interests of the participants are contradictory and collide with each other.

Even though we are convinced that our recommendations above will significantly contribute to restoring the currently skewed balance, we think a fundamental copyright debate is necessary, because *ad hoc* measures and stopgaps do not fundamentally resolve the issues at stake. We therefore welcome the recent reflection paper of the European Commission⁴¹⁷.

Copying: from exception to rule – Current copyright legislation was conceived in the analogue era, where copies were an exception and would almost always lead to a decrease of quality. In a digital environment, however, copying is the rule and no longer the exception. Any use of a work – even mere consultation – leads to many partial or entire copies of the initial work⁴¹⁸, each of which is of the same quality as the initial work. Conversely, many uses of the same work in an analogue environment (reading, lending, selling, ...) are not regulated by copyright law. In other words, there has been a shift

⁴¹² L. GUIBAULT, Accommodating the Needs of iConsumers: Making Sure they get their money's worth of digital entertainment, available at www.ivir.nl/publications/gui/bault/Lucie_Guibault_Accommodating_the_Needs_of_iConsumers.pdf www.ivir.nl/publications/gui/bault/Lucie_Guibault_Accommodating_the_Needs_of_iConsumers.pdf, p.9

⁴¹³ *Copyright Law and Consumer Protection*, European Consumer Law Group, February 2005, available at www.ivir.nl/publications/other/copyrightlawconsumerprotection.pdf

⁴¹⁴ *Ibid.*, p. 3

⁴¹⁵ *Ibid.*

⁴¹⁶ Green Paper on Copyright in the Knowledge Economy COM(2008) 466/3, p. 20

⁴¹⁷ Creative Content in a European Digital Single Market: Challenges for the Future - A Reflection Document of DG INFSO and DG MARKT, 22 October 2009, available at http://ec.europa.eu/avpolicy/docs/other_actions/col_2009/reflection_paper.pdf

⁴¹⁸ on the server, access provider server, intermediary routers, client routers, RAM of the pc, processor cache, operating system cache, ...

from an environment where copying is the exception and inherently leads to inferior copies, to an environment where copying is the rule and copies are identical to the initial work⁴¹⁹. The law, however, still reflects the analogue ideas, where permission must be obtained for each copy (unless an exception would apply).

Automatic protection – Another example where the law does not reflect today's reality, is in the automatic copyright protection afforded to most digital content. Although it is not contested that an important portion of this digital content should receive automatic protection (e.g., films, music and novels), the question arises to which extent content should be protected for which the "creative inspiration" was very low (e.g., user comments on a forum, or occasional photos taken by consumers with their point-and-shoot cameras), which was automatically created by computer software, or for which the rightholder cannot be found (orphan works). Copyright laws were conceived in an era where content production was expensive, and only a limited selection of content was made publicly available. Conversely, content production has become very easy, and content is literally only a mouse click away.

Copyright paradox – Consequently, current copyright laws do not appropriately reflect the day-to-day reality on the Internet, where users copy photos, music and texts without permission — often unaware of the fact that they breach the law (particularly when the user is a minor). These users are caught in a fundamental "*copyright paradox*": never before have copyrighted works been so important to consumers (and minors in particular), yet never before have users disrespected copyright in this amount.

Aware of this paradox, rightholders start lawsuits against direct and indirect copyright infringers, hesitate to sell digital works online due to the risk of infringements, or sell digital works that are DRM-protected and consequently do not allow users to enjoy their legal exceptions. One observer would point out that users are stealing digital property and that this attitude must be stopped, another observer would point out that the established business models of rightholders are no longer appropriate and that rightholders must find alternative models instead of spending energy on copyright wars. As noted by Commissioner REDING: "*(A)re there really enough attractive and consumer-friendly legal offers on the market? Does our present legal system for Intellectual Property Rights really live up to the expectations of the internet generation? Have we considered all alternative options to repression? Have we really looked at the issue through the eyes of a 16 year old? Or only from the perspective of law professors who grew up in the Gutenberg Age? In my view, growing internet piracy is a vote of no-confidence in existing business models and legal solutions. It should be a wake-up call for policy-makers.*"⁴²⁰

Economic and societal effects of copyright infringements – The effects of copyright infringements may not be so obvious as may be intuitively felt at first glance. Both scientific and anecdotal evidence suggests that there are, in fact, many beneficial effects linked to some forms of copyright infringements⁴²¹. Similarly, it has been pointed out that from a historical perspective, each threat to copyright protection due to the introduction of new technologies (from the printing process to the

⁴¹⁹ L. LESSIG, *Free culture, o.c.*, p. 143

⁴²⁰ V. REDING, EU Commissioner for Telecoms and Media Digital Europe - Europe's Fast Track to Economic Recovery, The Ludwig Erhard Lecture 2009 Lisbon Council, Brussels, 9 July 2009

⁴²¹ See, for example, the 2009 study from Frank N. Magid Associates, which concludes that users of illegal peer-to-peer networks generate more legal turnover for the media industry than other users: "*the P2P user attends 34% more movies in theaters, purchases 34% more DVDs and rents 24% more movies than the average Internet user.*" - see www.businessinsider.com/chart-of-the-day-content-stealers-spend-a-ton-on-media-2009-8

phonograph, radio and VCR) eventually turned out very beneficial to rightholders⁴²², and that the figures used to describe the impact of the copyright infringements phenomenon are not always correct⁴²³.

Conclusion: a fundamental debate is required – We are of the opinion that the fundamental and highly complex opposition between the interests of online service providers, consumers and rightholders requires a fundamental debate, that goes well beyond mere legal issues. This debate must touch upon subjects such as the balance between copyright and privacy; balancing the rights of consumers in DRM'ed works; the threshold for copyright protection; copyright duration; fostering the public domain; multi-territorial licensing; etc. It is important for this debate to be held between three parties: online service providers, rightholders and consumers⁴²⁴.

Although we are convinced that many improvements can be made to current copyright legislation, we think a more fundamental revision of copyright legislation is required, because merely tweaking a legal framework that may no longer be supported by a significant portion of the citizens, may not be sufficient.

⁴²² See A. ENGELFRIET, "Van mededeling naar conversatie" (translation: from speech to conversation), blog post on the future of copyright legislation, available at <http://blog.iusmentis.com/2009/06/30/van-mededeling-naar-conversatie>; L. LESSIG, *Free Culture*, p. 55

⁴²³ For example, the official figures on the level of illegal file sharing in the UK seems to from questionable research commissioned by the music industry. See www.pcpro.co.uk/news/351331/how-uk-government-spun-136-people-into-7m-illegal-file-sharers.

⁴²⁴ In a speech in November 2008, EU Commissioner Reding criticised efforts at the EU and national level to narrow the digital content issue to two camps only. The "third camp" (consumers) must also be part of the equation. See www.out-law.com/default.aspx?page=10377

