



Exceptions and limitations to copyright

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Exceptions and limitations to copyright

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Maja Cappello
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Foreword

In the beginning, information was free. “Not who said it, but what was said - this was what mattered”.¹ But with time, as soon as the connection between information and power, including religious power, became clear, copyright was introduced as a property right, with privileges to those who would take care of reproducing written texts, either manually, as in the case of monks, or in print after Gutenberg’s era, and distributing them to a wider audience.

It was only in the XIX century that the relationship between authors’ rights and other reasons of public interest was analysed by courts and parliaments, and then enshrined in the Berne convention in 1886. In his speech at the first 1884 Berne Conference, the Chairman of the Conference, Numa Droz, underlined that “Consideration also has to be given to the fact that limitations on absolute protection are dictated, rightly in my opinion, by the public interest. The ever-growing need for mass instruction could never be met if there were no reservation of certain reproduction facilities, which at the same time should not degenerate into abuses”.²

Since property rights are absolute, the result of this balancing of interests was legally translated into the concept of an exception to intellectual property rights, with the connected obligation of restrictive interpretation, as is the case with any exceptional provision according to the general principles of law.

As can be imagined, the public needs underlying the balancing of possibly conflicting interests have naturally evolved over time, which explains the succession of rules in this domain.

This IRIS Plus aims at providing a general overview of the rationale and the evolution of the exceptions and limitations to copyright (chapter 1) in the numerous international treaties and European directives devoted to this topic (chapter 2), and in the consequent ratifications and implementations at national level (chapter 3). Particular attention is given to the challenges deriving from the digital revolution, such as the adaptations of the rules concerning temporary acts of reproduction, private copying and exceptions for cultural heritage institutions to the online context.

At the same time, this is an area where the initiatives from the industry have been particularly welcomed at EU level (chapter 4). This has been the case in the field of out-of-commerce works or of accessible copies for people with disabilities. The increasing use

¹ Oliver R., *Communication and Culture in Ancient India and China*, Syracuse University Press, 1971, as referred to by Mendis D., *The Historical Development of Exceptions to Copyright and Its Application to Copyright Law in the Twenty-first Century*, vol 7.5 *Electronic journal of Comparative Law*, <http://www.ejcl.org/ejcl/75/art75-8.html>.

² Davies P., *Access v Contract, Competing freedoms in the context of copyright limitations and exceptions for libraries*, *Cahiers de la documentation – Bladen voor documentatie – 2013/4*, http://www.abd-bvd.be/wp-content/uploads/2013-4_Davies.pdf.

of so-called copyleft licenses, such as open-source software or creative commons licenses, also bears witness to the inventiveness of private actions.

As is the case when interests of a different nature have to be balanced against each other, judicial case law has been very significant also in the domain of copyright exceptions (chapter 5). Considering the harmonised nature of these rules, the report focuses on EU jurisprudence, which has been an important source of inspiration both for national courts and legislators.

The publication rounds up with an overview of the state of play of EU legislation under the Digital Single Market Strategy (chapter 6). The most recent initiatives under the so-called copyright package are explored – text and data mining, cross-border uses in the field of education, the preservation of cultural heritage and accessible formats for people with disabilities. An insight is also given into pending issues, such as e-lending, panorama exception and private copying, which remain to be dealt with by future legislative actions and...future reports from the European Audiovisual Observatory.

Strasbourg, May 2017

Maja Cappello

IRIS Coordinator

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Table of contents

1. Setting the scene	1
1.1.The origins of copyright.....	1
1.1.1.From Gutenberg's press to the Statute of Anne.....	1
1.1.2.Beaumarchais' first supper.....	2
1.2.An exceptional property right.....	3
1.3.The economic impact of certain exceptions and limitations to copyright in the European Union.....	4
1.3.1.The access to film heritage works in the digital era.....	5
1.3.2.Private copying.....	7
<hr/>	
2. International and European legal framework	9
2.1.Exceptions and limitations at international level.....	9
2.1.1.The Berne Convention.....	9
2.1.2.Extension of the scope of the three-step test under the TRIPS Agreement.....	13
2.1.3.Exceptions and limitations in the digital age: the WIPO Internet Treaties.....	15
2.1.4.New mandatory exceptions for blind and visually-impaired persons under the Marrakesh Treaty.....	17
2.2.Exceptions to copyright and related rights in the EU acquis.....	18
2.2.1.General overview.....	18
2.2.2.Main exceptions related to the digital environment.....	22
<hr/>	
3. National legal framework	29
3.1.General overview.....	29
3.2.Overview of national implementations of certain exceptions to copyright.....	30
3.2.1.Exception for temporary acts of reproduction (transient copies).....	31
3.2.2.Exception for reproductions for private uses (private copying).....	32
3.2.3.Exception for cultural heritage institutions.....	35
3.2.4.Exceptions for reporting of current events, quotations for criticism or review and parodies.....	37
<hr/>	
4. The role of self and co-regulation	41
4.1.General overview of EU strategies.....	41
4.2.Memorandum of Understanding on Out-of-Commerce Works.....	42
4.3.Access to copyright works for people with print disabilities.....	43
4.4.Licenses for Europe.....	43
4.4.1.Facilitating the digitisation and access to audiovisual heritage.....	44
4.4.2.Text and data mining for research purposes.....	45

4.5. “Open” copyright licenses initiatives.....	46
4.5.1. Free and open-source software domain and “copyleft” licenses.....	46
4.5.2. “Creative Commons” (CC) licenses.....	47

5. Case law 51

5.1. General principles.....	51
5.2. Caricature, parody or pastiche.....	52
5.3. Private copying.....	54
5.3.1. Padawan v. SGAE.....	55
5.3.2. EGEDA et al. v Administración del Estado et al.....	57
5.3.3. ACI Adam v Stichting de Thuis kopie.....	59

6. State of play..... 61

6.1. Copyright exceptions in the bigger picture of the DSM.....	61
6.2. Policy documents concerning exceptions and limitations.....	62
6.2.1. From the Green Paper to the Vitorino Recommendations.....	62
6.2.2. The actions under the DSM strategy.....	64
6.3. The “copyright package”.....	65
6.3.1. The rationale underlying the four new mandatory exceptions.....	66
6.3.2. Text and data mining in the field of scientific research.....	67
6.3.3. Digital and cross-border uses in the field of education.....	68
6.3.4. Preservation of cultural heritage.....	68
6.3.5. Accessible formats for people with disabilities.....	69
6.4. The pending issues.....	70
6.4.1. The e-lending exception.....	70
6.4.2. The panorama exception.....	71
6.4.3. The private copying exception.....	72
6.5. The state of the legislative process.....	73

Figures

Figure 1. Copyright exceptions in the EU-28.....	29
Figure 2. The “panorama exception” worldwide	71

Tables

Table 1. Overview of limitations and exceptions under the Berne Convention.....	11
Table 2. Tariff-setting models.....	34
Table 3. Overview of countries that apply a percentage as a tariff.....	35
Table 4. Conditions for Creative Commons licenses.....	48
Table 5. Jurisprudence from the European Court of Justice concerning private copying.....	54
Table 6. The three pillars of the Digital Single Market (with programmed years of proposal)	61
Table 7. Overview of tools and objectives of the “copyright package”	66
Table 8. Compensation regimes for publishers in EU-28.....	72

1. Setting the scene

1.1. The origins of copyright

Copyright is a form of intellectual property which grants protection to the creators of original works, usually for a limited time. It is often shared among multiple authors, each of whom holds a set of rights to use or license the work, and who are commonly referred to as rightsholders. These rights (also known as 'authors' rights') secure protection of both the economic interests of authors – such as reproduction, control over derivative works, and distribution – as well as their moral interests (for example protection against unauthorised use of their works). In general, copyright is territorial, which means that it does not extend beyond the territory of a specific state unless that state is party to an international agreement.

There are two major copyright law traditions: the Anglo-American copyright (common law) system and the continental European authors' rights (civil law) system. Generally speaking, whereas the former stresses the economic aspects of copyright, the latter is based on the intimate connection between the work and its author. While many aspects of national copyright laws have been harmonised through international copyright agreements and EU legislation, copyright laws in most countries have some unique features, which can be explained by looking at their origins.

1.1.1. From Gutenberg's press to the Statute of Anne

Since the dawn of humanity, there have been copyists. From Egyptian scribes to medieval monks, the transmission of knowledge has been in the hands of mainly anonymous people.³ To produce a single copy of a work, such copyists required long hours of manual work and skills that at that time were only made available to an elite. That is why Gutenberg's invention of the printing press in the 15th century was a major revolution. For the first time in the history of civilisation, a machine could automatise the process of copying an intellectual work. However, there was a problem with Gutenberg's invention: in theory, anybody who owned a printing press could easily reproduce any written text and distribute it in great numbers. This could be done without the authors' permission

³ For instance, Greek philosophy would probably have been lost to the world without the labour of Arab translators, who preserved for posterity the works of Aristotle and Plato by "copying" them into a different language.

and, at least in theory, without any form of censorship. That was obviously not acceptable for the powers that be, so laws regulating “the press” were swiftly introduced all around Europe.⁴

As an example of this, Henry VIII of England’s Royal Proclamation of 1538 prohibited the printing and publishing of ecclesiastical and other books without prior licence, as well as the importation, sale and publication of English language texts printed on the continent.⁵ Later, in 1557, the Worshipful Company of Stationers⁶ (usually known as the Stationers’ Company) obtained the monopoly over the printing and distribution of books, securing thereby that “licensed” printers would only print the “right” books. An interesting feature of this system is that whenever a member of the Stationers’ Company registered a book, a perpetual monopoly on the book was bestowed upon him, a monopoly that remained valid even after the author’s death.

This system had a rather chaotic life until 1710, when the so-called Statute of Anne was adopted, actually entitled “An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned”.⁷ This statute, considered to be the first Copyright Act, was aimed at preventing “printers, booksellers, and other persons” from taking “the liberty of printing, reprinting, and publishing, or causing to be printed, reprinted, and published, books and other writings, without the consent of the authors or proprietors of such books and writings, to their very great detriment, and too often to the ruin of them and their families”. It also aimed for the “encouragement of learned men to compose and write useful books”. Thus, the Statute already contained one of the bases of copyright as we know it today: the protection of the author’s economic interests, which provide an incitement to produce new works.

1.1.2. Beaumarchais’ first supper

Money makes the world go round, and authors are surely interested in gaining profit from their part in the movement. But for authors of dramatic works and music composers, the money lies not in the printing press, but rather on the theatre, opera and concert stage. However, primitive copyright legislations based merely on the right to copy, such as the Statute of Anne, did nothing for them. That is why, for example, great composers such as Bach, Mozart or Beethoven did not enjoy the financial success that their later colleagues had.

⁴ The best example of this is the *Index Librorum Prohibitorum*, a list of books deemed heretical by the Catholic Church, see https://en.wikipedia.org/wiki/Index_Librorum_Prohibitorum. This is the reason why in different European languages, putting something or somebody “in the index” means “to blacklist”: e.g. *mettre à l’index* (French), *auf die Index setzen* (German), *mettere all’indice* (Italian), *Być, znajdować się na indeksie* (Polish), *A pune la index* (Romanian).

⁵ Deazley R., Commentary on Henrician Proclamation 1538, http://www.copyrighthistory.org/cam/commentary/uk_1538/uk_1538_com_972007121733.html.

⁶ See <https://stationers.org/about.html>.

⁷ The text of the Statute of Anne is available at: http://avalon.law.yale.edu/18th_century/anne_1710.asp.

Unsurprisingly, the revolution in this field came from France. On 3 July 1777, Pierre-Augustin Caron de Beaumarchais, the poorly remunerated author of the successful play “the Barber of Seville”, organised a supper in which a group of twenty-two authors got together to form the first *Bureau de législation dramatique* and lobby for their interests.⁸ Some years later, the French Revolution abolished all royal privileges on which the legal situation of authors was based, and in 1791 two laws on authors’ rights concerning performing and reproduction rights were adopted. These laws were based on the revolutionary notion that the authors’ rights were a property right of a particular kind: the work was intimately bound to its author, but the exploitation rights attached thereto were limited in time.⁹

1.2. An exceptional property right

A great deal of water has flowed under the bridge since the adoption of the Statute of Anne. The protection that copyright law affords authors and performers has grown in a proportion unimaginable in Beaumarchais’ times. However, as much as rightsholders are (at least in theory) very well protected, that does not mean that the end-users (that is, the readers of novels, the listeners of music recordings, the theatre and cinema audiences, etc.) have no rights at all. Copyrighted works are of such value to society that nowadays copyright legislation includes a number of exceptions and limitations to maintain a fair balance between the interests of users and those of rightsholders.

As mentioned previously, copyright protection is tempered by exceptions and limitations in two different ways:

- Works are protected only for a certain period of time, at the expiration of which they may be used freely;¹⁰
- During the term of protection, a number of exceptions and limitations allows for copyrighted works to be used without a license from the copyright owner in favour of certain groups of users or the public at large, based on their legitimate interests.

In order to determine when unauthorised use is lawful, the Berne Convention instituted the so-called “three-step test”. Article 9-2 of the Convention stipulates that “it shall be a matter for legislation in the countries of the Union to permit the reproduction of such

⁸ This society laid down the basis for the current French Society of Dramatic Authors and Composers, see <http://www.sacd.fr/1777-until-today.2119.0.html>.

⁹ In the following decades, other countries followed the French example with the creation of authors’ societies, which were usually promoted by successful writers or composers. As an example of this, the Italian SIAE had in its first *Consiglio Direttivo* such notable figures as Edmondo De Amicis and Giuseppe Verdi. See https://it.wikipedia.org/wiki/Societ%C3%A0_Italiana_degli_Autori_ed_Editori.

¹⁰ For more information on the terms of protection see Nikoltchev, S. (Ed.), *The Lifespan for Copyright of Audiovisual Works*, IRIS plus 2012-2, European Audiovisual Observatory, Strasbourg 2012, http://www.obs.coe.int/documents/205595/264635/Iris_plus_2012-2_EN_FullText.pdf/8a8b2077-12e5-4627-8c45-83ae2cc1ecd1

works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author". The three-step test has also been taken up among others in the TRIPs agreements and in the WIPO Internet Treaties.¹¹

With regard to exceptions and limitations, there are two types of copyright systems:¹²

- Open system: this system contains a general "clause" outlining exceptions to copyright. The most famous example of this type of general clause is the fair use doctrine included in section 107 U.S.C.,¹³ which establishes the factors to be considered when balancing conflicting interests. These factors include (but are not limited to):
 1. the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
 2. the nature of the copyright work;
 3. the amount and substantiality of the portion used in relation to the copyright work as a whole; and
 4. the effect of the use upon the potential market for or value of the copyright work.
- Closed system: This system, based on an exhaustive list of exceptions and limitations, was introduced into EU legislation by the so-called InfoSoc Directive.¹⁴

1.3. The economic impact of certain exceptions and limitations to copyright in the European Union

Intellectual property matters for the competitiveness of the European audiovisual sector. It creates wealth and jobs. According to a joint report by the European Patent Office¹⁵ and the Office for Harmonization in the Internal Market,¹⁶ about 39% of the total economic activity in the European Union (worth some EUR 4.7 trillion annually) is generated by IPR-intensive industries, and approximately 26% of all employment in the European Union (56 million jobs) is provided directly by these industries, while a further 9% of jobs in the European Union stem indirectly from IPR-intensive industries.¹⁷

¹¹ See section 2.1. of this publication.

¹² For more information on this distinction see e.g. UNESCO, Overview of exceptions and limitations to copyright in the digital environment, <http://unesdoc.unesco.org/images/0013/001396/139696E.pdf>.

¹³ See 17 U.S.C. § 107, <https://www.law.cornell.edu/uscode/text/17>.

¹⁴ See section 2.2. of this publication.

¹⁵ See <https://www.epo.org/index.html>.

¹⁶ See <https://euipo.europa.eu/ohimportal/en/>.

¹⁷ European Patent Office and Office for Harmonization in the Internal Market, "Intellectual property rights intensive industries: contribution to economic performance and employment in the European Union", Industry-Level Analysis Report, September 2013, http://ec.europa.eu/internal_market/intellectual-property/studies/index_en.htm.

As part of the IPR industries, Europe's cultural and creative sectors make a substantial contribution to economic growth, employment, innovation and social cohesion in Europe. According to the European Commission,¹⁸ they represent around 4.5 % of the European gross domestic product and account for some 3.8 % of the EU workforce (8.5 million people). They contribute to innovation, skills development and urban regeneration, and they have a positive impact on tourism and information, and communication technology.

Exceptions and limitations to copyright also have an economic impact: on the one hand, they reduce the ability of rightsholders to monetise their economic rights; on the other hand, in certain cases they are attached to a right to remuneration in favour of rightsholders. Whereas there are many different types of exceptions and limitations, there are two types of exceptions that are particularly relevant for the audiovisual sector, not only for their economic importance but also for their impact on culture and society at large:

- Exception for digital preservation by cultural heritage institutions
- Exception for private copying.

1.3.1. The access to film heritage works in the digital era

Whatever the exploitation window, making heritage films available to the public meets with both legal and technical obstacles:

- First, the clearance of rights faces many hurdles (on-demand exploitation was not foreseen in the authors' contracts; production companies have shut down; authors or their heirs cannot be localised).
- Secondly, only a fraction of film heritage works have actually been digitised. Costs can indeed be significant when digitisation implies an extensive restoration process, and the investment cannot be recouped in the short term (and in particular not from a VOD-only exploitation). Only the major production companies have the resources to engage in large-scale restoration processes. However, even in this case, only films with an expected commercial potential will be concerned. The role of public funding in the digitisation of both public domain and copyrighted films is therefore paramount. That is why Article 5(2)c of the InfoSoc Directive authorises member states to provide for an exception or limitation "in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage."¹⁹

¹⁸ European Commission, "The EU explained: Culture and audiovisual", 2014, https://europa.eu/european-union/file/825/download_en?token=p8YdsZ5b.

¹⁹ See section 2.2.2.1.1. of this publication.

The digitisation of cinemas has theoretically lowered the cost of re-releasing older films, as expensive traditional print copies are no longer necessary. Hence, a growing number of territories are opening up to film heritage in cinemas, increasing the number of national players active in the market. The competition to place heritage films in cinemas, which are already suffering from a bottleneck of recent films, has therefore increased. At the same time, film heritage works remain in demand for television channels, although increasingly from the smallest ones which pay lower prices. Finally, the DVD crisis has impacted the film heritage market segment in different ways. The “cinophile” market has resisted to a certain extent, as no substitute was available to replace DVD collection box sets of classic and cult films. In turn, catalogue films that are not well-known appear to have suffered the most from the crisis in the sector and from the competition with TV channels, which has further narrowed the DVD film heritage market to a niche of film lovers.

In this context, video-on-demand (VOD) could represent an opportunity to make film heritage works available again; however, accessing the on-demand services may be challenging. Indeed, data gathered by the European Audiovisual Observatory suggests that EU heritage films struggle to access VOD:²⁰

- Fewer EU heritage films make it from cinemas to on-demand than US films: 84% of US film heritage works re-released in cinemas in 2014 were available in transactional VOD (TVOD) in October 2015, compared with 54% for EU films;
- When released in VOD, EU heritage films were available in significantly fewer countries (2) than US films (8).

The fragmentation of the European on-demand services, which implies significant transactional costs to engage with many different national players, and the modest revenue flows generated by VOD services account, among other factors, for these figures.

The fact that public funding, through the Film Heritage Institutions (FHIs), plays a key role in the digitisation of heritage films gives a specific weight to the discussion on exceptions and limitations to copyright for the access to copyrighted film heritage works for non-commercial use. The current legislative framework²¹ was established at a time where digital exploitation was not foreseen. In several countries, a Film Heritage Institution is not (explicitly) allowed to make digital copies of a film, a procedure which would make local consultations easier (no need to have a dedicated technician to handle the print). Furthermore, FHIs are prevented from setting up services providing remote access to copyrighted film collections for students or researchers.²² However, the

²⁰ In 2016, the European Audiovisual Observatory, in a study for the European Commission, analysed the opportunities and challenges for the exploitation of Film Heritage works in the digital era, see Fontaine G., Simone P., *The Exploitation of Film Heritage Works in the Digital Era*, European Audiovisual Observatory for the European Commission, 2016, http://ec.europa.eu/newsroom/dae/document.cfm?action=display&doc_id=16404

²¹ Directive 2001/29/EC on copyright in the information society, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML>.

²² Film Heritage in the EU - REPORT on the Implementation of the European Parliament and Council Recommendation on Film Heritage 2012-2013 – pages 32-33 -European Commission, 2014, http://ec.europa.eu/newsroom/dae/document.cfm?action=display&doc_id=6962.

extension of copyright exceptions to digital is seen by rightsholders as a threat to the commercial exploitation of their works.

1.3.2. Private copying

If the invention of the printing press in the 15th century allowed the widespread distribution of books, at the beginning of the twentieth century, another major invention, the phonogram, brought a miracle to the homes of millions of people: the recording of a performance of a work. Now there was no longer any need to leave the house or learn to play the piano to enjoy the pleasures of listening to music. With the phonogram, a new business was also born: the production and the sale of music recordings.

A further revolution came in the early 1950s, when sound recording equipment was introduced into the mass market. This was a major change for both consumers and the recording industry. For the first time, any individual could make exact, inexpensive reproductions of sound recordings from the comfort of their own home. This also meant that for the first time there existed an easy way to circumvent the business of selling copies of sound recordings to private persons. The film industry would also experience a similar revolution in the late 1970s, when video recorders found their way into the homes of most people.

This new revolution was met with some resistance from the content industries. Not so long ago, the former MPAA (Motion Picture Association of America) president, Jack Valenti, declared at a hearing on home recording of copyrighted works that “the VCR is to the American film producer and the American public as the Boston strangler is to the woman home alone”.²³ Later, the film industry discovered that there was money to be made with the “play” button of a video recorder and embraced videotapes (later came the DVDs, BluRays and VOD). But both the film industry and the recording industry never liked the “rec” button. To them, private copying was taking a slice of their market pie. Therefore they tried – though unsuccessfully – to have such recording equipment declared illegal.

Short of a legal basis to outlaw recording equipment and blank media, the issue then became how to mitigate the harm undoubtedly caused to rightsholders by private copying of music recordings and audiovisual works. In 1965, Germany pioneered the solution to this problem in Europe: in the *Gesetz über Urheberrecht und verwandte Schutzrechte* (German Copyright Act), it introduced a levy on the sale of sound and video recording equipment. In 1985, it added to the same law a levy on blank tapes for sound and audiovisual recording. Soon, other European countries followed this path and introduced a system of copyright levies into their national legislation.²⁴

²³ <http://cryptome.org/hrcw-hear.htm>.

²⁴ See Cabrera Blázquez F.J., *Private Copying Levies at the Crossroads*, in Nikoltchev, S. (Ed), *Who Pays for Private Copying?*, IRIS plus 2011-4, European Audiovisual Observatory, Strasbourg 2011, http://www.obs.coe.int/documents/205595/264635/Iris_plus_2011-4_EN_FullText.pdf/78e34a8f-74b5-4ac5-9920-ed28a99dece0.

In the analogue world, the solution to impose a levy on recording devices and media seemed reasonable, because tape and video recorders were almost exclusively used to copy protected works. Then came the digital revolution, and everything became a lot more controversial. Since almost nobody used analogue equipment and blank media for home recording anymore, it seemed logical to impose levies on their digital surrogates in order to compensate rightsholders for losses incurred as a result of private copying, especially since digital technologies allow the production of an indefinite number of perfect copies. However, the extension of private copying levies to digital recording equipment and blank media has been abundantly criticised by the IT industry, users' associations and even some members of academia.²⁵ They argue that this may go beyond the original purpose of private copying levies. They defend the idea that, in our times, when every piece of information is literally reduced to bits and any communication takes the form of zeroes and ones, the same recording device or support can be used for copying Lady Gaga's latest album, for backing up a company's yearly accounts or for safeguarding last summer's holiday pictures. A system of private copying levies that taxes digital reproduction equipment and media without taking into consideration their actual use may remunerate rightsholders for acts of copying unrelated to their creative work.²⁶

Private copying, as defined in the EU copyright law, refers to the reproduction of creative content for use in the private sphere. One of the important features of private copying is that it is limited to the reproduction of content; therefore, commercial use of reproductions, as well as communication to the public, distribution to the public, public performance or adaptation is by definition out of the scope of private copying. Total revenues collected in the European Union from levies have increased over the years from 598 million euros in 2007 to an all-time high of 804 million euros in 2014.²⁷

For more details on the history of private copying levies see Hugenholtz, P.B., Guibault, L., van Geffen, S., *The Future of Levies in a Digital Environment*, March 2003, <https://www.ivir.nl/publicaties/download/DRM&levies-report.pdf>

²⁵ See Cabrera Blázquez F.J., *op.cit.*

²⁶ While private copying levies are being attacked by the IT industry and users' associations, simultaneously, different proposals have been made by civil society and even certain political parties to extend the concept of private copying levies to file-sharing on the Internet (*licence globale* in France, *Kulturflatrate* in Germany, etc). They submit that a file-sharing levy paid by Internet users in addition to their Internet access flat-rate can result in adequate remuneration for rightsholders and solve (at least in part) the problem of Internet piracy, see Cabrera Blázquez F.J., *op.cit.*

²⁷ See WIPO/de Thusikopie, p. 13 & 14, http://www.wipo.int/edocs/pubdocs/en/wipo_pub_1037_2016.pdf. See also EP report on private copying levies, JURI Committee, rapporteur Castex, F., 17.2.2014, p. 4, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2014-0114+0+DOC+PDF+V0//EN>.

2. International and European legal framework

2.1. Exceptions and limitations at international level

2.1.1. The Berne Convention

2.1.1.1. General principle governing exceptions: the “three-step test”

The Berne Convention for the Protection of Literary and Artistic Works, usually known as the Berne Convention, was adopted in 1886 and amended several times until its last revision in 1979.²⁸ The Convention contains a series of provisions determining the minimum protection to be granted to authors in relation to their works, based on three basic principles:

- the principle of “national treatment”
- the principle of “automatic protection”
- the principle of “independence of protection”

In its original 1886 version, the Berne Convention already contained some provisions allowing parties to limit the authors’ exclusive right of reproduction in certain circumstances and to permit the reproduction of their protected works without their authorisation. Article 9(2) of the Berne Convention provides as follows:

It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

Article 9(2) of the Convention has set out three conditions that, today, still govern exceptions and limitations to copyright and related rights under international and EU law, namely that they be limited:

²⁸ Berne Convention for the Protection of Literary and Artistic Works, WIPO, 9 September 1886, as last amended in 1979, http://www.wipo.int/treaties/en/text.jsp?file_id=283698#P144_29304.

- to special cases, provided that the act
- does not conflict with a normal exploitation of the work, and
- does not unreasonably prejudice the legitimate interests of the author.

These three conditions, known as the “three-step test”, are used to determine whether or not an exception or limitation is permissible under the international norms on copyright and related rights. Although the three-step test under Article 9(2) initially applied exclusively to the right of reproduction, it was later extended to all exclusive rights under other international treaties.

2.1.1.2. Overview of exceptions and limitations under the Berne Convention

The limitations and exceptions to copyright under the Berne Convention can be grouped into the following categories:

- “Limitations” on protection, in the sense that no protection is required for the particular kind of subject-matter in question.
 - These limitations are mainly based on the assumption that there are clear public policy grounds that copyright protection should not exist in the works in question (for example, in the interest of the public).
 - These limitations concern official texts of a legislative, administrative and legal nature (Article 2(4)), news of the day (Article 2(8)), and speeches delivered in the course of legal proceedings (Article 2*bis*(1)).
- Exceptions to protection for certain “permitted uses”, in that they allow the use of protected work without the authorisation of the author.
 - The policy ground for such exceptions is based on the premise that certain types of uses of protected works should be allowed if there is a public interest that justifies overriding the private rights of authors in their works in these particular circumstances.
 - Examples of these exceptions can be found in the Berne Convention (Paris Act, 1971) in Articles 2*bis*(2) (reproduction and communication to the public of public addresses, lectures, etc., by the press), 9(2) (certain exceptions to the reproduction right, subject to specific conditions), 10 (quotation and use for teaching²⁹ purposes) and 10*bis* (which permits certain uses for reporting of news and the like).³⁰

²⁹ Article 10(2) of the Berne Convention states that:

“(2) it shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice.

“(3) Where use is made of works in accordance with the preceding paragraphs of this Article, mention shall be made of the source, and of the name of the author if it appears thereon.”

³⁰ For further details see Ricketson, S., WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital environment, 5 April 2003, presented at WIPO Standing Committee on Copyright and Related Rights, Ninth Session, Geneva, June 23 to 27, 2003, http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=16805.

- Another category could be added concerning “compulsory” or “obligatory licenses” that allow a particular use of copyright material, subject to the payment of compensation to the copyright owner.
 - In this case, the author’s rights continue to be protected but they are significantly reduced: the public interest justifies the use of the protected work regardless of the author’s consent, but it is subject to the payment of appropriate remuneration.
 - Specific provisions permitting such type of use are found in Articles 11*bis*(2) (Broadcasting and related rights) and 13 (possible limitation of the right of recording of musical works), and the Appendix of the Paris Act of Berne.

Most of these limitations and exceptions are usually made on an optional rather than mandatory basis, in the sense that they set the limits within which national laws may provide for limitations and exceptions to protection. The only exception that is mandatory under the Berne Convention is the exception for quotation (Article 10(1)),³¹ which must be applied by the parties in their national laws. The Berne Convention does not prescribe a particular model for the structuring of limitations and exceptions under national law.

Table 1. Overview of limitations and exceptions under the Berne Convention

Abbreviations:

LW: Literary works M: Mandatory B: all rights under Art. 11*bis*(1)
 L: Limitations P: Permissive R: Reproduction
 E: Exceptions PP: Public performance
 CL: Compulsory license PR: Public recitation

Source	Subject matter	Justification	L, E or CL	M or P	Rights	Conditions
2(4)	Official texts (LW)	Informatory	L	P	All	None
2(8)	News of the day and press information (LW)	Informatory	L	M	All	None
2<i>bis</i>(1)	Political and legal speeches (LW)	Informatory	L	P	All	None

³¹ Under Article 10(1) of the Berne Convention, “(1) It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.”



Source	Subject matter	Justification	L, E or CL	M or P	Rights	Conditions
2bis(2)	Public lectures, etc. (LW)	Informatory	E	P	R, B	Informatory purpose
9(2)	General (All works)	General	E, CL	P	R	3 step test
10(1)	Quotation (All works)	Informatory	E, CL	M	All	1 Fair practice 2 Justified by purpose
10(2)	Illustration in teaching (All works)	Educational	E, CL	P	R, B	1 Illustration 2 Fair practice
10bis(1)	Newspaper, etc. Articles, broadcast works (LW)	Informatory	E	P	R, B	1 No reservation 2 Indication of source
10bis(2)	Reporting current events (all works)	Informatory	E	P	Photos, cine, B	Informatory purpose
11bis(2)	Broadcasting (all works)	Public access	CL	P	B	1 Equitable remuneration 2 Moral rights respected
11bis(3)	Ephemeral recording (music & words)	Convenience, archival preservation	E, CL	P	R	1 Must be “ephemeral” 2 Exceptional “documentary character” (archival)
13(1)	Recording of music and words	New industry	CL	P	R	1 Already recorded 2 Equitable remuneration
14bis(2)(b)	Cine works – co-authors (limited)	Convenience	E	P	R, B, PP	No contrary stipulation

Source	Subject matter	Justification	L, E or CL	M or P	Rights	Conditions
17	Censorship (all works)	State power	L	P	All rights	Must be for censorship reasons, none other
Implied/ancillary agreement between parties	Minor reservations	De minimis	E	P	PP, B, PR	De minimis
Implied/ancillary agreement between parties	Translations	Necessity	E	P	R, PP, PR, B (not 11bis, 13)	Those applicable under arts 2bis, 9(2), 10 and 10bis
Implied/ancillary agreement between parties	Anti-monopoly controls (all works)	State power	L	P	All rights	Must be for anti-trust reasons, none other

Source: WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital environment (2003).

2.1.2. Extension of the scope of the three-step test under the TRIPS Agreement

Similar provisions exist in the World Trade Organisation agreement on Trade-Related Aspects of Intellectual Property (TRIPS Agreement), which confirmed the use of the three-step test as a valid tool for evaluating limitations and exceptions to author's rights. Article 13 of the TRIPS Agreement, entitled "Limitations and Exceptions", is the general exception clause applicable to the exclusive rights of copyright holders. Its wording derives largely from Article 9(2) of the Berne Convention, but its scope is broader as it applies to all economic rights and not only to reproduction rights.

Under Article 13 of the TRIPS Agreement, limitations and exceptions to exclusive rights may only be introduced or maintained if the conditions of the three-step test are met and are thus confined to (1) certain special cases, which (2) do not conflict with normal exploitation of the work, and (3) do not unreasonably prejudice the legitimate interests of the rightsholder.

A Panel Report by the WTO Dispute Settlement Body (DSB)³² in June 2000 gave a clarifying interpretation of the three-step test. First of all, it confirmed that "(...) the three conditions apply on a cumulative basis, each being a separate and independent

³² Article 13 TRIPS was considered by a Panel established by the WTO Dispute Resolution Body in the United States - Section 110(5) of the US Copyright Act - WT/DS160/R - 15 June 2000. https://www.wto.org/english/tratop_e/dispu_e/1234da.pdf.

requirement that must be satisfied. Failure to comply with any one of the three conditions results in the Article 13 exception being disallowed”.³³

With respect to the first condition of Article 13, namely the “certain special cases” criteria, the DSB considered that it requires that “(...) a limitation or exception in national legislation should be clearly defined and should be narrow in its scope and reach.” The DSB added that “(...) a limitation or exception may be compatible with the first condition even if it pursues a special purpose whose underlying legitimacy in a normative sense cannot be discerned.”³⁴

Concerning the second condition of Article 13, that the exception does “not conflict with a normal exploitation of the work”, the DSB first clarified that this should be judged for each exclusive right individually. Secondly, it emphasised the “empirical or quantitative aspect of the connotation of ‘normal’, the meaning of ‘regular, usual, typical or ordinary’”. The measure of the “normal exploitation” criteria should also, according to the DSB, take into account future (plausible) forms of exploitation that could acquire economic or practical importance.³⁵

Finally, as regards the third condition of the test, that the exception does “not unreasonably prejudice the legitimate interests of the rightsholder”, the DSB gives some interpretation of the various notions it includes, such as the “interests” of rightsholders at stake and which attributes make them “legitimate”, and the notion of “prejudice” and what should constitute an “unreasonable” one. Thus, according to the DSB, “(...) the notion of ‘interest’ is not necessarily limited to actual or potential economic advantage or detriment.” It encompasses both a legal right or title to a property and more generally “something that is of some importance to a natural or legal person.”³⁶ On the other hand, a “legitimate” interest is understood from a normative perspective of “legitimacy” rather than from a mere lawfulness perspective, and it should be understood “(...) in the context of calling for the protection of interests that are justifiable in the light of the objectives that underlie the protection of exclusive rights.”³⁷

As for the notion of prejudice, the DSB refers to its ordinary meaning as damage, harm or injury, whereas “‘not unreasonable’ connotes a slightly stricter threshold than ‘reasonable’. This later term means proportionate”, understood as of a “fair, average or

³³ Ibid, p. 31, paragraph 6.97.

³⁴ Ibid, p. 34, paragraph 6.112.

³⁵ “(...) one way of measuring the normative connotation of normal exploitation is to consider, in addition to those forms of exploitation that currently generate significant or tangible revenue, those forms of exploitation which, with a certain degree of likelihood and plausibility, could acquire considerable economic or practical importance. In contrast, exceptions or limitations would be presumed not to conflict with a normal exploitation of works if they are confined to a scope or degree that does not enter into economic competition with non-exempted uses. (...) an exception or limitation to an exclusive right in domestic legislation rises to the level of a conflict with a normal exploitation of the work (i.e. the copyright or rather the whole bundle of exclusive rights conferred by the ownership of the copyright) if uses, that in principle are covered by that right but exempted under the exception or limitation, enter into economic competition with the ways that rightsholders normally extract economic value from that right to the work (i.e. the copyright) and thereby deprive them of significant or tangible commercial gains.”, Ibid., p. 48, paragraphs 6.180 and 6.181.

³⁶ Ibid, p. 57, paragraph 6.223.

³⁷ Ibid, p. 58, paragraph 6.224.

considerable amount or size.” The question is then to determine at which degree or level a prejudice may be considered as unreasonable and how to measure or quantify it. The DSB proposes that it be estimated in economic terms based on the value of exercising, for example by licensing such rights, but highlights at the same time that legitimate interests are not necessarily limited to this economic value. This shall be assessed on a case-by-case basis. The approach taken by Article 13 of the TRIPS Agreement has generally been accepted and has paved the way for the WIPO Internet Treaties in a decisive way.

2.1.3. Exceptions and limitations in the digital age: the WIPO Internet Treaties

In 1996, two additional treaties were adopted within the framework of the WIPO, with a view to updating and supplementing the Berne and Rome Conventions in the field of related rights,³⁸ and adequately responding to the questions raised by the development of technologies and the new forms of dissemination of works via the Internet. The WIPO Copyright Treaty (WCT)³⁹ and the WIPO Performance and Phonogram Treaty (WPPT)⁴⁰ - commonly referred to as the “Internet Treaties” - which entered into force in 2002, require parties to provide a framework of basic rights to creators in relation to the use of their works and to ensure that creators will continue to be adequately and effectively protected when their works are disseminated through new technologies in the digital environment.

To maintain a fair balance of interests between the owners of rights and the general public, the treaties further clarify that countries have reasonable flexibility in establishing exceptions or limitations to rights in the digital environment. The Internet Treaties provide that countries may, in appropriate circumstances, grant exceptions for uses deemed to be in the public interest, such as for non-profit educational and research purposes.

Thus, for example, Article 10 of the WCT provides for its parties to enact exceptions within the confines of the three-step test,⁴¹ as follows:

Article 10 Limitations and Exceptions

(1) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty

³⁸ The Rome Convention secures protection in performances for performers, in phonograms for producers of phonograms and in broadcasts for broadcasting organizations. For further information, see: WIPO, Rome Convention for the protection of Performers, Producers of Phonograms and Broadcasting Organisations, 26 October 1961, http://www.wipo.int/treaties/en/text.jsp?file_id=289757.

³⁹ WIPO Copyright Treaty, 20 December 1996, <http://www.wipo.int/wipolex/en/details.jsp?id=12740>.

⁴⁰ WIPO Performance and Phonograms Treaty, 20 May 1996, <http://www.wipo.int/wipolex/en/details.jsp?id=12743>.

⁴¹ This principle has once again been confirmed in two other copyright treaties ; in the BTAP (Beijing Treaty on Audiovisual Performances of 24 June 2012) and in the Marrakesh Treaty of 27 June 2013 (Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled).



in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

(2) Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.”

Furthermore, the Agreed Statement to Article 10 clarifies this point and allows scope for signatory nations to extend exceptions in the digital environment:

Agreed Statement concerning Article 10

It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws, which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.

It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.

Ninety-three countries⁴² have adhered to the WCT (94 to the WPPT), 49 of which did so between 1996 and 1997. The WCT and WPPT are in force in most of these countries.

All the principles and values promoted in the WCT and WPPT were later confirmed through the adoption, in 2012, of the Beijing Treaty on Audiovisual Performances (BTAP),⁴³ which has been signed by 77 countries to date, but which is not yet in force. As regards limitations and exceptions, Article 13 of the Beijing Treaty incorporates the “three-step test” to determine limitations and exceptions, as provided for in Article 9(2) of the Berne Convention, extending its application to all rights. The accompanying Agreed Statement provides that the Agreed Statement of Article 10 of the WCT applies similarly to the Beijing Treaty, that is, that such limitations and exceptions as established in national law in compliance with the Berne Convention may be extended to the digital environment. Contracting states may devise new exceptions and limitations appropriate to the digital environment. The extension of existing or the creation of new limitations and exceptions is allowed if the conditions of the “three-step test” are met.

⁴² See http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=16.

⁴³ WIPO, Beijing Treaty on Audiovisual Performances, 24 June 2012, <http://www.wipo.int/wipolex/en/details.jsp?id=12213>.

2.1.4. New mandatory exceptions for blind and visually-impaired persons under the Marrakesh Treaty

The “Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled” (Marrakesh Treaty)⁴⁴ is the latest international copyright treaty adopted under the aegis of the WIPO; it was adopted on 27 June 2013 and entered into force on 30 June 2016, after having achieved the deposit of 20 instruments of ratification or accession by eligible parties. The main objective of this Treaty is to create a set of mandatory limitations and exceptions for the benefit of the blind, visually impaired and otherwise print disabled (VIPs).

The Marrakesh Treaty requires contracting parties to introduce a standard set of limitations and exceptions to copyright rules in order to permit reproduction, distribution and the making available of published works in formats designed to be accessible to VIPs, and to permit the exchange of these works across borders by organisations that serve those beneficiaries.

The beneficiary persons to the Treaty are those affected by a range of disabilities that interfere with the effective reading of printed material, including persons who are blind, visually impaired or print disabled, or persons with a physical disability that prevents them from holding and manipulating a book. The definition of works included within the scope of the Treaty is also broad as it covers all works “in the form of text, notation and/or related illustrations, whether published or otherwise made publicly available in any media”, including audio books. The organisations which are in charge of performing the cross-border exchange encompass many non-profit and government entities. They are either specifically authorised or “recognised” by the government as entities that provide many functions, including education and information access to beneficiary persons. It is their duty to establish and follow their own practices in several areas, which include establishing that the persons they serve are beneficiary persons; providing services only to those persons; discouraging unauthorised uses of copies; and maintaining “due care” in handling copies of works.

The Marrakesh Treaty provides for specific rules regarding both domestic and cross-border limitations and exceptions. At the domestic level, contracting parties are required to have a limitation or exception to domestic copyright law for VIPs for the rights of reproduction, distribution, and making available to the public. Authorised entities may, on a non-profit basis, make accessible format copies, which can be distributed by non-commercial lending or by electronic communication; the conditions for this activity include having lawful access to the work, introducing only those changes needed to make the work accessible, and supplying the copies only for use by beneficiary persons. VIPs may also make a personal use copy where they have lawful access to an accessible format copy of a work. At the domestic level, countries can confine limitations or exceptions to

⁴⁴ The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, WIPO, 27 June 2013, <http://www.wipo.int/treaties/en/ip/marrakesh/>.

those works that cannot be "obtained commercially under reasonable terms for beneficiary persons in that market."⁴⁵

At cross-border level, contracting parties are required to allow the import and export of accessible format copies under certain conditions. Regarding importation, when an accessible format copy can be made pursuant to national law, a copy may also be imported without right holder authorisation. With reference to exportation, accessible format copies made under a limitation or exception or other law can be distributed or made available by an authorised entity to a beneficiary person or authorised entity in another contracting party. This specific limitation or exception requires the exclusive use of the works by beneficiary persons, and the Treaty also clarifies that, prior to such distribution or making available, the authorised entity must not know or have reasonable grounds to know that the accessible format copy would be used by others.

The Treaty leaves contracting parties the freedom to implement its provisions taking into account their own legal systems and practices, including determinations on "fair practices, dealings or uses", provided they comply with their "three-step test" obligations.⁴⁶ It also requires WIPO to establish an "information access point" to allow the voluntary sharing of information facilitating the identification of authorised entities, and contracting parties to assist their authorised entities engaged in cross-border transfer arrangements.

As the EU signatory to this Treaty, the recently proposed Copyright package includes two regulatory instruments in order to ensure its implementation in the member states.⁴⁷

2.2. Exceptions to copyright and related rights in the EU acquis

2.2.1. General overview

The EU copyright legal framework harmonises the rights of authors and neighbouring rightsholders and seeks to harmonise exceptions and limitations to these rights. As explained in Chapter 1, an exception to an exclusive right means that a rightsholder is no

⁴⁵ Article 4.4, Marrakesh Treaty, *op. cit.*

⁴⁶ There is no requirement to be a party to any other international copyright treaty to join the Marrakesh Treaty; accession is open to Member States of WIPO and to the European Union. However, contracting parties that receive accessible format copies and do not have obligations to comply with the three-step test under Article 9 of the Berne Convention must ensure that accessible format copies are not redistributed outside their jurisdictions. Also, cross-border transfer by authorized entities is not permitted unless the contracting party in which the copy is made is a party to the WIPO Copyright Treaty or otherwise applies the three-step test to limitations and exceptions when implementing the Marrakesh Treaty.

⁴⁷ See section 6.3. of this publication.

longer in a position to authorise or prohibit the use of a work or other protected subject matter, as the beneficiary of the exception is already authorised by law to do so. The main objectives of the exceptions and limitations provided in EU law are to achieve public policy goals, such as fundamental freedoms, education or research, or to facilitate the use of protected content in specific circumstances.

Most of the exceptions in the *acquis communautaire* are optional for the member states to implement. They are set out in five directives, as follows:

- The InfoSoc Directive (Directive 2001/29/EC, Article 5)⁴⁸
- The Software Directive (Directive 2009/24/EC, Articles 5 and 6)⁴⁹
- The Database Directive (Directive 96/9/EC, Article 6 and 9)⁵⁰
- The Directive on Rental Right and Lending Right (Directive 2006/115/EC, Articles 6 and 10)⁵¹
- The Orphan Works Directive (Directive 2012/28/EU, Article 6)⁵²

The InfoSoc Directive is the most horizontal of these directives as it aims at harmonising the exceptions to copyright and related rights and applies to all types of works, with the exception of computer programs and databases, which continue to be regulated by the Software and the Database Directives.

2.2.1.1. The rationale for exceptions under the InfoSoc Directive

The InfoSoc Directive entered into force on 22 June 2001. As part of the Lisbon Agenda of 2000, whose main objective was to foster the growth of the knowledge-based economy in the European Union, the directive seeks to create a general and flexible legal framework at Community level with a view to fostering the development of the information society in Europe.⁵³ To that end, it aims at harmonising the principles and rules of copyright law that were deemed essential to the protection of works and creative content in the information society, both to increase the legal certainty of market players and to provide a high level of protection of intellectual property.⁵⁴ The other general objective of the

⁴⁸ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, <http://eur-lex.europa.eu/legal-content/FR/TXT/?uri=CELEX%3A32001L0029>.

⁴⁹ Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:111:0016:0022:EN:PDF>.

⁵⁰ Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31996L0009>.

⁵¹ Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32006L0115>.

⁵² Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32012L0028>.

⁵³ Recital 2 of the InfoSoc Directive.

⁵⁴ Recital 4 and 9 of the InfoSoc Directive.

directive was to transpose into Community law the international obligations arising from the WIPO Internet Treaties.

As part of this exercise, the Directive dealt extensively with copyright exceptions, first due to the impact of digital technologies and the Internet on the cross-border circulation of protected works covered by an exception and, secondly, in view of the new digital uses of works derived from the information society. In doing so, the Directive pursued the specific objective of striking a balance between the rights and interests of copyright holders and those of the public at large, while at the same time reaching an adequate level of harmonisation of exceptions in the member states.

In addition, the Directive clarifies in its preamble that the objectives of the promotion of culture and the safeguard of public interests should not be achieved to the detriment of a high level of protection for copyright holders, in particular as regards illegal forms of the distribution of counterfeited or pirated works.⁵⁵

As far as exceptions are concerned, the harmonisation objective, as explained in Recital 31 of the Directive, stresses the need to reassess the existing exceptions and limitations, as set out by the member states, in the light of the new electronic environment. Differences between national laws in relation to exceptions and limitations are considered to have direct negative effects on the functioning of the Internal Market of copyright and related rights and this impact is expected to become more pronounced in view of the further development of the transborder exploitation of works and cross-border activities.⁵⁶ However, this harmonisation task proved to be a difficult and controversial exercise, which may explain in part the delay between the first introduction of the proposal in 1997 and the adoption of the final text in 2001. The final text of the Directive provides for an exhaustive enumeration of exceptions and limitations to the reproduction right and/or the right of communication to the public, based on the different legal traditions in the member states.

2.2.1.2. The regime of exceptions under the InfoSoc Directive

The regime of exceptions and limitations is contained in Article 5 of the InfoSoc Directive.

The Directive provides only one obligatory exception, and this concerns service providers, telecommunications operators and certain others in limited circumstances for particular acts of reproduction which are considered technical copies, provided that those acts of reproduction form an essential part of a technological process and take place in the context of a transmission in a network (Article 5(1)).

Apart from this mandatory exception, the Directive provides for an exhaustive list of optional exceptions to the reproduction right and right of communication to the public (and to the distribution right under certain conditions). All are optional and therefore

⁵⁵ Recital 22 of the InfoSoc Directive.

⁵⁶ The first draft proposal presented in 1997 stated that the degree of harmonisation of exceptions had been made dependent on their impact on the smooth functioning of the Internal Market, taking due account of the principle of subsidiarity and proportionality and of the new WIPO obligations.

member states may choose to apply none, some or all of them. However, the list is exhaustive, which means that no other exception may be added to it. Article 5 thus leaves a great degree of discretion to the member states to decide which exceptions to introduce into their national legislation and how to implement them. Furthermore, the Directive does not determine the conditions applicable to each exception, so member states are free to transpose them according to their legal traditions.

Some exceptions must be accompanied by fair compensation to rightsholders, namely reprography (photocopying), private copying and broadcasts reproduced for viewing or listening in certain social institutions. However, member states are given some flexibility in how to interpret this notion of “fair compensation”, which was conceived by the EU legislator to provide adequate compensation to rightsholders (‘to compensate them adequately’, Recital 35). This notion must be distinguished from the notion of “equitable remuneration” as used in Articles 4(4) and 8(2) of the Rental and Lending Directive, which is based on the assumption that authors are entitled to remuneration for every act of usage of their protected works. “Fair compensation” is *inter alia*, linked to the possible harm that derives from the act in question according to Recital 35 of the Directive.⁵⁷ It is up to the member states to decide on the precise form of such compensation in accordance with their own legal traditions and practices.

Any exception introduced by a member state shall comply with the three conditions set forth in Article 5(5) of the Directive. This article introduces into the *acquis communautaire* the “three-step test” introduced by the Berne Convention and later incorporated into the TRIPS Agreement and WIPO Internet Treaties.

During the negotiations for the Directive, one of the most controversial aspects related to the compatibility of exceptions with technological measures against circumvention. In fact, the question of how to ensure that an exception can be enjoyed when the rightsholder has also put in place a technological protection measure (TPM) such as an anti-copying device or a Digital Rights Management (DRM) program, was much discussed. The final compromise resulted in Article 6 of the Directive providing first, that rightsholders have complete control over the manufacture, distribution, etc. of devices designed to circumvent anti-copying devices. Secondly, the Directive states that rightsholders, either voluntarily or by way of agreements with other parties, have to provide those who would benefit from a particular exception (for example schools, libraries, etc.) with the means to do so. Member states shall take appropriate measures to ensure that such means exist (Article 6(4)).

In the specific case of the private copying exception, the adoption by rightsholders of adequate measures to limit the number of reproductions in digital recording media was considered compatible with the Directive, due to the quality and the quantity of private copying that is made possible in the digital environment, justifying greater protection to rightsholders. This provision would be extensively discussed among stakeholders at a

⁵⁷ According to Recital 35 of the InfoSoc Directive, the payment of any compensation should take into account: (i) the “possible harm to the rightsholders”; (ii) whether rightsholders “have already received payment”; and (iii) that no obligation for payment arises where there is minimal harm to rightsholders.

later date, some of them arguing that technological measures against circumvention would justify the end of the private copying exception in the digital context.

2.2.2. Main exceptions related to the digital environment

Setting aside exceptions related to technological processes such as the exception for temporary acts of reproduction under the InfoSoc Directive,⁵⁸ it is possible to classify exceptions and limitations to copyright permitted under EU law into three main categories, based on their underlying foundations:⁵⁹

- the exceptions and limitations in favour of the public interest, including access to knowledge and information;
- the exceptions and limitations in favour of fundamental freedoms, including freedom of expression, freedom of the press and the right to information; and
- the exceptions and limitations for the benefit of private use.

Of these categories, some exceptions and limitations permitted under the *acquis communautaire* are more likely to have the most impact in the digital environment that will be examined below.

2.2.2.1. Exceptions in favour of the public interest

Some exceptions and limitations recognised under the EU *acquis* aim at encouraging the dissemination of knowledge and information among members of society at large. These exceptions and limitations reflect the idea that society as a whole will gain greater benefit from allowing certain specific uses of protected works without the rightsholder's consent, under certain specific conditions, than from respecting his/her exclusive right of authorisation. This is the case, for example, with the exception for the benefit of libraries, educational establishments, archives and museums; the exception for the purpose of teaching or scientific research; or the exception for public lending right, whose objective is to promote culture.

Many other exceptions which will not be addressed in this chapter could be included in this category: the exception for the benefit of disabled persons (Article 5(3)b of the InfoSoc Directive); for the purpose of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings (Article 5(3)e); for use during religious or official celebrations (Article 5(3)g); for use of works such

⁵⁸ The exception for temporary acts of reproduction is the only mandatory exception under the InfoSoc Directive (Article 5(1)). It concerns the right of reproduction for certain temporary acts of reproduction which are an integral and essential part of a technological process (temporary copies), and which aim to enable a lawful use or a transmission in a network between third parties by an intermediary, of a work or other subject-matter (e.g. browsing, caching, reproduction on Internet routers).

⁵⁹ Lepage, A., Overview of exceptions and limitations to copyright in the digital environment, e-Copyright Bulletin, January-March 2003, <http://unesdoc.unesco.org/images/0013/001396/139696E.pdf>.

as works of architecture or sculpture made to be located permanently in public places (or “panorama” exception) (Article 5(3)h), etc.

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

Libraries, archives and museums and other institutions, whose purpose is to preserve a collection of copyright-protected works and to provide access thereto for research, education or private study, benefit from several exceptions under EU law. Such exceptions limit copyright to accommodate key public-interest missions of the libraries, such as the preservation of and the access to knowledge and culture. They aim at ensuring the preservation of the collections (Article 5(2)c of the InfoSoc Directive); enabling the public to consult works on the premises of the establishment (Article 5(3)n of the InfoSoc Directive); or they authorise public lending by libraries (Article 6 of the Rental and Lending Directive). However, all these exceptions are formulated in broad terms that allow a great degree of flexibility as to their implementation by member states.

Thus, for example, Article 5(2)c of the InfoSoc Directive authorises member states to provide for an exception or limitation “in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage.” Although this article is very clear in the identification of the beneficiaries of the exception,⁶⁰ it does not give any detailed requirements in relation to the “specific acts of reproduction” concerned, and for what purposes those acts of reproduction are allowed. It is generally understood that the objective of this provision is to enable libraries to copy works for preservation purposes, which can include a large variety of activities. However, at the time of adoption of the Directive, libraries were only emerging as digital actors, and the activities of preservation and restoration undertaken by them at that time did not include the same activities as exist today in a digital environment. The notion of preservation and archiving itself can encompass different activities depending on the interpretation given by member states. It can include, for example, the restoration of damaged parts of a work, or some preventive activities; it can also cover the copying of often-consulted works, the copying for archives, or the format-shifting of works, depending on national laws.

Other issues remain open in Article 5(2)c, such as the number of copies authorised, the possibility of making digital copies, or the types of works which can be reproduced in the framework of this exception. This exception does not require fair compensation to copyright owners; however, as is the case for any exception of the Directive, member states can decide to apply this measure.

⁶⁰ Recital 40 of the InfoSoc Directive specifies that the exception only applies to non-profit-making establishments such as publicly-accessible libraries and equivalent institutions, as well as archives.

2.2.2.1.2. Exception for the purpose of teaching or scientific research

As mentioned earlier, teaching is one of the few exceptions listed in the first version of the Berne Convention adopted in 1886. Initially introduced as an exception “for educational or scientific purposes”, it was later reformulated as “illustration for teaching”. Exceptions for educational and research purposes are also largely present in the *acquis communautaire*.⁶¹

The exception provided for in the InfoSoc Directive is worded in very broad terms as it does not give any details in relation to its scope; it is only specified that the purpose should be *solely* illustration for teaching or scientific research. The notion of “teaching” is not defined in the Directive either.⁶² On the other hand, in the absence of any specification in relation to the notion of “illustration”, it is possible to presume that this concept refers to illustration by any means and media and by any technique. As to the works used for illustration, it is assumed that there must be a link between the work that is used and the topic of the teaching. The condition of illustration as well as the length of the work which is used may also be interpreted differently depending on the type of work considered (for example, photograph, poem, book, film, etc.).⁶³

Article 5(3)a of the InfoSoc Directive also refers to uses of works in the context of “scientific research”, without providing any further definition about the scope of this notion. The purpose of research was already mentioned in the Rental and Lending Directive (Article 10(1)d and in the Database Directive (Articles 6(2)b and 9(b), where it was specified in the preamble that the term “scientific research” covers both the natural and the human sciences.

The exception for education and teaching does not determine its beneficiaries, which can include any institution providing teaching or doing research, as well as any individual undertaking research. In addition, Recital 42 of the InfoSoc Directive specifies that the organisational structure and the means of funding of the establishment

⁶¹ Exceptions for educational and research purposes are included in three EU Directives.:

Article 10(1) of the 1992 directive on rental and lending right and on certain rights related to copyright in the field of intellectual property - later codified in the directive 2006/115 (the “Rental and Lending Directive”)⁶¹ - allows member states to limit related rights for use “solely for the purposes of teaching or scientific research” Article 6(2)b and 9(b) of the Database Directive⁶¹, respectively for copyright and *sui generis* right, admit an exception for the purpose of illustration for teaching or scientific research.

Article 5(3) of the InfoSoc Directive allows member states to provide for exceptions to the reproduction right and to the right of communication to the public and of making available to the public of works, for 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.” The exception can also cover acts of distribution. Recital 42 explicitly includes distance learning in the scope of the exception.

⁶² Recital 14 of the InfoSoc Directive refers to education and teaching, outlining that “this Directive should seek to promote learning and culture by protecting works and other subject-matter while permitting exceptions or limitations in the public interest for the purpose of education and teaching.” However, there is no explanation as to the differences between both notions.

⁶³ The exception for illustration for teaching could, in certain cases, overlap the exception for quotation – which is already the cases in many member states where the exception for quotation includes the purpose of teaching - but not necessarily, since entire works (e.g. photograph or poetry) could also in theory enter into the scope of this exception.

concerned are irrelevant. Therefore, both public and private educational and research institutions can benefit from the exception.⁶⁴ Furthermore, the Directive does not limit in any way the categories of works that could be covered by the exception.

According to Article 5(3) of the InfoSoc Directive, only acts accomplished with a non-commercial purpose will benefit from the exception. This condition applies both to teaching and to scientific research.⁶⁵

The provision that the use is limited “to the extent justified by the non-commercial purpose to be achieved” introduces some proportionality: the scope of the use as well as the length of the portion of work used shall not exceed what is strictly necessary to illustrate teaching or to do research.⁶⁶ Other conditions governing the use of this exception include indicating the source (for instance, including the name of the author, and also possibly the title of the work, the publisher, etc.).

Although none of the directives which provide for the possibility of allowing such an exception in the member states require that it be accompanied by some element of remuneration to the rightsholders, the application of the “three-step test” may result in the member state having to provide for some form of compensation.

2.2.2.1.3. The exception for public lending right

Rental and lending rights have been introduced as exclusive rights in the *acquis communautaire* by the Rental and Lending Directive.⁶⁷ According to this Directive, EU member states must introduce laws granting the right to authorise or prohibit the rental and lending of originals and copies of copyright works. The exclusive lending right shall belong to the author, the performer, the phonogram producer and the producer of the first fixation of a film (Article 3(1) of the Directive). According to the Rental and Lending Directive, the notion of “lending” only refers to acts of *public lending* since, according to its Article 2(1)b, “lending” means making available for use, for a limited period of time

⁶⁴ The Database Directive allows the Member States to exclude some teaching and research establishments from the benefit of the exception to the sui generis right, but such a rule is not contained in the InfoSoc Directive.

⁶⁵ Recital 42 of the InfoSoc Directive also provides that “when applying the exception or limitation for non-commercial educational and scientific research purposes, including distance learning, the non-commercial nature of the activity in question should be determined by that activity as such. The organisational structure and the means of funding of the establishment concerned are not the decisive factors in this respect”. This clarification would confirm that tuition fees for registration to a school or university will not prevent the application of the exception. The purpose of the teaching or research activity itself will determine whether the non-commercial dimension is satisfied.

⁶⁶ This aspect should be kept in mind when considering other possible educational uses, such as the making of anthologies. Although Article 5(3) a) of the InfoSoc Directive seems to be flexible enough to cover teaching anthologies, these should be solely for teaching purposes, and comply with both the non-commercial requirement and the three-step-test.

⁶⁷ Directive 2006/115/EC on rental and lending right and on certain rights related to copyright in the field of intellectual property, *op. cit.*

and not for direct or indirect economic or commercial advantage, when it is made through establishments which are accessible to the public.”⁶⁸

In practice, the notion of “public lending right” usually refers to the right of remuneration that in most countries replaces the exclusive right of public lending, as allowed under Article 6 of the Rental and Lending Directive. The objective of such a derogation is the promotion of cultural objectives, as provided in Article 6(1), which refers to the flexibility given to member states in determining the remuneration. Some establishments could be exempted from any remuneration, with the exception of lending of phonograms, films or computer programs if those categories of works are encompassed in the lending right (Article 6(2)). Article 6(3) even allows member states to exempt certain categories of establishments from this remuneration. Such establishments are in the first place public libraries. Depending in particular on the definition of the term “public” under national law, university libraries and those of educational establishments may also be covered.

The Rental and Lending Directive leaves member states a great deal of discretion in the way they exercise the public lending right exception, which reflects the compromise found at the time between complying with the Internal Market needs on the one hand, and taking into account the different traditions of member states in this area on the other.⁶⁹

2.2.2.2. Exceptions based on fundamental freedoms

A number of exceptions permitted under EU law are based on objectives of guaranteeing fundamental freedoms, in particular the freedom of expression, the freedom of the press and the right to information. Freedom of expression essentially concerns the possibility to seek, gather and disseminate information. All these activities form an essential prerequisite to the shaping of people’s opinions and values in a democratic society.

The exception for quotations for purposes such as criticism or review (Article 5(3)d of the InfoSoc Directive), as well as the exception for the purpose of caricature, parody or pastiche (Article 5(3)k) are of particular importance among the limitations recognised in EU law to protect users’ freedom of expression and promote the free flow of information.

Concerning the use of protected works for quotation, Article 5(3)d of the InfoSoc Directive establishes that member states may provide for exceptions or limitations to the right of reproduction, the right of communication to the public, and of making available to the public in the case of:

quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public,

⁶⁸ Conversely, the notion of rental, according to the directive, means making available for use, for a limited period of time and for direct or indirect economic or commercial advantage.

⁶⁹ See Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the public lending right in the European Union, COM/2002/0502, final, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52002DC0502:EN:HTML>.

that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose.

This provision follows on from the provision of the Berne Convention, in that it allows quoting from works already published, on the condition that it is compatible with fair practice and to the extent justified by the specific purpose. Article 5(3)d contains no specific indications concerning the permitted length of the quotation. Finally, as a rule, the name of the author and the source of the quoted work must be indicated in the quotation, in so far as it is possible.

Other exceptions permitted under the InfoSoc Directive are also based on objectives of fundamental freedom, such as reproduction by the press; communication to the public or the making available of published articles on current economic, political or religious topics or of broadcast works (Article 5(3)c); and the use of political speeches and extracts of public lectures or similar works, to the extent justified by the informatory purpose (Article 5(3)f), etc.

2.2.2.3. Exceptions for the benefit of private use: the private copying exception

This group of exceptions refers to the situations whereby it is impossible for rightsholders to exercise their exclusive rights of authorisation in relation to their works. This limitation is found in the so-called “private copying” exception, which is granted because it is practically impossible to grant permission to large numbers of individuals, or to monitor how such permission is subsequently used.

Thus, under Article 5(2)b of the InfoSoc Directive, member states may provide for an exception to the right of reproduction:

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 rightsholders receive fair compensation which takes account of the application or non-application of technological measures.

Following this definition, the following characteristics of the private copying exception can be emphasised:

- The medium on which the copy is made is not relevant;
- The copy has to be made by a natural person, which excludes enterprises and public bodies from the scope of the exception;
- All types of commercial ends are excluded;
- The rightsholders have the right to receive fair compensation;
- The application of technological measures introduced by rightsholders against copying are to be taken into account when applying the fair compensation.

Fair compensation shall remunerate rightsholders for the losses caused by private copying. As mentioned earlier, the Directive lists the possible harm that the act of private copying can cause to rightsholders as one “valuable criterion” used to determine the form,

arrangements and possible level of fair compensation (Recital 35). However, no compensation may be due if rightsholders have already received payment in some other form, for instance as part of a licence fee. In cases where the prejudice to the rightsholder would be minimal, it might not be necessary to provide for compensation. The Directive is neutral as to the form of fair compensation. It is also important to note that fair compensation applies for acts of legal private copying and therefore excludes any act of copyright infringement.⁷⁰

Although the private copying exception has been applied in almost all the member states, there is a great degree of difference among countries as to its practical implementation, ranging from the tariff/levy-setting models, to a difference in tariffs themselves or in the collection and distribution schemes. These differences are due to the flexibility left to member states and courts, and to the fact that only partial harmonisation was achieved in this field by the InfoSoc Directive.

Private copying levies are a constant topic of debate in EU copyright law and policy, especially in the context of the emergence of digital technologies, where the reproduction of protected content is becoming increasingly easy and inexpensive. They have been on the harmonisation agenda since the early 1990s, when the European Commission attempted to harmonise private copying compensation systems; however, the Commission's efforts have not yet resulted in legislative proposals.⁷¹ On the other hand, the Court of Justice of the European Union has intervened extensively in relation to the private copying exception, ensuring that it is interpreted and applied in the same way in all the member states and clarifying, through its judgments, important practical aspects of the implementation of levy systems and the notion of "harm".⁷²

⁷⁰ See also Cabrera Blazquez, F.J., "Who Pays for Private Copying?", *IRIS Plus 2011-4*, Who Pays for Private Copying? (Susanne Nikoltchev (Ed.), European Audiovisual Observatory, Strasbourg 2011), http://www.obs.coe.int/documents/205595/264635/Iris_plus_2011-4_EN_FullText.pdf/78e34a8f-74b5-4ac5-9920-ed28a99dece0.

⁷¹ See section 6.4.3. of this publication.

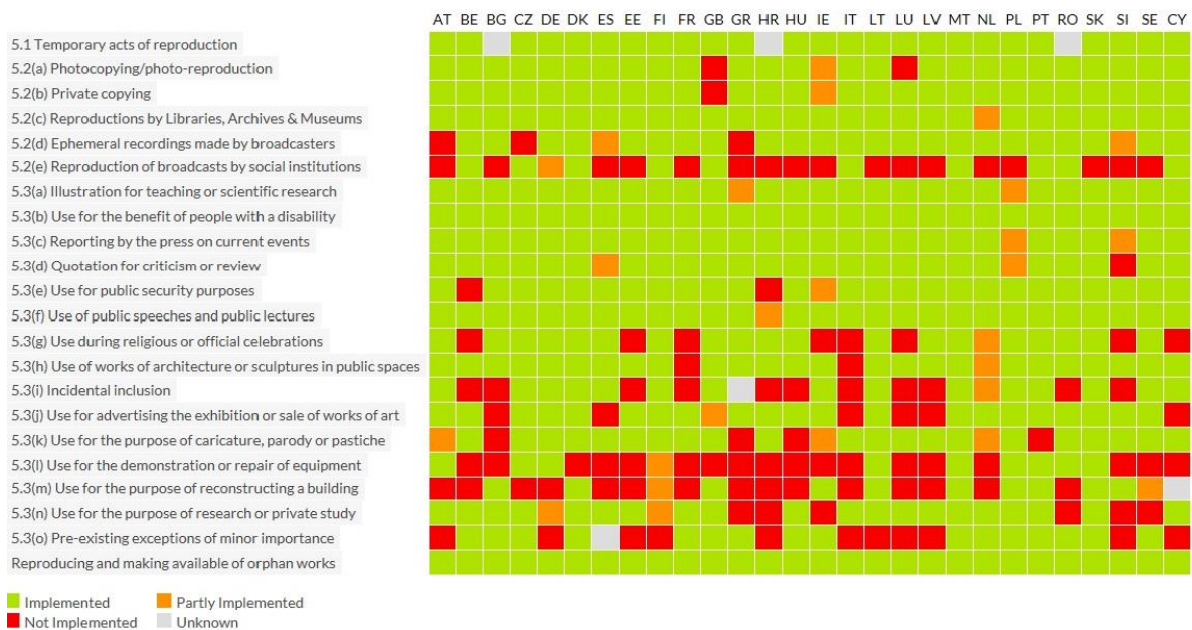
⁷² See Chapter 5 of this publication for further details on case law and interpretative issues.

3. National legal framework

3.1. General overview

As it is mostly optional, the implementation of the exceptions and limitations to copyright provided for by the InfoSoc Directive leads to a quite diversified picture across the European member states:

Figure 1. Copyright exceptions in the EU-28



Source: *CopyrightExceptions.eu*, 2016

In addition to the factual differences that derive from the non-mandatory nature of these rules, the diverse interpretations that may arise while applying the “three-step test”, and thus transposing the notions of normal exploitation and legitimate interest while interpreting the exceptions restrictively according to Article 5(5) of the InfoSoc Directive, have added further discrepancies to the harmonisation objective underlying the Directive. These notions may vary significantly from one jurisdiction to another, and as a result, what may be allowed as an exception in one country is not necessarily allowed in another.

Furthermore, the limitations laid down in national legislation and the form of each particular limitation are usually determined by assessing the need and desirability for society to use a work, in conformity with the country's national policy and traditions. The results of this assessment process also vary considerably from one country to the next, thus leading to wider or narrower concepts depending on which national framework is analysed.⁷³

3.2. Overview of national implementations of certain exceptions to copyright

In its first (and so far only available) implementation report on the application of the InfoSoc Directive, the European Commission has pointed to the determining role of national courts in order to adapt the current wording of the Directive to the needs deriving from the digital environment.⁷⁴

The exceptions that can also be applied to digital uses have been identified by the Commission as follows:

- Transient copies – Article 5(1)
- Private copying – Article 5(2)b
- Benefit of cultural heritage institutions – Articles 5(2)c and 5(3)n
- Reporting of current events (Article 5(3)c), Quotations for criticism or review (Article 5(3)d) and Parodies (Article 5(3)k)

These exceptions will be briefly explored in the following sections; it is noteworthy that the exception for the benefit of libraries is being affected by the ongoing copyright reform at EU level.⁷⁵

⁷³ For a more detailed overview, see the studies prepared for the European Commission of De Wolf & Partners, Part II of the Study on the application of Directive 2001/29/EC on copyright and related rights in the information society (the “InfoSoc Directive”), 2013, http://ec.europa.eu/internal_market/copyright/docs/studies/131216_study_en.pdf and Charles River Associates (CRA), Assessing the economic impacts of adapting certain limitations and exceptions to copyright and related rights in the EU, 2014, http://ec.europa.eu/internal_market/copyright/docs/studies/140623-limitations-economic-impacts-study_en.pdf and the paper prepared for the European Parliament by Renda A., Simonelli F., Mazziotti G., Bolognini A., Luchetta G., The Implementation, Application and Effects of the EU Directive on Copyright in the Information Society, CEPS, 2015, https://www.ceps.eu/system/files/SR120_0.pdf included in the general report Reynolds S. (ed), Review of the EU copyright framework, European Parliamentary Research Service (EPRS), 2015, [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/558762/EPRS_STU\(2015\)558762_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/558762/EPRS_STU(2015)558762_EN.pdf).

⁷⁴ European Commission, Report to the Council, the European Parliament and the Economic and Social Committee on the application of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, 30 November 2007, SEC(2007) 1556, http://ec.europa.eu/internal_market/copyright/docs/copyright-infso/application-report_en.pdf.

⁷⁵ See section 6.3. of this publication.

3.2.1. Exception for temporary acts of reproduction (transient copies)

The exception for temporary acts of reproduction is the only mandatory exception established by the InfoSoc Directive. Consequently, it has been literally implemented in all the member states of the European Union.

The concept of temporary act provided by Article 5(1) is explained by Recital 33 as a sort of complement to the exemption of liability for caching activities of Internet services providers under Article 13 of the e-Commerce Directive.⁷⁶ Some authors have therefore argued that rather than an exception, this provision should be considered as defining the scope of the right to reproduction.⁷⁷ It is in these terms that the implementation of the provision in the Netherlands is expressed, since the Dutch Copyright Act considers that the reproduction right itself does not include “temporary” copies, so that the latter are not part of the exclusive rights. The temporary copies thus remain outside the scope of copyright and do therefore not need to be treated as an “exception”.⁷⁸

In light of the literal transposition of this provision, there has been little case-law. It is worth mentioning the *Google v Copiepresse* case where the Brussels Court of Appeal found that by publishing archived versions of newspaper articles (“*Google Cache*”) and by publishing titles, headlines and snippets of newspaper articles (“*Google News*”), *Google* had infringed the copyright entitlements of the copyright management company for newspaper publishers *Copiepresse*.⁷⁹ More precisely, the Court held that the cache copy of a webpage stored in the memory of the search engine’s servers, together with the display of a link making the cached copy available to the public were against the InfoSoc Directive, but limitedly to the display of the links, which had to be removed from *Google*’s website.

⁷⁶ Directive of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001L0029&from=EN>.

⁷⁷ IViR, Study on the implementation and effect in member states’ laws of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, February 2007, http://ec.europa.eu/internal_market/copyright/docs/studies/infosoc-study_en.pdf, p. 30 ff.

⁷⁸ Article 13a of the Dutch Copyright Act (*Auteurswet*) provides that “The reproduction of a literary, scientific or artistic work does not include the temporary reproduction that is transient or incidental, forming an integral and essential part of a technological process, carried out for the sole purpose of enabling: (a) transmission in a network between third parties by an intermediary, or (b) lawful use to be made of a work, which has no independent economic significance”, <http://wetten.overheid.nl/BWBR0001886/2015-07-01>. English translation available at <http://www.hendriks-james.nl/auteurswet/>.

⁷⁹ Judgment of the Brussels Court of Appeal, 5 May 2011 (available in French only), <http://www.copiepresse.be/pdf/Copiepresse5mai2011.pdf>.

3.2.2. Exception for reproductions for private uses (private copying)

Apart from two countries (the United Kingdom and Ireland), the exception for private copying laid down in Article 5(2)b of the InfoSoc Directive has been implemented in all member states. There are quite significant differences across the countries with regard to both the notion of private copying as such, and the implementation of the compensation systems to allow for the fair compensation to the rightsholder envisaged by the Directive. This concerns the tariff-setting activity itself, as much as the definition of the levied products and the amount of the levies.⁸⁰

3.2.2.1. Examples of recent developments in the implementation of the exception of private copying

The Directive does not provide for a clear definition of what should be intended as falling under the notion of private copying, except for what has been included in Recital 38, which states that “digital private copying is likely to be more widespread and have a greater economic impact. Due account should therefore be taken of the differences between digital and analogue private copying and a distinction should be made in certain respects between them.”⁸¹ This lack of guidance has led to the adoption of a quite diversified range of national implementation rules. Some significant regulatory developments can be reported.

In the United Kingdom, the private copying exception was introduced in 2014 into the Copyright, Designs and Patents Act 1988, under which “The making of a copy of a work, other than a computer program, by an individual does not infringe copyright in the work provided that the copy (a) is a copy of (i) the individual’s own copy of the work, or (ii) a personal copy of the work made by the individual; (b) is made for the individual’s private use; and (c) is made for ends which are neither directly nor indirectly commercial.”⁸² The provision was declared void by the High Court of Justice in 2015 because of the absence of a fair compensation system,⁸³ so the United Kingdom remains, together with Ireland, the only member state not to have implemented the exception.

Moreover, in 2015, a significant amendment to the Austrian copyright law entered into force, introducing a levy for fair compensation to rightsholders on digital media with

⁸⁰ For a complete overview of the implementation of the private copying exception see WIPO/de ThuisKopie, International survey on private copying, 2015, http://www.wipo.int/edocs/pubdocs/en/wipo_pub_1037_2016.pdf.

⁸¹ See section 2.2.2.3. of this publication.

⁸² Section 28B of the British Copyright, Designs and Patents Act 1988, <http://www.legislation.gov.uk/ukpga/1988/48/section/28B>.

⁸³ Judgment of the High Court of Justice, *R (British Academy of Songwriters, Composers and Authors and others) v Secretary of State for Business, Innovation and Skills*, 19 June 2015, <http://www.bailii.org/ew/cases/EWHC/Admin/2015/1723.html>. See Wilkins J., Legislation to introduce copyright exception law with no accompanying levy scheme deemed unlawful, IRIS, IRIS 2015-8/17, <http://merlin.obs.coe.int/iris/2015/8/article17.en.html>.



the capacity to store, particularly PCs, tablets and smartphones (*Speichermedienvergütung*). These devices had not previously been subject to a levy. Before claiming new tariffs, collecting societies must ascertain the accuracy of the data on the actual use of the various media for private copying and publish their results.⁸⁴

In Portugal, in 2015, a new law on private copy extended the list of devices subject to private copying licenses. With this change in law, devices such as mobile phones, tablets and other multifunctional devices have been brought within the scope of the exception, each with specific tariffs per unit.⁸⁵

In April 2014, the European Court of Justice ruled in the case C-435/12, *ACI v Thuiskopie*, that downloading from an illegal source was not within the scope of the Private Copying Regulation.⁸⁶ In the past, the Dutch government had always taken the view that copying from illegal sources by a consumer was also within the scope of the private copying exception. To comply with the EJC ruling, as of 1 January 2015, a decree issued by the Ministry of justice,⁸⁷ competent for the administration of the private copy levy system in the Netherlands, extended the system in place until 2018 and lowered the levies by 30%. A levy on e-readers was also introduced.

An intervention on the amount of the levies was also put in place in Italy, where a decree issued by the Ministry of Culture in 2014 established the maximum amount for each device, including smartphones and tablets.⁸⁸

A quite radical change has taken place in Finland, where the levy system has been replaced by a state-funded system. According to Section 26 a(1) of the Copyright Act as amended at the end of 2014,⁸⁹ it is now up to the state to compensate authors for private copying, and not the device-based levies collected from consumers. As of this year (2017), compensation is derived from the state budget and the amount should correspond to a fair compensation.

A similar approach had been followed in Spain, where a new system was introduced in 2011 providing that fair compensation for acts of private copying be paid to rightsholders from the state budget. Following a ruling of the ECJ in the case C-470/14,

⁸⁴ Article 42B of the Austrian Copyright Act (*Urheberrechtsgesetz*) (available in German only), https://www.jusline.at/42b_UrhG.html.

⁸⁵ Table annexed to the Portuguese Law no. 49/2015 amending the Copyright Act (*Código do Direito de Autor e dos Direitos Conexos*), converting Decree-Law no. 320/XII (available in Portuguese only), <https://www.parlamento.pt/ActividadeParlamentar/Paginas/DetailheDiplomaAprovado.aspx?BID=18632>. See Sousa H., Fees for private copying approved after President's veto, IRIS, IRIS 2015-6/30, <http://merlin.obs.coe.int/iris/2015/6/article30.en.html>.

⁸⁶ See section 5.3.3. of this publication.

⁸⁷ Decree issued by the Dutch Minister of Justice, 28 October 2014 (available in Dutch only), <https://zoek.officielebekendmakingen.nl/dossier/29838/stb-2014-410.html>. See Sluiter, S.K., Dutch Minister Prolongs Private Copy Levy System and Lowers Levy in Response to CJEU Ruling, IRIS, 2015-1/32, <http://merlin.obs.coe.int/iris/2015/1/article32.en.html>.

⁸⁸ Decree issued by the Italian Minister of Culture, 20 June 2014 (available in Italian only), <http://www.gazzettaufficiale.it/eli/id/2014/07/07/14A05171/sq>.

⁸⁹ Article 26a of the Finnish Copyright Law, 19 December 2014 (available in Finnish and Swedish only), <https://www.finlex.fi/sv/laki/ajantasa/1961/19610404#L2a>. See Alén-Savikko, A., New system for compensating private copying, IRIS, 2015-6/14, <http://merlin.obs.coe.int/iris/2015/6/article14.en.html>.

EGEDA v. Administracion del Estado,⁹⁰ according to which the Spanish scheme, whereby the payment of the fair compensation is financed from all the budget resources of the general state budget and therefore also from all taxpayers, was not in line with the InfoSoc Directive, the Supreme Court cancelled the decree.⁹¹ Discussions are now under way in order to put in place a levy-based system for ensuring fair compensation.

Work in progress can also be registered in France, where the Commission on private copying is about to decide on whether the fair compensation system should also be applied to Network Personal Video Recorders (cloud stocking capacities and recordings of TV streaming).⁹²

3.2.2.2. The implementation of the fair compensation systems

With regard to tariff-setting models, there seem to be four dominant models: (i) state-funded systems with no tariffs, (ii) direct state intervention systems in which the lawmaker sets tariffs, (iii) negotiation systems in which tariffs are set through negotiations between rightholders and importers/manufacturers, and (iv) a combination of the latter two systems.

Table 2. Tariff-setting models

Models	Countries
State-funded system (no tariffs)	Spain, Finland (as of Jan. 1, 2015)
Direct state intervention	Czech Rep., Denmark, Estonia, Finland (until Dec. 31, 2014), Greece, Italy, Lithuania, Norway, Poland, Portugal, Slovak Rep., Slovenia
Negotiation industries and societies	Austria, Croatia, Germany
Set by law/government after proposals by rightholders or negotiation stakeholders in special government-appointed body	Belgium, France, Hungary, Latvia, the Netherlands, Romania, Sweden

Source: EAO elaboration on WIPO/deThuisKopie, 2015

With regard to the amount of the tariffs, levels vary significantly among EU countries; most of them apply a fixed tariff directly related to the capacity of objects, but they may also apply a tariff based on a percentage of the sales or import price to determine the amount of the levy, or combine fixed tariffs on blank media with a percentage on devices.

⁹⁰ See section 5.3.2. of this publication.

⁹¹ Judgment of the Spanish Supreme Court (*Tribunal Supremo*), 10 November 2016 (available in Spanish only), http://www.poderjudicial.es/stfls/SALA%20DE%20PRENSA/NOTAS%20DE%20PRENSA/20161111%20Sentencia_Canon%20digital.pdf. See Valais, S., Supreme Court decision on private copying, IRIS, 2017-1/11, <http://merlin.obs.coe.int/iris/2017/1/article11.en.html>.

⁹² See Rees, M., L'enregistrement dans le cloud à la porte de la Commission copie privée, NextInpact, 4 January 2017, <https://www.nextinpact.com/news/102736-lenregistrement-dans-cloud-a-porte-commission-copie-privee.htm>.

Table 3. Overview of countries that apply a percentage as a tariff

Country	Percentage of levy on blank media and devices
Czech Republic	Fixed amount on blank media, 0.75% to 3% on devices
Estonia	8% on blank media, 3% on devices
Greece	6% on all products/devices
Latvia	4%/6% on flash/blank media, fixed amount on devices
Lithuania	6% on blank media, fixed amount on devices
Poland	Ranging from 0.05% to 3%
Romania	3% on blank media, 0.5% on devices
Slovak Republic	6% on blank media, 3% on devices

Source: EAO elaboration on WIPO/deThuisKopie, 2015

In addition to the variation among the models, it should also be noted that the InfoSoc Directive does not provide for an enforceable right to private copying, but has to be applied in light of the “three-step-test”. This was clearly stated by various national courts, as in the Belgian *Test Achats v EMI* case,⁹³ which concerned a case of the illegitimately assumed right to private copying on DVDs, or in the French *Mulholland Drive* case,⁹⁴ where the Court stated the need for carrying out the “three-step-test” in any event.

3.2.3. Exception for cultural heritage institutions

Article 5(2)c of the InfoSoc Directive authorises member states to provide for an exception or limitation in respect of “specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage.”

Although optional, this exception has been transposed in all the member states, but in quite diverse ways, subjecting the act of reproduction to different conditions of application and requirements. As has been noted, “some member states only allow reproductions to be made in analogue format; others restrict digitisation to certain types of works, while yet other member states allow all categories of works to be reproduced in both analogue and digital form.”⁹⁵

⁹³ Judgment of the Brussels Court of Appeal, *Test Achats v EMI Recorded Music Belgium et al*, 9 September 2005 (available only in French), <http://www.crid.be/pdf/public/5259.pdf>.

⁹⁴ Judgment of the *Cour de cassation*, *Studio Canal et al v S. Perquin et Union fédérale des consommateurs Que Choisir*, 8 February 2006 (available only in French), <https://www.legifrance.gouv.fr/affichJurijudi.do?idTexte=JURITEXT000007052414>.

⁹⁵ See Guibault, L., Westkamp, G., Rieber-Mohn, Th., Hugenholtz, P.B., Van Eechoud, M., Helberger, N., Steijger, L., Rossini, M., Dufft, N., Bohn, Ph., 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, IViR, 2007, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2006358, and U. Gasser and S. Ernst, Best Practice Guide – Implementing the EU Copyright Directive in the Digital Age, s.l., Open Society Institute, 2006, https://www.opensocietyfoundations.org/sites/default/files/eucd_20070315.pdf.

Member states have generally restricted the purposes of the exception to preservation or equivalent notions. This is the case for Belgium,⁹⁶ Denmark,⁹⁷ Luxemburg,⁹⁸ and France,⁹⁹ whereas Hungary¹⁰⁰ refers to archiving, Spain¹⁰¹ to conservation and Poland¹⁰² to maintaining and protecting collections.

⁹⁶ According to Article 22(1)8 of the Belgian Copyright Law of June 30, 1994, “Once a work has been lawfully published, its author may not prohibit [...] duplicates, copies, restorations and transfers by the Cinémathèque, royale de Belgique, for the purpose of preserving the cinematographic heritage, provided that this does not prejudice the normal exploitation of the work or the legitimate interests of the author”, <http://www.wipo.int/edocs/lexdocs/laws/en/be/be064en.pdf>.

⁹⁷ According to Article 16(1-2) of the Danish Copyright Law (Consolidate Act No. 1144 of October 23, 2014), “(1)Public archives, public libraries and other libraries that are financed in whole or in part by the public authorities, as well as State-run museums and museums that have been approved in accordance with the Museums Act, may use and distribute copies of works in their activities in accordance with the provisions of subsections (2)-(6) if this is not done for commercial purposes. However, this does not apply for computer programs in digital form, with the exception of computer games. (2) The institutions may make copies for the purpose of back-up and preservation.”, <http://www.wipo.int/edocs/lexdocs/laws/en/dk/dk091en.pdf>.

⁹⁸ According to Article 10(11) of the Luxemburg Copyright Law of 18 avril 2001, “When the work has been lawfully made available to the public, the author may not prohibit: [...] the reproduction of a lawfully available to the public, carried out by a library, a film library, a documentation center or other non-commercial scientific or cultural institution with the sole purpose of preserving the heritage and make all reasonably useful work to safeguard this work, provided it does not affect the normal exploitation of such works and does not prejudice the legitimate interests of authors and the public communication of audiovisual works by these institutions in order to connatre cultural heritage, provided that such communication takes place in the institution’s pregnant and it is recognized by the Minister that culture in its attributions, by grand Ducal regulation”, http://www.wipo.int/wipolex/en/text.jsp?file_id=128652.

⁹⁹ According to Article L-122-5(8) of the French Intellectual Property Code of 1 July 1992 (consolidated version of October 9, 2016), “La reproduction d’une oeuvre et sa représentation effectuées à des fins de conservation ou destinées à préserver les conditions de sa consultation à des fins de recherche ou d’études privées par des particuliers, dans les locaux de l’établissement et sur des terminaux dédiés par des bibliothèques accessibles au public, par des musées ou par des services d’archives, sous réserve que ceux-ci ne recherchent aucun avantage économique ou commercial.”, <http://www.wipo.int/edocs/lexdocs/laws/fr/fr/fr501fr.pdf>.

¹⁰⁰ According to Article 35(4) of the Hungarian Act No. LXXVI of 1999 on Copyright (consolidated text as of January 1, 2007), “Publicly accessible libraries, educational establishments [Article 33(4)] museums and archives as well as audio and audiovisual archives shall be allowed to make a copy of a work for internal institutional purposes – outside the scope of entrepreneurial activity – to the extent and in the way justified by such a purpose if it is not intended for earning or increasing income even in an indirect way and if the copy is a) required for scientific research, b) made for archiving from an own copy of such an institution for scientific purpose or for public library supply, c) made of a minor part of a work made public or of an article published in a newspaper or periodical, or d) the copying is allowed by a separate law under certain conditions, in exceptional cases.”, <http://www.wipo.int/edocs/lexdocs/laws/en/hu/hu084en.pdf>.

¹⁰¹ According to Article 37(1) of the Spanish Copyright Law 1/1996 (consolidated text as of 5 November 2014) “Los titulares de los derechos de autor no podrán oponerse a las reproducciones de las obras, cuando aquéllas se realicen sin finalidad lucrativa por los museos, bibliotecas, fonotecas, filmotecas, hemerotecas o archivos de titularidad pública o integradas en instituciones de carácter cultural o científico y la reproducción se realice exclusivamente para fines de investigación o conservación.”, <http://www.wipo.int/edocs/lexdocs/laws/es/es/es189es.pdf>.

¹⁰² According to Article 28(1) of the Polish Copyright Law no. 83/94 (consolidated text as of 20 May 2016), “Libraries, museums and archives may: 1) grant us, in terms of their statutory tasks, copies of a widespread, 2) reproduce works contained in their collections to supplement, preserve or protect these collections, 3) make collections for research purposes or cognitive via terminals system (terminals) located on the territory of these units - if these activities are not made in for direct or indirect financial gain.”, http://www.wipo.int/wipolex/en/text.jsp?file_id=408585.

Connected to the exception allowing for acts of reproduction is the one concerning the possibility for member states, under Article 5(3)n of the InfoSoc Directive, to allow for “use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections”.

Apart from the ongoing discussions concerning the possibility of including e-lending in its scope,¹⁰³ these two exceptions are basically following on from each other, but both of them have some shortcomings:¹⁰⁴

- on the one hand, the preservation exception under lit. c) includes activities such as the restoration of damaged items or the replacement of lost items, and the copying of fragile works,
 - but not necessarily format-shifting (unless the existing one is obsolete), archiving and web-harvesting
 - and certainly not mass-scale digitisation;
- on the other hand, the making available exception under lit. n) includes delivery upon request and on-site consultation,
 - but not necessarily online consultation and e-lending,
 - and certainly not making available for downloading.

3.2.4. Exceptions for reporting of current events, quotations for criticism or review and parodies

3.2.4.1. Exception for reporting of current events

According to Article 5(3)c of the InfoSoc Directive, member states may introduce exceptions and limitations for the “reproduction by the press, communication to the public or making available of published articles on current economic, political or religious topics or of broadcast works or other subject-matter of the same character, in cases where such use is not expressly reserved”, provided that the source and the author’s name are indicated.

What becomes determining for the application of this optional exception to both the reproduction right and to communication to the public is clearly the definition of “press”, which varies significantly across the member states.

On the one hand, the Dutch Copyright Act has, for example, introduced a very broad definition, including any medium “that has the same function”;¹⁰⁵ on the other hand,

¹⁰³ See section 6.4.1. of this publication.

¹⁰⁴ See De Wolf & Partners, *cit.*, p. 282, and also sections 6.3.4. and 6.4.1. of this publication.

¹⁰⁵ Article 15 of the Dutch Copyright Act (*Auteurswet*) provides that “Using reports or articles on current economic, political, religious or ideological topics or works of the same nature which have been published in

in the *Copiepress v Google* case, the Belgian Court held that the mere grouping of fragments of published articles, as appeared in the *Google News* service, could not be considered as qualifying for the reporting of current events due to the lack of any commentary by *Google*.¹⁰⁶

Significantly, the Copyright package presented in September 2016 proposes that press publishers be protected in the case of digital uses of press publications, a provision which is likely to address cases like the Belgian one in the presence of news aggregators. Article 11 of the proposed Copyright Directive provides for the rules on exceptions to be extended to the newly introduced publishers' rights too.

3.2.4.2. Exception for quotations for criticism or review

The Belgian *Copiepresse* case was also significant for the exceptions of criticism or review provided for by Article 5(3)d of the InfoSoc Directive, according to which member states may introduce them “provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose”.

The ancillary nature of the quoted work, which is meant to be used in order to illustrate an opinion, is the discriminating element for this exception, and the Belgian Court in *Copiepresse* did not consider the mere displaying of titles and opening sentences (snippets) of news articles as qualifying for the application of this provision.

A similar reasoning was adopted by a German Court when denying the application of this exception in a case dealing with the publication of excerpts from a protected film which were not linked to the alleged comments made about the film by an operator on the YouTube channel.¹⁰⁷ According to Cologne Court of Appeal, the freedom to quote should not be exploited as a vehicle for publishing a work or parts thereof. It was therefore not sufficient to insert or add quotations in an unstructured way; instead, quotations should be closely related to the ideas being expressed by the person using them.

In equivalent terms, the Court of Rome decided that the exception for quotation could not be used to cover excerpts of videos from TV programmes broadcast on the *RTI*

a daily or weekly newspaper or weekly or other periodical, radio or television programme or other medium that has the same function, is not regarded as an infringement of the copyright in a literary, scientific or artistic work, if: 1°. the use is made by a daily or weekly newspaper, a weekly or other periodical, a radio or television programme or other medium that has the same function; 2°. the provisions of Section 25 are observed; 3°. the source, including the name of the author, is clearly indicated; and 4°. the copyright is not expressly reserved.”, <http://wetten.overheid.nl/BWBR0001886/2015-07-01>. English translation available at <http://www.hendriks-james.nl/auteurswet/>.

¹⁰⁶ Judgment of the Brussels Court of Appeal, *cit.*, <http://www.copiepresse.be/pdf/Copiepresse5mai2011.pdf>.

¹⁰⁷ Judgment of the Cologne Court of Appeal (*Oberlandesgericht Köln*), 13 December 2013 (available in German only), http://www.justiz.nrw.de/nrwe/olgs/koeln/j2013/6_U_114_13_Urteil_20131213.html. See Rupp M., Cologne Appeal Court Limits Quotation Right Under Art. 51 UrhG For YouTube Excerpts, IRIS, 2014-3/17, <http://merlin.obs.coe.int/iris/2014/3/article17.en.html>.

channels in the online news section of the newspaper *La Repubblica*, especially when the videos and the news articles to which the videos were supposed to be ancillary were shown in two separate sections of the website.¹⁰⁸ The Court stated therefore that there was no direct link between the (unauthorised) use of the videos and the exercise of the journalistic activity by the newspaper.

3.2.4.3. Exception for parodies

Article 5(3)k of the InfoSoc Directive allows member states to provide for an exception to the rights of reproduction and communication to the public “for the purpose of caricature, parody or pastiche”.

Until just a few years ago, the United Kingdom was one of the few countries that had not implemented this exception. In 2014, the British Copyright, Designs and Patents Act 1988 was amended so that fair dealing with a copyright work for the purposes of caricature, parody, or pastiche does not infringe copyright in the work.¹⁰⁹ This means that one can use a sample of another person’s work, for example, a song, music, film or artwork, without seeking permission or a licence, provided that the use is regarded as fair dealing. If the extent of the material used is regarded as outside the scope of fair dealing, then a licence or permission from the copyright owner will be required. Before this amendment, the use of quotations could only be allowed without the copyright owner’s permission if it was for fair dealing, criticism, review or news reporting.

Very recently, Slovakia also introduced the exception for parody, while at the same time adapting national copyright law to the ruling of the CJEU in the case C-435/12, *ACI v Thuiskopie* with regard to the inapplicability of exceptions to works derived from illegal sources.¹¹⁰

¹⁰⁸ Judgment of the Tribunal of Rome, 13 July 2016. See Apa, E., Bellezza, M., Online newspaper cannot publish “entertainment videos” without the rightsholder’s consent, IRIS, 2017-1/22, <http://merlin.obs.coe.int/iris/2017/1/article22.en.html>.

¹⁰⁹ Article 30A of the British Copyright, Designs and Patents Act 1988, as amended by the British Copyright and Rights in Performances (Quotation and Parody) Regulations 2014, states that “(1) Fair dealing with a work for the purposes of caricature, parody or pastiche does not infringe copyright in the work. (2) To the extent that a term of a contract purports to prevent or restrict the doing of any act which, by virtue of this section, would not infringe copyright, that term is unenforceable.”, <http://www.legislation.gov.uk/ukpga/1988/48/section/30A>. See Wilkins, J., United Kingdom adapts existing copyright law to allow greater fair dealing and flexibility for the digital age, IRIS, 2014-10/19, <http://merlin.obs.coe.int/iris/2014/10/article19.en.html>.

¹¹⁰ Slovak Copyright Act, 5 August 2015 (available in Slovak only), <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2015/185/20160101>. See Polak, J., New Copyright Act adopted, IRIS, 2015-9/25, <http://merlin.obs.coe.int/iris/2015/9/article25.en.html>.



4. The role of self and co-regulation

4.1. General overview of EU strategies

The digital economy and the emergence of new business models based on the Internet have dramatically changed the way creative works are produced, distributed and accessed. They bring new opportunities for the creative industries but also represent new challenges for EU copyright rules that need to adapt to new consumer behaviours.

This is one of the conclusions reached by the European Commission in a Communication adopted on 18 December 2012 on “Content in the Digital Single Market”.¹¹¹ This Communication came as a follow-up to the 2011 Intellectual Property Strategy “A Single Market for Intellectual Property Rights”,¹¹² where the Commission recognised the strategic importance of copyright for the development of the Digital Single Market.

The Strategy sought to develop solutions targeted and designed to address specific obstacles with the most appropriate tools available, including not only legislative intervention but also commercial, contractual or technology-based solutions. In this context, the Commission took a number of actions, some of them through new legislative proposals (for example the directive on certain permitted uses of orphan works¹¹³ and the directive on collective management¹¹⁴), and others derived from contractually-based solutions (for example the Memorandum of Understanding on out-of-print books).

¹¹¹ Communication from the Commission “On Content in the Digital Single Market”, COM(2012) 789 final, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012DC0789&from=EN>.

¹¹² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, “A Single Market for Intellectual Property Rights – Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe, COM(2011) 287 final, 24 May 2011, http://ec.europa.eu/internal_market/copyright/docs/ipr_strategy/COM_2011_287_en.pdf.

¹¹³ Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, 27 October 2012, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012L0028&from=FR>.

¹¹⁴ Directive 2014/26/EU of the European Parliament and of the Council of 20 March 2014, on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0026&from=FR>.

4.2. Memorandum of Understanding on Out-of-Commerce Works

The Memorandum of Understanding (MoU) on Key Principles on the Digitisation and Making Available of Out-of-Commerce Works¹¹⁵ was signed on the 21 September 2011.¹¹⁶ It is a result of a stakeholders' dialogue which was launched in November 2010 between publishers, authors, libraries and collecting societies, with the aim of facilitating the digitisation and making available of out-of-commerce books and journals,¹¹⁷ including embedded images, by publicly accessible libraries, educational establishments, museums and archives in the EU member states.

The MoU stems from the Commission's overall objectives in the Digital Agenda for Europe and the Strategy on Intellectual Property Rights to further enhance the development of digital libraries in Europe and provide the widest possible access to the European cultural heritage. It is complementary to the Directive on Orphan Works¹¹⁸ (that is to say, the rightsholder of the work is not identified or, even if identified, is not located after a diligent search for the rightsholder has been carried out). In contrast to the latter, the MoU is focused on "mass digitisation" – for instance of parts of a library's collection.

The key principles aim to encourage and underpin voluntary licensing agreements to allow cultural institutions to digitise and make available online these type of works while fully respecting copyright. They focus on "Voluntary agreements on out-of-commerce works", "Practical implementation of collective agreements" and "Cross border access to digital libraries".

The MoU is a sector-specific, stakeholder-driven agreement which constituted an important step forward in establishing consensus between cultural institutions and rightsholders, and political support for practical solutions to rights-clearance challenges in mass-digitisation projects.

The recently proposed Copyright package includes rules on out-of-commerce works.¹¹⁹

¹¹⁵ Memorandum of Understanding (MoU) on Key Principles on the Digitisation and Making Available of Out-of-Commerce Works,

http://ec.europa.eu/internal_market/copyright/docs/copyright-info/20110920-mou_en.pdf.

¹¹⁶ The MoU signatories: Association of European Research Libraries (LIBER), Conference of European National Librarians (CENL), European Bureau of Library, Information and Documentation Associations (EBLIDA), European Federation of Journalists (EFJ), European Publishers Council (EPC), European Writers' Council (EWC), European Visual Artists (EVA), Federation of European Publishers (FEP), International Association of Scientific, Technical & Medical Publishers (STM), International Federation of Reprographic Rights Organisations (IFRRO).

¹¹⁷ Out-of-commerce works are those works that are still protected by copyright but are no longer available in customary channels of commerce.

¹¹⁸ Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, http://ec.europa.eu/internal_market/copyright/orphan_works/index_en.htm.

¹¹⁹ Title III of the proposal for a Directive on copyright in the Digital Single Market of 14 September 2016 proposes new measures to improve licensing practices and ensure wider access to content. Chapter 1 of Title III refers to out-of-commerce works and includes a set of measures aimed at facilitating the digitalisation and dissemination of these works, with a view to increasing the availability of works for people across Europe, providing new distribution channels for creators and bringing the EU's cultural heritage to the forefront. For

4.3. Access to copyright works for people with print disabilities

As a follow-up to the MoU on Out-of-Commerce Works, the stakeholders, with the support of the European Commission, created the “European Network of Trusted Intermediaries” (ETIN), a Brussels-based network representing both trusted intermediary organisations and rightsholders, with the aim of working on the practical implementation of the key principles of the MoU and of achieving a pan-European coverage.

The ETIN has agreed on a model licence/agreement for the cross-border transmission of accessible copies of works. This model licence/agreement is put forward as a basis for arrangements between potential “Trusted Intermediaries” (Tis) and rightsholders at national level. The ETIN has also finalised terms for the mutual recognition of TIs within the ETIN. The ETIN will continue to serve as a contact point and advisory and consultation centre for the cross-border transmission and supply of accessible copies of works.¹²⁰

4.4. Licenses for Europe

In view of the high level of priority given to the modernisation of Europe’s copyright regimes and the facilitation of licensing in the digital environment, the Commission announced in the 2012 Communication on “Content in the Digital Single Market” that it would work on two parallel tracks of action: on the one hand, it would complete the review of the EU copyright legislative framework with a view to modernising it, and in parallel, it would launch a structured stakeholders’ dialogue aimed at addressing a number of issues on which rapid progress was considered as necessary and possible.

Under the name of “Licensing Europe”, this process was designed to explore the possible limits of innovative licensing and technological solutions in making EU copyright law and practice fit for the digital age. It was assigned the objective of delivering practical, industry-led solutions to these issues by the end of 2013, without prejudice to further public policy action, including legislative reform, as appropriate.

“Licensing Europe” comprised four thematic working groups, with participants representing rightsholders, licensing bodies, commercial and non-commercial users of protected content, as well as internet end-users:

1. Cross-border access to and portability of services: how to foster cross-border online access and “portability” of content across borders.
2. User-generated content and micro licensing for small-scale users of protected material: how to foster transparency and ensure that end-users have greater

further information, see Article 7 to 9 of the Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market - COM(2016)593, <https://ec.europa.eu/digital-single-market/en/news/proposal-directive-european-parliament-and-council-copyright-digital-single-market>.

¹²⁰ See http://ec.europa.eu/internal_market/copyright/docs/initiative/etin_licence_en.pdf.

clarity on legitimate and illegitimate uses of protected material and easier access to legitimate solutions.

3. Audiovisual heritage institutions: how to facilitate the deposit and online accessibility of films in the European Union, both for commercial purposes and non-commercial cultural and educational uses.
4. Text and Data Mining for scientific research purposes: how to promote the efficient use of text and data mining for scientific research purposes.

The main outcome of the “Licences for Europe” stakeholders’ dialogue was delivered through “Ten pledges to bring more content online”:

1. Further development of the cross-border portability of subscription services
2. Improved availability of e-books across borders and across devices
3. Easier licensing for music
4. Easier access to print and images
5. Enabling the identification of your work and rights online
6. More active reader involvement in the online press
7. More heritage films online
8. Freeing up TV footage archives through digitisation
9. Improving the identification and discoverability of audiovisual content online
10. Easier text and data mining of subscription-based material for non-commercial researchers

These pledges were agreed by copyright holders across different sectors, on a case-by-case basis, or they constitute plurilateral commitments on the part of a sector of the industry. Of all the pledges, those closest to the heart of the current discussion about copyright exceptions are the ones concerning audiovisual heritage institutions and text and data mining for scientific research purpose.

4.4.1. Facilitating the digitisation and access to audiovisual heritage

The Commission considered that it remains difficult for online service providers to develop catalogues of European films for online availability, particularly those which are “out-of-distribution”, namely works whose rightsholders are unwilling or unable to exploit them on an individual basis: it may be difficult to identify the existence of films, or the rights may be complex and time-consuming to clear. Film Heritage Institutions also considered that the situation in some member states did not allow them to fulfil their public interest mission.

Against this background, the objective of Working Group 3 of Licences for Europe was to facilitate the deposit and online accessibility of films in the EU both for commercial purposes and for non-commercial cultural and educational uses. This work strand was due to identify successful collaborative solutions to improve the discoverability and the making available online of audiovisual works, particularly those

which have been voluntarily kept out of distribution. The group was expected to deliver concrete solutions to spread best practice approaches throughout the EU both for commercial and non-commercial uses.

Within this framework, a group of stakeholders representing the organisations ACE, FERA, FIAPF and SAA¹²¹ agreed on a final Statement of Principles and Procedures for facilitating the digitisation of, access to and increased interest of European citizens in European cinematographic heritage works. The Statement aims at facilitating discussions among the parties concerned on the relevant terms for digitisation and access to European cinematographic heritage works conserved in European film heritage institutions. It defines principles and procedures to facilitate reaching an agreement between the parties involved in the context of the digitisation of European cinematographic heritage works conserved in European film heritage institutions. Such principles and procedures could also be used for any further steps involved in the restoration and the providing of access to European cinematographic heritage works for European citizens. The approach of the Statement is voluntary and does not concern works which the rightsholders, for whatever reasons, have opted to withdraw from circulation. ACE, FERA, FIAPF and SAA have agreed to promote and recommend the use of the Principles and Procedures to their respective members.

4.4.2. Text and data mining for research purposes

According to the European Commission, Text and data mining (TDM) for scientific purposes currently requires contractual agreements between users (typically research institutions) and rightsholders (for example publishers of scientific journals) to establish the modalities for technical access to the relevant datasets. The Commission's objective through Working Group 4 was to promote the efficient use of TDM for scientific research purposes. This work strand was asked to identify the scale of demand for TDM access at EU level for text mining of scientific publications and underlying data for research purposes, and appropriate means of meeting this demand. It was expected to explore the potential and possible limits of standard licensing models, as well as assess the appropriateness and feasibility of technology platforms to facilitate TDM access.

On that occasion, a group of STM publishers issued a declaration ("A statement of commitment by STM publishers to a roadmap to enable text and data mining (TDM) for non-commercial scientific research in the European Union"¹²²) where they committed in particular to including TDM clauses in subscription contracts for no additional cost to users and to developing further technological solutions to facilitate TDM licences.

¹²¹ Association des Cinémathèques Européennes (<http://www.ace-film.eu/>), Federation of European Film Directors (<http://www.filmdirectors.eu/>), International Federation of Film Producers Associations (<http://www.fiapf.org/>), and Society of Audiovisual Authors (<http://www.saa-authors.eu/>).

¹²² See <https://ec.europa.eu/licences-for-europe-dialogue/sites/licences-for-europe-dialogue/files/10-Text-data-mining.pdf>.

However, researchers did not generally welcome these developments favourably as they considered that only legislative changes, as opposed to a voluntary approach, would allow them to fully address their problems. They pointed out that making TDM subject to specific authorisation in addition to the subscription would expose them to the risk of always being subject, at least potentially, to the different conditions and policies of different publishers.

The recently proposed Copyright package includes rules on TDM.¹²³

4.5. “Open” copyright licenses initiatives

A number of private initiatives have been launched since the 1990s with the aim of removing restrictions on the use and distribution of protected works, especially in relation to computer software, where new types of “open” licenses have been created and implemented on a large scale. Such an approach based on free use has then to be exported to other works falling under copyright law, such as books, movies, music, etc. with the expansion of Creative Commons (CC) licenses.

4.5.1. Free and open-source software domain and “copyleft” licenses

Free software or “open-source software” (OSS) refers to computer software with its source code made available with a license in which the copyright holder provides the rights to study, modify, and share (copy, distribute) the software to anyone and for any purpose.

The promotion of open-source software started back in the 1980s when Richard Stallman, an American software freedom activist and programmer, launched the GNU Project at the Massachusetts Institute of Technology (MIT). The GNU Project was a free-software, mass-collaboration project, whose founding goal was to build a free operating system, basing its design on that of Unix, a proprietary operating system. The aim of the GNU Project was to give computer users freedom and control in their use of their computers and computing devices by collaboratively developing and providing software based on the right to four freedoms: the freedom of users to use the software, share it (copy, distribute), study it and modify it. GNU software guarantees these rights legally via its license, the GNU General Public License (GNU GPL or GPL). Historically, the GPL license family has been one of the most popular software licenses in the free and open-source software domain. Prominent free software programs licensed under the GPL include the Linux kernel and the GNU Compiler Collection (GCC). Open-source software is often considered as offering the potential for a more flexible technology and quicker innovation due to the collaborative approach on which it is based.

¹²³ See section 6.3.2. of this publication.

The type of licenses generally used for free and open-source software are also referred to as “copyleft” licenses. These licenses describe the practice of using copyright law to remove restrictions on distributing copies and modified versions of a work. The aim of copyleft is to use the legal framework of copyright to enable users to be able to re-use and, in many licensing schemes, modify content that is created by an author. Unlike works in the public domain, the author still maintains copyright over the material, however the author has granted a non-exclusive license to any person to distribute, and often modify, the work. Copyleft licenses require that any derivative works be distributed under the same terms (“share alike”), and that the original copyright notices be maintained. A symbol commonly associated with copyleft is a reversal of the copyright symbol, which faces the other way; the opening of the C points left rather than right.

A copyleft license differs from a “copycentre” or a “permissive free software license” (also called “BSD-like” or “BSD-style” licenses). In fact, the Open Source Initiative defines a “permissive software license” as a “non-copyleft” open-source license, that is to say, one that guarantees the freedoms to use, modify and redistribute, but that permits proprietary derivative works.¹²⁴ In other words, unlike copyleft licences and copyright law, permissive free software licenses do not control the license terms that derivative works falls under. These permissive free software are not actually equivalent to releasing a piece of work into the public domain; they do often stipulate some requirements, such as that the original authors must be credited (“attribution”), which is not required when a work is in the public domain.¹²⁵

4.5.2. “Creative Commons” (CC) licenses

More than a decade after the launching of the GPL for free software, a first set of copyleft licenses was released in 2002 by an American non-profit organisation, Creative Commons, with the aim of enabling the free distribution of creative works. Creative Commons has released several types of licenses known as Creative Commons (CC) licenses, which allow creators to communicate which rights they reserve, and which rights they waive for the benefit of other users.





The works licensed under CC licenses are governed by applicable copyright law and all the works which fall under these laws may thus potentially be licensed under CC licenses, that is to say, books, films, music, photographs, etc. Furthermore, CC licenses are non-exclusive and non-revocable. Any work or copies of the work obtained under a Creative Commons license may continue to be used under that license.

The types of CC licenses differ by several combinations that condition the terms of distribution. They include four main conditions, as follows:

¹²⁴ See <https://opensource.org/faq#permissive>.

¹²⁵ From an intellectual property perspective, works in the public domain refer to those works whose exclusive intellectual property rights have expired, have been forfeited, or are inapplicable.

Table 4. Conditions for Creative Commons licenses

Icon	Right	Description
	By attribution (BY)	Licensees may copy, distribute, display and perform the work and make derivative works and remixes based on it only if they give the author or licensor the credits (attribution) in the manner specified by these.
	Share-alike (SA)	Licensees may distribute derivative works only under a license identical ("not more restrictive") to the license that governs the original work. Without share-alike, derivative works might be sublicensed with compatible but more restrictive license clauses, e.g. CC BY to CC BY-NC.)
	Non-commercial (NC)	Licensees may copy, distribute, display, and perform the work and make derivative works and remixes based on it only for non-commercial purposes.
	No Derivative Works (ND)	Licensees may copy, distribute, display and perform only verbatim copies of the work, not derivative works and remixes based on it.

Source: Creative Commons¹²⁶

Among the combinations more frequently used by rightholders are the licenses BY (attribution alone), BY-SA (attribution + share alike), BY-NC (attribution + non-commercial), BY-ND (attribution + non-derivative), BY-NC-SA (attribution + non-commercial + share alike) and BY-NC-ND (attribution + non-commercial + no derivative works).

The question of the co-existence of CC licenses and exclusive licenses granted by collective management societies was raised on several occasions in national courts. Some collective management societies entered into negotiations with Creative Commons at national level in order to explore the possibility of combining the freedom of rightholders to issue CC licences for non-commercial uses of their works with the collective administration of their rights. In some cases, such negotiations resulted in pilot projects; this was the case for SACEM,¹²⁷ the collective management society for the rights of authors, composers and music publishers, which concluded a first pilot project with Creative Commons France in 2012. The pilot project aimed at allowing SACEM's members to develop the promotion of their works within a non-commercial framework, in particular on the internet. This agreement, which allies in an innovative way the use of non-commercial licenses proposed by Creative Commons and the modes of collection and distribution of authors' rights, was reconducted in 2013 due to initial satisfactory results.

¹²⁶ See https://creativecommons.org/faq/#What_are_Creative_Commons_licenses.3F.

¹²⁷ See <https://societe.sacem.fr/ressources-presse/par-publication/Communiqu%C3%A9s/la-sacem-et-creative-commons-renouvellent-leur-accord>.



The question of CC licenses was also raised by several Members of Parliament (MEPs) during the negotiations for the Directive on collective management of rights;¹²⁸ they insisted on allowing rightsholders to issue such types of non-commercial licensing expressly provided for in the Directive. As a result, Article 5(3) of the Directive reserves rightsholders the right to grant licences for non-commercial uses of any rights, categories of rights or types of works and other subject-matter that they may choose. As this directive was due for implementation by 10 April 2016, this means that from that day on, every rightsholder in the European Union shall have the option to license parts of their own work repertoire for non-commercial use autonomously and at the same time let collective management societies collect money for the commercial use of these works. Therefore, authors and other rightsholders will not be obliged to choose between their participation in a collective management society or to use “non-commercial” licenses.

¹²⁸ Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0026&from=FR>.



5. Case law

In recent years, the role of the Court of Justice of the European Union (CJEU) has been fundamental in clarifying the scope of exceptions and limitations to copyright. Not only has it further explained those general principles which apply to all exceptions, but it has delivered some ground-breaking judgments concerning exceptions that are particularly important for the audiovisual sector.

5.1. General principles

As explained in the previous chapters, copyright law is based on the exclusivity of rights tempered by exceptions and limitations. However, the member states' freedom to introduce any type of exception or limitation is not absolute. First, Article 5 of the InfoSoc Directive introduced an exhaustive, optional list of exceptions to the reproduction, communication to the public and distribution rights. And per Article 5(5) of the same Directive, exceptions or limitations may be introduced in national legislation only "in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightsholder".

The jurisprudence of the CJEU has highlighted the discretion left to member states to implement the exceptions in their national laws as well as the modalities thereof when the provisions of the Directive do not expressly specify them.¹²⁹ However, such discretion must be exercised within the limits imposed by EU law and according to the following principles:

- Proportionality;
- High level of protection of copyright;

¹²⁹ See Judgment of the CJEU (Third Chamber), case C-467/08, Padawan SL v Sociedad General de Autores y Editores de España (SGAE), 21 October 2010, paragraph 36, <http://curia.europa.eu/juris/document/document.jsf?docid=83635&doclang=en>; Judgment of the CJEU, Case C-145/10, Eva-Maria Painer v Standard Verlags GmbH et al., 1 December 2011, paragraph 104, <http://curia.europa.eu/juris/document/document.jsf?docid=115785&doclang=EN>; Judgment of the CJEU (Third Chamber), C-510/10, DR and TV2 Danmark, of 26 April 2012, paragraph 36, <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130d65a55b298304e4118afeefe51f6d09b55.e34KaxiLc3eOc40LaxqMbN4PahmLe0?text=&docid=122167&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1265645>.

- The need for legal certainty: the conditions of exceptions cannot be dependent on uncertain circumstances, such as a discretionary human intervention.¹³⁰
- The principle of strict interpretation: provisions related to exceptions should be strictly construed as they derogate from the general principle of the Directive, that of exclusive rights.¹³¹
- However, the interpretation of the conditions of an exception must “enable the effectiveness of the exception thereby established to be safeguarded and its purpose to be observed”.¹³²
- The exception must permit observance of the exception’s purpose and, as far as the transient reproduction exception is concerned, “must allow and ensure the development and operation of new technologies and safeguard a fair balance between the rights and interests of rightsholders on the one hand, and of users of protected works who wish to avail themselves of those new technologies on the other”.¹³³
- “Three-step test”, whose conditions cannot be construed as harming the normal exploitation of the work or unreasonably prejudicing the legitimate interests of the rightsholders.¹³⁴

5.2. Caricature, parody or pastiche

Paraphrasing a well-known saying, it could be argued that one man’s exclusive copyright is another man’s restriction as regards his right to receive and impart information. Of course, it could also be opposed that copyright protects one man’s speech from being appropriated by others. But whatever one may say, ultimately, freedom of expression and information has to be balanced against copyright in cases where both fundamental rights collide.¹³⁵

¹³⁰ See Judgment of the CJEU (Fourth Chamber), Case C-5/08, *Infopaq International A/S v Danske Dagblades Forening*, 16 July 2009, paragraph 62,

<http://curia.europa.eu/juris/document/document.jsf?docid=72482&doclang=en>.

¹³¹ See *Infopaq*, paragraphs 56-57 and *Painer*, paragraph 109. See also Judgment of the CJEU (Grand Chamber), Joined Cases C-403/08 and C-429/08, *FA Premier League et al. v. QC Leisure et al. and Karen Murphy v. Media Protection Services*, 4 October 2011, paragraph 162,

<http://curia.europa.eu/juris/document/document.jsf?docid=110361&doclang=en>.

¹³² See *Painer*, paragraph 133.

¹³³ See *Premier League*, paragraph 164. For a description of the *Premier League* case *in extenso* see Cabrera Blázquez, F.J., Cappello, M., Fontaine, G., Valais, S., *Audiovisual sports rights – between exclusivity and right to information*, IRIS Plus 2016-2, European Audiovisual Observatory, Strasbourg, 2016, <http://www.obs.coe.int/documents/205595/8351541/IRIS+Plus+2016-2+Audiovisual+sports+rights+%E2%80%93+between+exclusivity+and+right+to+information.pdf/711f61a8-ea02-45df-af03-25cdbfe3587f>.

¹³⁴ See *Infopaq*, paragraph 58; *Painer*, paragraph 110; *Premier League*, paragraph 181.

¹³⁵ For a description of decisions taken by the European Court of Human Rights and the CJEU concerning the tension between copyright and freedom of expression see Izyumenko, E., *The Freedom of Expression Contours of Copyright in the Digital Era: A European Perspective*, <http://atrip.org/wp-content/uploads/2016/12/2015-2Izyumenko.pdf>. For more information on the case law of the European Court of Human Rights concerning freedom of expression see Voorhoof, D. et al and McGonagle, T. (Ed. Sup.), *Freedom of Expression, the Media*



On different occasions, the CJEU has dealt with the conflict between copyright protection and the right to freedom of expression and information (*Scarlet*, *Sabam* and *Telekabel* cases).¹³⁶ However, these cases did not concern the application of exceptions or limitations to copyright but rather the liability of ISPs in cases of copyright infringement by their uses. Only in *Deckmyn v. Vandersteen*¹³⁷ did the CJEU ponder on a copyright exception that supersedes copyright protection in favour of freedom of expression: the one concerning “caricature, parody or pastiche” included in Article 5(3)k of the InfoSoc Directive. A parody implies the creation of a new, original work based on a pre-existing one, but the parodist does not need the authorisation of the parodied work’s author in order to borrow substantial parts of it. This often makes it difficult to draw the line between legitimate use as parody and copyright infringement. This exception represents a delicate balancing act between two important interests: on the one hand, parody serves to foster freedom of expression by limiting the author’s monopoly over his/her work, and therefore its boundaries will be drawn in each country according to the national understanding of free speech; on the other hand, the “inherent paradoxes” of parody¹³⁸ can be explained by the fact that some limits are needed to avoid it becoming a back door for plagiarism.¹³⁹

In *Deckmyn v. Vandersteen*, the CJEU made a number of important points:

- The concept of ‘parody’ is an autonomous concept of EU law.
- The essential characteristics of parody are “to evoke an existing work, while being noticeably different from it” and “to constitute an expression of humour or mockery”.
- The concept of parody is not subject to the condition that the parody should display an original character of its own, but it does have to display noticeable differences with respect to the original parodied work. Furthermore, it can reasonably be attributed to a person other than the author of the original work itself and it should relate to the original work itself or mention the source of the parodied work.
- The application of the exception for parody in a particular case must strike a fair balance between, on the one hand, the interests and rights of rightsholders, and,

and Journalists: Case-law of the European Court of Human Rights, IRIS Themes, European Audiovisual Observatory, Strasbourg, 2015, <http://www.obs.coe.int/documents/205595/2667238/IRIS+Themes+-+Vol+III+-+Ed+2015+EN.pdf/2f3d578d-2e05-442f-8326-917beab7626d>.

¹³⁶ See Case-C-70/10 *Scarlet Extended v. SABAM*, Case C-360/10 *SABAM v. Netlog NV* and Case C-314-12 *UPC Telekabel v. Constantin Film Verleih*.

¹³⁷ Judgment of the CJEU (Grand Chamber), Case C-201/13, *Deckmyn and VZW Vrijheidsfonds v. Vandersteen a.o.*, 3 September 2014, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=157281&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=283288>

¹³⁸ See Voorhoof D., *Freedom of expression, parody, copyright and trademarks*, presentation held at the ALAI 2001 Congress, Adjuncts and Alternatives to Copyright, 16 June 2001, New York.

¹³⁹ For a description of the boundaries between plagiarism and parody see Cabrera Blázquez F.J., *Plagiarism: an Original Sin?*, European Audiovisual Observatory, 2005, http://www.obs.coe.int/documents/205595/2408826/FCabrera_Plagiarism_EN.pdf/4e9b299b-383b-4193-929a-cba887d33bd0.

on the other, the freedom of expression of the user of a protected work who is relying on the exception for parody.

The CJEU clarified that it is for the national court to determine, in the light of all the circumstances of the case in the main proceedings, whether the application of the exception for parody fulfils the essential requirements of parody and preserves that fair balance.

5.3. Private copying

The CJEU has clarified the contours of the private copying exception of Article 5(2)b of the InfoSoc Directive in a long list of judgments:

Table 5. Jurisprudence from the European Court of Justice concerning private copying

Case	Date	Parties	Issue
C-467/08	21 October 2010	<i>Padawan v. SGAE</i>	Indiscriminate application of the private copying levy
C-470/14	14 October 2014	<i>EGEDA and Other v Administracion del Estado and Others</i>	Compensation financed from the General State Budget
C-435/12	10 April 2014	<i>ACI Adam/Stichting de Thuiskopie</i>	Lawful nature of the origin of the copy
C-462/09	16 June 2011	<i>Stichting de Thuiskopie v Opus GmbH</i>	Cross-border transactions
C-277/10	9 February 2012	<i>Luksan v Van del Let</i>	Author is entitled directly and originally to the right of fair compensation
C-457/11 C-460/11	27 June 2013	<i>VG Wort v Kyocera</i>	Technological measures, consequences of an authorisation to reproduce
C-521/11	11 July 2013	<i>Amazon v Austro-Mechana</i>	Indiscriminate application combined with a reimbursement scheme, payment of the revenue in part to social or cultural institutions, double payment in cross-border transactions.
C-463/12	5 March 2015	<i>Copydan Bandkopi / Nokia Danmark</i>	Equal treatment, reimbursement scheme, consequences of an authorisation to reproduce
C-110/15	2 March 2015	<i>Nokia Italia v SIAE</i>	<i>Ex ante</i> exemption and reimbursement scheme for professional use.

Source: *International Survey on Private Copying, Law and practice 2015, WIPO and de Thuiskopie*¹⁴⁰

¹⁴⁰ International Survey on Private Copying, Law and practice 2015, WIPO and de Thuiskopie, http://www.wipo.int/edocs/pubdocs/en/wipo_pub_1037_2016.pdf.

The following paragraphs describe *in extenso* the three most relevant cases for the audiovisual sector:

- In *Padawan*,¹⁴¹ the CJEU clarified important issues such as the uniform interpretation of the concept of fair compensation, the persons liable to pay the levy and the relationship between the imposition of the levy and the use of recording equipment or media for the purposes of private copying.
- In some respects a follow-up to the *Padawan* case, in *Egeda*¹⁴² the CJEU ruled on the legality of a fair compensation scheme financed from the general state budget.
- In *ACI Adam*,¹⁴³ the CJEU clarified the scope of the private copying exception for cases in which the source from which a reproduction for private use is made is unlawful.

5.3.1. Padawan v. SGAE

The trend towards extending private copying levies has been subject to criticism for some time, notably by the IT industry, users' associations and academia. In their opinion, a system of private copying levies that taxes digital reproduction equipment and media goes beyond the scope of Article 5(2)b of the InfoSoc Directive, because according to Recital 35 of the Directive the purpose of fair compensation is solely to compensate rightsholders adequately for the use made of their protected works or other subject-matter.¹⁴⁴ However, these critics had to wait until October 2010 to see the CJEU render a ground-breaking judgment concerning the applicability of private copying levies to digital reproduction equipment and media.

The parties to this case were the *Sociedad General de Autores y Editores* (a Spanish collecting society for authors and editors – SGAE), and Padawan, a Spanish company that markets CD-Rs, CD-RWs, DVD-Rs and MP3 players. SGAE requested from Padawan payment of the private copying levy for the years 2002 to 2004. The defendant Padawan opposed the claim on the grounds that the indiscriminate application of a levy to digital media, regardless of the purpose for which they were used (private use or other professional or commercial activities), was incompatible with the InfoSoc Directive.

¹⁴¹ Judgment of the Court of Justice of the European Union (Third Chamber), case C-467/08, *Padawan SL v Sociedad General de Autores y Editores de España (SGAE)* 21 October 2010, <http://curia.europa.eu/juris/document/document.jsf?docid=83635&doclang=en>.

¹⁴² Judgment of the CJEU (Fourth Chamber), Case C-470/14, *EGEDA et al. v Administración del Estado et al.*, 9 June 2016, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=179784&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=938849>.

¹⁴³ Judgment of the CJEU, Case C-435/12, *ACI Adam BV and Others v. Stichting de Thuiskopie*, 10 April 2014, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=150786&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=286178>.

¹⁴⁴ See section 1.4.2. of this publication.

The Spanish system of private copying levies in force at the time was regulated by Article 25 of the *Ley de Propiedad Intelectual* (Intellectual Property Act – LPI).¹⁴⁵ This article regulated fair compensation for acts of “[r]eproduction exclusively for private use, by means of non-typographical devices or technical instruments, of works circulated in the form of books or publications, deemed by regulation to be equivalent, and phonograms, videograms and other sound, visual or audiovisual media”. These acts of reproduction should give rise to fair compensation paid at a flat rate for each of the said methods of reproduction. The creditors of this compensation were the authors of works publicly exploited in one of the aforementioned forms, as well as editors, producers of phonograms and videograms and performers whose performances have been fixed on those phonograms and videograms. Collective management of this compensation was mandatory. The debtors of this compensation were manufacturers established in Spain, where they operate as commercial distributors, and persons who, outside Spanish territory, acquire the equipment, devices and media referred to with a view to their commercial distribution or use in Spain. Distributors, wholesalers and retailers should pay compensation jointly and severally with their suppliers for the products concerned, unless they prove that that compensation has in fact been paid for them.

On 14 June 2007, the *Juzgado de lo Mercantil No 4 de Barcelona* (Barcelona Commercial Court n.4) upheld SGAE’s claim in its entirety and ordered Padawan to pay EUR 16,759.25 plus interest. Padawan appealed against the judgment with the *Audiencia Provincial de Barcelona* (Barcelona Provincial Court). On 15 September 2008, the *Audiencia Provincial de Barcelona* (Spain) referred the case to the CJEU for a preliminary ruling under Article 234 EC.¹⁴⁶

In its judgment of 21 October 2010, the CJEU made a number of important clarifications for the future of private copying levies:

- The concept of “fair compensation” must be regarded as an autonomous concept of EU law and interpreted uniformly throughout the European Union. Neither Article 5(2)b nor any other provision of the InfoSoc Directive refers to the national law of member states as regards this concept. In such cases, the need for a uniform application of EU law and the principle of equality require that an EU law provision must normally be given an independent and uniform interpretation throughout the European Union, considering the context of the provision and the objective of the relevant legislation.¹⁴⁷

¹⁴⁵ See *Real Decreto Legislativo 1/1996, de 12 de abril, por el que se aprueba el Texto Refundido de la Ley de Propiedad Intelectual, regularizando, aclarando y armonizando las disposiciones legales vigentes sobre la materia* (Royal Legislative Decree 1/1996 of 12 April 1996, approving the consolidated text of the Law on Intellectual Property). That royal legislative decree was amended in the context of the transposition of the InfoSoc Directive by Act 23/2006 of 7 July 2006 amending the consolidated text of the Law on Intellectual Property approved by Royal Legislative Decree 1/1996 (BOE No 162 of 8 July 2006, p. 25561). For legislative developments taken at national level after the *Padawan* decision see section 3.2.2. of this publication. See also section 5.3.2 below.

¹⁴⁶ Reference for a preliminary ruling under Article 234 EC from the *Audiencia Provincial de Barcelona*, made by decision of 15 September 2008.

¹⁴⁷ The judgment quotes here Case 327/82 Ekro [1984] ECR 107, paragraph 11; Case C-287/98 Linster [2000] ECR I-6917, paragraph 43; and Case C-523/07 A [2009] ECR I 2805, paragraph 34.



- Member states have the power to determine, within the limits imposed by EU law and in particular by the InfoSoc Directive, the form and detailed arrangements for financing and collection, as well as the level of what constitutes fair compensation.
- Fair compensation must necessarily be calculated based on the criterion of the harm caused to authors of protected works by the introduction of the private copying exception.
- The copying of works by natural persons, for their own private use, is likely to cause harm to rightsholders. In principle, it is for that person to compensate the rightsholders. However, identifying private users and obliging them to compensate rightsholders on a case by case basis is practically impossible. Moreover, the harm caused by each private use considered separately may be minimal. Therefore, systems of private copying levies charged to those who make digital recording equipment and media available to private users or who provide copying services for them are acceptable since their activity is the factual precondition for natural persons to obtain private copies. Moreover, the costs of the private copying levy can be passed on in the price charged to the final user, who is then indirectly liable to pay fair compensation.
- The digital reproduction equipment and media charged with a levy must be liable to be used for private copying and likely to cause harm to the rightsholder. Article 5(2)b of the InfoSoc Directive must be interpreted as meaning that there is a necessary link between the application of the levy to the digital reproduction equipment and media and their use for acts of private copying.
- The indiscriminate application of the private copying levy to all types of digital reproduction equipment and media, including in the case at hand in which they are acquired by non-natural persons for purposes clearly unrelated to private copying, does not comply with Article 5(2)b of the InfoSoc Directive.
- If the digital reproduction equipment or media have been made available to natural persons as private users, the application of the private copying levy is justified, without the need to prove that actual private copying has taken place. The possibility of causing harm to the rightsholder suffices.

5.3.2. EGEDA et al. v Administración del Estado et al.

On 9 June 2016, the CJEU delivered its judgment in Case C-470/14, EGEDA v. Administración del Estado. The case was a reference from the Spanish Supreme Court which was seeking a preliminary ruling on the interpretation of Article 5(2)b of the InfoSoc Directive.

On 7 December 2012, the Spanish government had adopted Royal Decree 1657/2012, which regulates the procedure of compensating rightsholders for acts of private copying. This was a continuation of the derogation by Royal Decree Law 20/2011 of the private copying levy and the introduction of a new system whereby fair compensation for acts of private copying is paid to rightsholders from the state budget. This new system was a result of the government's intention to achieve full conformity

with the regulatory framework and jurisprudence of the European Union following the decision of the CJEU in the *Padawan* case.

The applicants in the main proceedings are intellectual property rights collecting societies, which are entitled to collect the fair compensation owed to rightsholders in instances of private copying of their protected works or subject matter. On 7 February 2013 they brought an action for annulment of Royal Decree 1657/2012 before the *Tribunal Supremo* (Spanish Supreme Court). In support of their claims, the applicants in the main proceedings submitted that Royal Decree 1657/2012 is incompatible with Article 5(2)b of Directive 2001/29/EC.

Article 5(2)b provides that member states may provide for exceptions or limitations to the reproduction right “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 rightsholders receive fair compensation”.

The first question referred to the CJEU was whether a scheme for fair compensation for private copying is compatible with Article 5(2)b of the InfoSoc Directive, where the scheme, while taking as a basis an estimate of the harm actually caused, is financed from the General State Budget, as it is thus not possible to ensure that the cost of that compensation is borne by the users of private copies.

The second question was whether, if the first question is answered in the affirmative, the scheme is compatible with Article 5(2)b where the total amount allocated by the general state budget to fair compensation for private copying, although calculated on the basis of the harm actually caused, must be set within the budgetary limits established for each financial year.

The CJEU first recalled that, further to Recitals 35 and 38 of the InfoSoc Directive, member states may provide for a private copying exception on the condition that it is accompanied by a fair compensation scheme. This is “triggered by the existence of harm caused to rightsholders, which gives rise, in principle, to the obligation to ‘compensate’ them”, according to the Court. Furthermore, Article 5(2)b of the InfoSoc Directive imposes “an obligation to achieve a certain result upon the member states which have implemented the private copying exception, in the sense that they must guarantee, within the framework of their competences, the actual recovery of the fair compensation intended to compensate the rightsholders”.

On the other hand, the Court afforded to the member states broad discretion on how this result is to be achieved, including determining who has to pay the fair compensation, what form it would take, and according to what arrangements and level.

The Court notes that in principle, nothing in the InfoSoc Directive precludes the establishment of a fair compensation scheme financed by the general state budget of a member state, in lieu of a levy system. However, it is for the person who reproduced the protected works or subject matter without the prior authorisation of the rightsholder concerned, and who therefore caused harm to them, to make good that harm by financing the fair compensation provided for that purpose.

The Court considered that, in the Spanish scheme, the payment of the fair compensation is financed from all the budget resources of the general state budget, and

therefore also from all taxpayers. According to the CJEU, such a scheme is not a guarantee that the cost of that compensation is ultimately borne solely by the users of private copies.

The Court concluded that Article 5(2)b of the InfoSoc Directive precludes a fair compensation scheme financed from the general state budget in such a way that it is not possible to ensure that the cost of that compensation is borne by the users of private copies.

5.3.3. ACI Adam v Stichting de Thuiskopie

The private copying exception introduced by Article 5(2)b of the InfoSoc Directive is probably the most frequently invoked as a defence in cases of copyright infringement. Most member states have some form of private copying exception in their national legislation coupled with a compensation scheme for rightsholders.¹⁴⁸ While users may invoke a private copying exception for cases in which the source from which a reproduction for private use is made is lawful, it has been discussed whether this is also possible for cases in which the source is unlawful. This issue was clarified by the CJEU in the *ACI Adam and Others v. Stichting de Thuiskopie and Stichting Onderhandeligen Thuiskopie vergoeding* case.¹⁴⁹

In its judgment of 10 April 2014, the CJEU ruled that EU law, and in particular Article 5(2)b of the InfoSoc Directive, must be interpreted as precluding national legislation “which does not distinguish the situation in which the source from which a reproduction for private use is made is lawful from that in which that source is unlawful”.¹⁵⁰ The CJEU explained that if the member states had the option of adopting legislation that also allowed reproductions for private use to be made from an unlawful source, the result of that would clearly be detrimental to the proper functioning of the internal market. Furthermore, following Recital 22 of the InfoSoc Directive, the CJEU stated that the objective of proper support for the dissemination of culture must not be achieved by sacrificing strict protection of rights or by tolerating illegal forms of distribution of counterfeited or pirated works.¹⁵¹

¹⁴⁸ See section 3.2.2. of this publication.

¹⁴⁹ Judgment of the CJEU, Case C-435/12, *ACI Adam BV and Others v. Stichting de Thuiskopie*, 10 April 2014, http://curia.europa.eu/juris/document/document.jsf?text=&docid=150786&pageIndex=0&doclang=en&mode=_lst&dir=&occ=first&part=1&cid=286178.

¹⁵⁰ In this case the CJEU also ruled that the Enforcement Directive 2004/48/EC must be interpreted “as not applying to proceedings in which those liable for payment of the fair compensation bring an action before the referring court for a ruling against the body responsible for collecting that remuneration and distributing it to copyright holders, which defends that action”.

¹⁵¹ See also section 3.2.2.1. of this publication.



6. State of play

6.1. Copyright exceptions in the bigger picture of the DSM

The past two years have seen intense activity at European level with regard to the tabling of reforms in various fields related to the Digital Single Market strategy.¹⁵² The European Commission has presented several proposals addressing most of the sixteen actions announced in May 2015 around the three main pillars of:

- a) ensuring better access for consumers and businesses to digital goods and services across Europe;
- b) creating the right conditions for digital networks and services to flourish; and
- c) maximising the growth potential of the Digital Economy.

Table 6. The three pillars of the Digital Single Market (with programmed years of proposal)

Access		Environment		Economy and Society		
Cross-border commerce	e-	2015	Telecoms rules	2015	Data economy	2016
Enforcing rules	consumers	2016	AVMS Directive	2016	Standards	2015
Parcel delivery		2016	Online platforms	2015	Skills and e-government	2016
Unjustified geo-blocking		2015	e-Privacy	2016		
Antitrust enquiry		2015	Cybersecurity	2016		
Copyright reform		2015				
SatCab Directive		2015/16				
VAT		2016				

Source: Elaboration on European Commission, COM(2015) 192 final

The actions that are mostly related to the issue of the circulation of protected works, including audiovisual works, have all been presented as of today, and respond to the idea

¹⁵² European Commission, Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the regions, "A Digital Single Market Strategy for Europe", 8 May 2015, COM(2015) 192 final, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0192&from=EN>.

of facilitating transfrontier access by removing all possible unjustified obstacles to cross-border access.¹⁵³

Within the reform concerning copyright rules, the topic of the exceptions retains a particular position considering the various levels of harmonisation reached among the member states. Even though exceptions and limitations to exclusive rights have been horizontally harmonised by the InfoSoc Directive,¹⁵⁴ the fact that only the one concerning transient copies is mandatory, whereas the remaining 21 are all optional, has led to different degrees of implementation at national level.

The scattered picture of the national frameworks across Europe, the heated debates around the balancing of the legitimate interests of the rightholders with possible new conflicting public interests arising from the new uses made possible by digital technologies, subject to a rigorous application of the “three-step-test”, have made legislative initiatives in this domain particularly complex.

6.2. Policy documents concerning exceptions and limitations

It took eight years from the presentation of the Green Paper adopted in 2008 until the presentation of the so-called “Copyright package” in 2016. During this period, the issue of exceptions to copyright was analysed from several angles, many of which were dropped along the way.

6.2.1. From the Green Paper to the Vitorino Recommendations

While highlighting the need for assessing whether the exceptions and limitations to copyright and related rights that enable the public dissemination of knowledge were still fit for their purpose in the digital environment, the Green paper on Copyright in the Knowledge Economy launched a public consultation on the following four exceptions: for libraries and archives (including digitisation, making available digitised works, orphan works); for the benefit of people with disabilities; for the dissemination of works for teaching and research; and for user-generated content.¹⁵⁵

In the Communication of 2009 which summed up the outcome of the consultation, the Commission stated that:

¹⁵³ For an overview of the state of art of the schedule of the various actions, see European Parliament, The legislative train schedule, Modern copyright rules, <http://www.europarl.europa.eu/legislative-train/theme-connected-digital-single-market/file-modern-european-copyright-rules>.

¹⁵⁴ See section 2.2.2.3. of this publication.

¹⁵⁵ European Commission, Green paper on “Copyright in the Knowledge Economy”, 16 July 2008, COM(2008) 466 final, http://ec.europa.eu/internal_market/copyright/docs/copyright-infso/greenpaper_en.pdf.



In the immediate future, the preferred tool for many of the issues raised in the Green Paper is a structured dialogue between relevant stakeholders, facilitated by services of the European Commission. In particular, the dialogue on creating information products, publications and cultural material in formats accessible for persons with disabilities should be taken forward as a priority. Another priority should be finding appropriate licensing solutions for mass-scale digitisation in a European context. The Commission will also conduct an impact assessment on how to foster the clearance issues that arise with "orphan" works. The impact assessment will analyse the necessary level of diligent search required prior to the use of orphan works as well as the mutual recognition of orphan work status across Europe.¹⁵⁶

Some of these actions have been unfolded: the Memorandum of Understanding on the Digitisation of Out-of-Commerce Works signed in 2011,¹⁵⁷ the adoption in 2012 of the Directive on Orphan Works,¹⁵⁸ or the Licenses for Europe initiative launched as a structured stakeholders dialogue in 2013.¹⁵⁹

Quite an ambitious project was presented in 2011 when the Commission referred to the possibility of adopting a "European Copyright Code" that would provide a codification of all EU copyright directives and also the opportunity to:

(...) examine whether the current exceptions and limitations to copyright granted under the 2001/29/EC Directive need to be updated or harmonised at EU level. A Code could therefore help to clarify the relationship between the various exclusive rights enjoyed by rights holders and the scope of the exceptions and limitations to those rights.¹⁶⁰

The Code never saw the light of day, but further investigations were carried out on the specific exception of private copying, which until then had not been touched upon in the Commission's policy documents. The so-called Vitorino Recommendations, which were presented in 2013, concerned the definition and the application of levies with regard to

¹⁵⁶ European Commission, Communication on "Copyright in the Knowledge Economy", 19 October 2009, COM(2009) 532 final,

<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009DC0532&qid=1486335000567&from=EN>.

¹⁵⁷ Memorandum of Understanding (MoU) on "Key Principles on the Digitisation and Making Available of Out-of-Commerce Works",

http://ec.europa.eu/internal_market/copyright/docs/copyright-infso/20110920-mou_en.pdf.

¹⁵⁸ Directive of the European Parliament and of the Council on certain permitted uses of orphan works,

<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012L0028&qid=1486334751248&from=EN>.

¹⁵⁹ Licenses for Europe, <https://ec.europa.eu/licences-for-europe-dialogue/en/content/about-site.html>.

¹⁶⁰ European Commission, Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the regions, "A Single Market for Intellectual Property Rights. Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe", 24 May 2011, COM(2011) 287 final,

<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011DC0287&qid=1486335974547&from=EN>.

copies made by end users for private purposes under Article 5(2)b of the InfoSoc Directive.¹⁶¹

6.2.2. The actions under the DSM strategy

In 2015, the newly appointed European Commission presented a strategic paper for the implementation of the objectives of the DSM.¹⁶² The Communication outlined targeted actions and a long-term vision which aimed to “ensure a wider access to content across the European Union, adapt exceptions to digital and cross-border environments, achieve a well-functioning marketplace for copyright, and provide an effective and balanced enforcement system”. Together with this Communication, the Commission tabled a proposal for a regulation on the portability of online content services to ensure that subscribers have access to these services even when they are not in their home country.¹⁶³

In the specific case of exceptions, “the general objective (was) to increase the level of harmonisation, make relevant exceptions mandatory for Member States to implement and ensure that they function across borders within the EU”. The areas that would fall under the Commission’s assessment were the following: text and data mining, exception for illustration for teaching purposes, preservation by cultural heritage institutions, remote consultation of works held in libraries (e-lending), panorama exception.

¹⁶¹ Vitorino A., Recommendations resulting from the mediation on private copying and reprography levies, 31 January 2013,

http://ec.europa.eu/internal_market/copyright/docs/levy_reform/130131_levies-vitorino-recommendations_en.pdf.

¹⁶² European Commission, Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the regions, “Towards a modern, more European copyright framework”, 9 December 2015, COM(2015) 626 final,

<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0626&qid=1486337076443&from=EN>.

¹⁶³ European Commission, Proposal for a regulation of the European Parliament and of the Council on ensuring the cross-border portability of online content services in the internal market, 9 December 2015, COM(2015) 627 final,

<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015PC0627&qid=1486339514183&from=EN>. For an overview of related documents see European Parliament, Legislative train schedule, Modern copyright rules: the Marrakesh Treaty implementation framework, <http://www.europarl.europa.eu/legislative-train/theme-connected-digital-single-market/file-the-marrakesh-treaty-implementation-framework>.

6.3. The “copyright package”

In line with the DSM strategy, the new set of measures proposed by the European Commission in the Copyright package presented in 2016¹⁶⁴ had three goals: (i) ensuring wider online access to content in the EU and reaching new audiences, (ii) adapting certain exceptions to the digital and cross-border environment, and (iii) fostering a well-functioning and fair copyright marketplace, and each of these goals was accompanied by a set of proposals.

These objectives have been pursued through four different legislative instruments:

1. a directive on Copyright in the Digital Single Market,¹⁶⁵
2. a regulation on cross-border access to ancillary audiovisual content,¹⁶⁶
3. a regulation on the cross-border exchange of accessible format copies to implement the Marrakesh Treaty,¹⁶⁷ and
4. a directive introducing a new exception for people with disabilities to implement the Marrakesh .¹⁶⁸

¹⁶⁴ European Commission, Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the regions, “Promoting a fair, efficient and competitive European copyright-based economy in the Digital Single Market”, 14 September 2016, COM(2016) 592,

<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016DC0592&qid=1486340106820&from=EN>.

The copyright package was accompanied by an extensive “Impact Assessment on the modernisation of EU copyright rules” in three parts, 14 September 2016, SWD(2016) 301 final, <https://ec.europa.eu/digital-single-market/en/news/impact-assessment-modernisation-eu-copyright-rules>. See Valais S., New proposals for the modernisation of EU copyright rules in the Digital Single Market, IRIS, 2016-9/4, <http://merlin.obs.coe.int/iris/2016/9/article4.en.html>.

¹⁶⁵ European Commission, Proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market, 14 September 2016, COM(2016) 593 final, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016PC0593&from=EN>. For an overview of related documents see European Parliament, Legislative train schedule, Modern copyright rules: Directive on copyright in the digital single market, <http://www.europarl.europa.eu/legislative-train/theme-connected-digital-single-market/file-directive-on-copyright-in-the-digital-single-market>.

¹⁶⁶ European Commission, Proposal for a regulation laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, 14 September 2016, COM(2016) 594 final, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016PC0594&qid=1486342308490&from=EN>. For an overview of related documents see European Parliament, Legislative train schedule, Modern copyright rules: Regulation on online transmissions of broadcasting organisations and retransmissions of television and radio programmes, <http://www.europarl.europa.eu/legislative-train/theme-connected-digital-single-market/file-regulation-on-online-transmissions>.

¹⁶⁷ European Commission, Proposal for a regulation of the European Parliament and of the Council on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject-matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print disabled, 14 September 2016, COM(2016) 595 final, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016PC0595&qid=1486341396991&from=EN>. For an overview of related documents see European Parliament, Legislative train schedule, Portability of online content, <http://www.europarl.europa.eu/legislative-train/theme-connected-digital-single-market/file-portability-of-online-content>.

Table 7. Overview of tools and objectives of the “copyright package”

Online access to content	Exceptions	Marketplace for copyright
Regulation on cross-border access to streaming, catch-up and IPTV retransmission	Text and data mining, teaching activities, cultural heritage (Copyright Directive, Art. 3-6)	Press publishers and UGC platforms (Copyright Directive, Art. 11-13)
Licensing of out-of-commerce works and negotiation mechanisms for VOD (Copyright Directive, Art. 7-10)	Directive and Regulation on accessible formats for people with disabilities to implement the Marrakesh Treaty	Transparency obligations (Copyright Directive, Art. 14-16)

Source: European Audiovisual Observatory elaboration

With regard to the issue of exceptions, the proposed Copyright Directive includes three mandatory exceptions in the areas announced by the DSM strategy of 2015: text and data mining (Article 3), digital and cross-border teaching activities (Article 4) and the preservation of cultural heritage (Article 5). Should the proposal be adopted, cross-border access in these fields would become possible without the need for the rightsholders’ prior authorisation.

The implementation of the Marrakesh Treaty, which concerns accessible format copies for people with print disabilities, will add a fourth mandatory exception to the list.

6.3.1. The rationale underlying the four new mandatory exceptions

In the digital environment, new types of uses of protected content have emerged, making it uncertain to determine if the current exceptions are still adapted to achieving a fair balance between the rights and interests of authors and other rightsholders on the one hand, and of users on the other. In addition, considering their optional nature, these exceptions remain merely national, and legal certainty around cross-border uses is therefore not guaranteed.

¹⁶⁸ European Commission, Proposal for a directive of the European Parliament and of the Council on certain permitted uses of works and other subject-matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, 14 September 2016, COM(2016) 596, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016PC0596&qid=1486341619165&from=EN>. For an overview of related documents see European Parliament, Legislative train schedule, Modern copyright rules: the Marrakesh Treaty implementation framework, <http://www.europarl.europa.eu/legislative-train/theme-connected-digital-single-market/file-the-marrakesh-treaty-implementation-framework>.

In this context, for each of the identified four areas of intervention, the Commission has outlined the objective to guarantee the legality of certain types of uses, including across borders:

1. for text and data mining in the field of scientific research, to provide a clearer legal space for researchers to use innovative text and data mining research tools;
2. for digital and cross-border uses in the field of education, to allow teachers and students to take full advantage of digital technologies at all levels of education;
3. for the preservation of cultural heritage, to support cultural heritage institutions (that is to say, publicly accessible libraries or museums, archives, or film or audio heritage institutions) in their efforts to preserve the cultural heritage; and
4. for the accessible formats for people with disabilities, to ensure the making and exchanging of such copies within the single market.

6.3.2. Text and data mining in the field of scientific research

According to the CRA report prepared for the European Commission, “text and data mining (TDM) refers to a computational process that aims at discovering patterns in large databases and/or collections of textual content. More specifically, it aims at extracting information from previous sources (for example, existing dataset and collections of journal articles) and transforming it into information that can be used for further purposes (for example, analysis or pattern discovery).”¹⁶⁹

This is an area where no possible adaptable exception already exists in the European regulatory framework, a circumstance that has obliged the relevant actors, such as universities and research institutes, to resort to licensing solutions and thus bear the often significant transaction costs of the licenses.

Considering the negative impact that this lack of certainty might have on the European Union’s competitiveness and scientific leadership at a time when most research is cross-border and cross-discipline, Article 3 of the proposed Copyright Directive envisages a mandatory exception:

for reproductions and extractions made by research organisations in order to carry out text and data mining of works or other subject-matter to which they have lawful access for the purposes of scientific research.

¹⁶⁹ CRA – Charles River Associates, Assessing the economic impacts of adapting certain limitations and exceptions to copyright and related rights in the EU, May 2014, http://ec.europa.eu/internal_market/copyright/docs/studies/140623-limitations-economic-impacts-study_en.pdf, p. 60 ff.

6.3.3. Digital and cross-border uses in the field of education

The InfoSoc Directive already calls for an optional exception to the rights of distribution and communication to the public in the case of “use for the sole purpose of illustration for teaching or scientific research” in Article 5(3)a, provided that the source is indicated.

So far, considering that Recital 42 of the InfoSoc Directive allows for its extension to distance learning, member states have interpreted this exception in various ways with regard to online activities. These differences have been seen by the European Commission as representing a possible brake on education trends like online courses.

Article 4 of the proposed Copyright Directive therefore introduces a mandatory exception:

to allow for the digital use of works and other subject-matter for the sole purpose of illustration for teaching, to the extent justified by the non-commercial purpose to be achieved, provided that the use:

(a) takes place on the premises of an educational establishment or through a secure electronic network accessible only by the educational establishment's pupils or students and teaching staff;

(b) is accompanied by the indication of the source, including the author's name, unless this turns out to be impossible.

The proposed provision gives member states the option to make it subject to the availability of adequate licenses covering the same uses (digital and cross-border).

6.3.4. Preservation of cultural heritage

Furthermore, in the case of cultural heritage institutions, Article 5(2)c of the current InfoSoc Directive provides an optional exception to the right of reproduction “in respect of specific acts of reproduction made by accessible libraries, educational establishments or museums, or by archives” provided that there is no economic exploitation of the protected works.

The influence of Recital 40 of the Directive, which states that this exception “should be limited to certain special cases covered by the reproduction right” and “should not cover uses made in the context of the on-line delivery of protected works or other subject-matter”, may have been quite significant. In this respect, the Commission has pointed out that member states do not often take digital formats into account when implementing the exception at national level, despite the recommendation to allow multiple copying and migration of digital cultural material for preservation purposes.¹⁷⁰

¹⁷⁰ European Commission, Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the regions, “i2020: Digital Libraries”, 30 September 2005, COM(2005) 465 final, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005DC0465&qid=1486347315715&from=EN>.

Typically, cultural institutions are allowed to make copies of the works which form their collections for the specific purpose of preservation, which may be particularly significant for the purposes of preserving film heritage.¹⁷¹ However, cultural heritage institutions (CHIs) in some member states are not able to engage in the digitisation of their collections because, for instance, the making of digital copies is not permitted by national laws (for example, because format-shifting or digital copying is not allowed).

Furthermore, CHIs are generally not allowed to engage in the “mass preservation” of their collections because the optional exception has, as a rule, been narrowly implemented across member states (only “specific” acts of reproduction are covered). CHIs may then be required to ask for the rightholders’ permission to digitise their works, especially in large preservation projects which involve the copying of works that are not in need of preservation (implying certain acts of reproductions that do not fit the “specific” nature covered by article 5(2)(c) of the InfoSoc Directive).

This situation is likely to change should the new Copyright Directive be approved, given the provision of a mandatory exception to allow CHIs “to make copies of any works or other subject-matter that are permanently in their collections, in any format or medium, for the sole purpose of the preservation of such works”.¹⁷²

Article 5 of the proposed Copyright Directive takes into account the need for content in digital forms and the use of digital technology for preservation purposes when introducing a new mandatory exception:

permitting cultural heritage institutions to make copies of any works or other subject-matter that are permanently in their collections, in any format or medium, for the sole purpose of the preservation of such works or other subject-matter and to the extent necessary for such preservation.

6.3.5. Accessible formats for people with disabilities

The “use for the benefit of people with a disability” is foreseen by Article 5(3)b of the InfoSoc Directive as an exception to both the reproduction right and the right to communication to the public. This exception, apart from being merely optional, lacks cross-border effect and makes it difficult for persons who are blind, visually impaired or otherwise print disabled to access special formats under the copyright exception of other member states.

Unrelated to the online word, the new mandatory exception foreseen by a specifically dedicated directive of the Copyright package owes its existence to the European Union’s international commitment on signing the Marrakesh Treaty.¹⁷³ This Directive is part of its ratification process and will oblige member states to

¹⁷¹ See section 1.3.1. of this publication.

¹⁷² See section 6.3.4. of this publication.

¹⁷³ See section 2.1.4. of this publication.



provide that any act necessary for:

(a) a beneficiary person, or a person acting on their behalf, to make an accessible format copy of a work or other subject-matter for the exclusive use of the beneficiary person; and

(b) an authorised entity to make an accessible format copy and to communicate, make available, distribute or lend an accessible format copy to a beneficiary person or authorised entity for the purpose of exclusive use by a beneficiary person;

does not require the authorisation of the rightholder of any copyright or related right in the work or protected subject-matter.

6.4. The pending issues

All actions envisaged by the DSM Strategy in the field of exceptions have been followed up, apart from two issues: the e-lending exception and the panorama exception, which are still under investigation.

6.4.1. The e-lending exception

In addition to the exception provided by Article 5(3)n of the InfoSoc Directive for the on-screen consultation of works for research and private studies on their premises, the Rental and Lending Directive¹⁷⁴ foresees a specific exception for the case of public lending in Article 6(1).¹⁷⁵ At the time the Copyright package was presented, the latter was under scrutiny by the CJEU in case C-174/15, so the European Commission decided to consider the issue at a later stage.

The awaited judgment was delivered on 10 November 2016 and concluded that the concept of lending “covers the lending of a digital copy of a book, where that lending is carried out by placing that copy on the server of a public library and allowing a user to reproduce that copy by downloading it onto his own computer, bearing in mind that only one copy may be downloaded during the lending period and that, after that period has expired, the downloaded copy can no longer be used by that user.”¹⁷⁶

¹⁷⁴ Directive 2006/115/EC of the European Parliament and of the Council on rental right and lending right and on certain rights related to copyright in the field of intellectual property, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006L0115&qid=1486338458537&from=EN>.

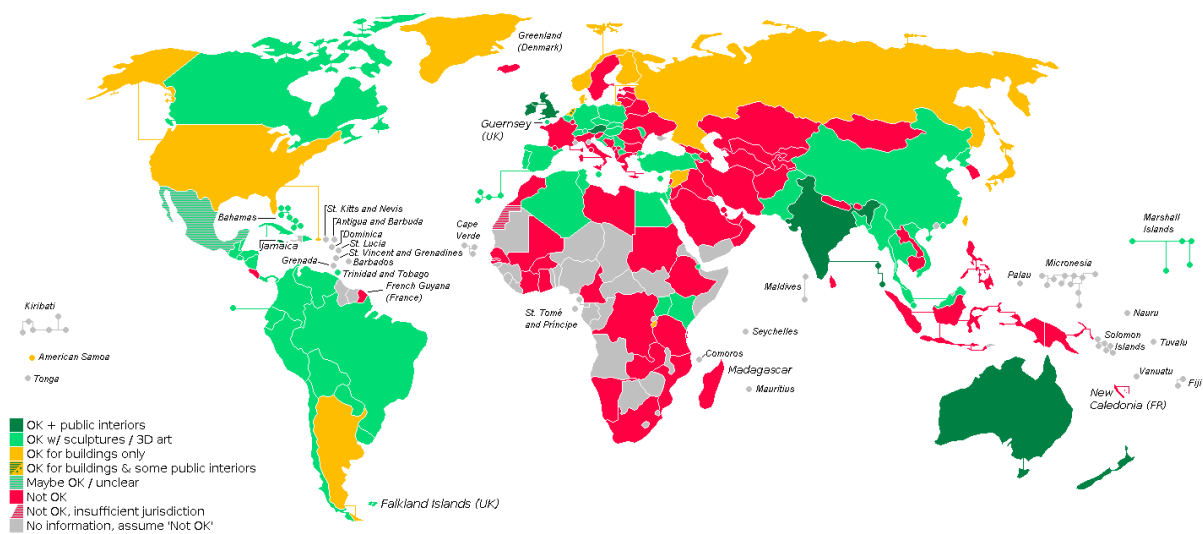
¹⁷⁵ De Wolf & Partners, Study on the application of directive 2001/29/EC on copyright and related rights in the information society, October 2013, http://ec.europa.eu/internal_market/copyright/docs/studies/131216_study_en.pdf, p. 323 ff.

¹⁷⁶ Court of Justice of the European Union, judgment of 10 November 2016, C-174/15, Vereniging Openbare Bibliotheken v Stichting Leenrecht, <http://curia.europa.eu/juris/celex.jsf?celex=62015CJ0174&lang1=en&type=TEXT&ancre=>.

6.4.2. The panorama exception

Article 5(3)h of the InfoSoc Directive foresees an exception to the rights of reproduction and communication to the public in the case of “use of works, such as works of architecture or sculpture, made to be located permanently in public places”. The results of the public consultation held in 2016 showed that almost all the member states had implemented this exception,¹⁷⁷ but at the same time, how they implemented it could differ widely, thus creating a situation of uncertainty.¹⁷⁸

Figure 2. The “panorama exception” worldwide



Source: Wikimedia Commons, Freedom of panorama world map, April 2014

A significant example of how complex the practical application of this exception can be for people who take and upload pictures of buildings or monuments in public spaces is the Eiffel tower in Paris: the monument can be freely photographed during the day, because copyright has expired, but not at night since its lightshow is protected by an independent copyright.¹⁷⁹

Since the panorama exception has been implemented over practically the whole of Europe, the European Commission did not find it necessary to introduce a new

¹⁷⁷ European Commission, Synopsis report on the results of the public consultation on the “panorama exception”, Autumn 2016, http://ec.europa.eu/information_society/newsroom/image/document/2016-37/synopsis_report_-_panorama_exception_-_final_17049.pdf.

¹⁷⁸ Clayton Newell B., Freedom of panorama: a comparative look at international restrictions to public photography, Creighton Law Review, Vol. 44, https://www.academia.edu/537550/Freedom_of_Panorama_A_Comparative_Look_at_International_Restrictions_on_Public_Photography.

¹⁷⁹ EPRS Briefing, The challenges of copyright in the EU, June 2015, [http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/564380/EPRS_BRI\(2015\)564380_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/564380/EPRS_BRI(2015)564380_EN.pdf).

mandatory one, and decided to replace its regulatory action with a monitoring activity of the regulatory developments in this field.

6.4.3. The private copying exception

According to Article 5(2)b of the InfoSoc Directive, member states may introduce an exception for private copying. In the Impact assessment accompanying the new Copyright package, the Commission has stated that it “will continue assessing the need for action to ensure that the different levies’ systems in place in Member States do not raise obstacles in the single market”, while also taking into account recent and pending cases before the CJEU.¹⁸⁰

The situation has been closely monitored with specific reference to the right of press publishers to receive compensation for uses of their publications under private copying or reprography (Article 5(2)a InfoSoc) and private copying (Article 5(2)b InfoSoc) exceptions. This issue has come to the fore following a recent decision of the CJEU where, stressing the fact that publishers are not rightsholders under the current EU rules, the Court questioned the lawfulness of mechanisms existing in a number of member states under which publishers have traditionally received compensation for uses of their publications under exceptions or limitations.¹⁸¹

A significant portion of the member states already recognises that compensation regimes also apply to publishers.

Table 8. Compensation regimes for publishers in EU-28

National situation	Member State
Compensation paid to both authors and publishers for uses under one or both of the private copying / reprography exceptions	AT, BE, BG, CZ, DE, EE, ES, EL, FR, HU, HR, LT, LV, NL, PL, PT, RO, SI, SK
Compensation paid only to authors for uses under private copying / reprography exception	DK, FI, IT, SE
No compensation for uses under private copying / reprography exception	CY, LU, MT
No private copying / reprography exception	IE, UK

Source: European Commission elaboration of national data, SWD(2016) 301 final

¹⁸⁰ European Commission, Impact assessment on the modernisation of copyright rules, 14 September 2016, SWD(2016) 301 final, <https://ec.europa.eu/digital-single-market/en/news/impact-assessment-modernisation-eu-copyright-rules>.

¹⁸¹ CJEU, judgment of 12 November 2015, C-572/13, *Hewlett-Packard Belgium SPRL v Reprobel SCRL*, <http://curia.europa.eu/juris/celex.jsf?celex=62013CJ0572&lang1=en&type=TEXT&ancre=>.

In light of this state of the art, Article 11 of the proposed Copyright Directive states that the exceptions provided for by Article 5 of the InfoSoc Directive also extend to publishers, including the setting-up of a compensation regime.

6.5. The state of the legislative process

Having been presented very recently, the Copyright package is in its early phase of the legislation process. With regard to exceptions, the proposed Copyright Directive¹⁸² and the Marrakesh exception¹⁸³ are being analysed by the competent Committees of the European Parliament and by the Council. No estimated date of final adoption has been announced yet.

¹⁸² European Parliament, Legislative Observatory, Procedure file 2016/0280(COD), Copyright in the digital single market,

[http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2016/0280\(COD\)&l=en](http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2016/0280(COD)&l=en).

¹⁸³ European Parliament, Legislative Observatory, Procedure file 2016/0278(COD), Permitted uses of works and other subject-matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print disabled,

[http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2016/0278\(COD\)&l=en](http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2016/0278(COD)&l=en).

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