Alternative Compensation Models for Large-Scale Non-Commercial Online Use of Works

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3.5 Alternative compensation models for large-scale non-commercial online use of works

I. Introduction

This panel has so far discussed the private copying systems in Spain and Israel (based on the national budget), as well as the private copying system in Japan, as legal models that assure remuneration for use. *De lege ferenda*, this presentation will briefly discuss an alternative legal model to assure remuneration for non-commercial mass online use of works by individuals, covered by the exclusive rights of reproduction and communication to the public in Directive 2001/29/EC. In doing so, it will report on the results of an ongoing interdisciplinary research project on such alternative compensation systems ("ACS").

ACS intersect with the previously discussed models not only because they are often designed as an extension of the private copying system, but also as some proposals rely on remuneration based on the national budget. The study of ACS has both normative and empirical justifications. Currently, a significant number of individuals' online uses are restricted by copyright. Enforcement of these uses is either impossible (de facto or due to high transaction costs) or undesirable, as it might clash with fundamental rights: of individuals, such as freedom of expression and information online, privacy and protection of personal data; of online service providers, in what concerns freedom to conduct a business. Criminalization and strict enforcement alienate end-users – with file-sharers being among the best clients of the content industries – and diminish the respect for, and legitimacy of, copyright law. Furthermore, emerging online legal channels, like streaming platforms, are increasingly criticized by rights holders for their failure to provide adequate remuneration.[1]

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1 For a list of scholarly literature on ACS, see *IViR Home*/*Research*/*Copyright in an Age of Access: Alternatives to Copyright Enforcement*, http://www.ivir.nl/onderzoek/acs and *ACS Literature*, http://acs-companion.tumblr.com/lit. On criticism to emerging online business models, see J.-J. Vallbé and others, 'Knocking on Heaven's Door. User Preferences on Digital Cultural Distribution' (2015) 1–2, 18, available at http://ssrn.com/abstract=2630519.

II. Alternative compensation systems

Simply put, ACS are legal mechanisms that forsake the need for direct authorization of end-user acts under the aforementioned rights (e.g. downloading, uploading, sharing, modifying), while simultaneously ensuring compensation to authors and performers (or all rights holders) of works included in the scheme. These mostly copyright-internal models entail a restriction to the scope or exercise of exclusive rights, but offer the assurance of remuneration. The previously unauthorized use becomes "permitted-but-paid".[2]

Since the early 2000s, legal and economics scholars, advocacy groups and political parties have come forward with ACS proposals under different labels: tax-and-royalty systems, *license globale*, content/culture flat-rate, creative contribution, file-sharing or broadband levies, sharing license, or alternative reward systems.[3] Legislative proposals of this type have been presented in the national parliaments of Portugal, France, Germany, Belgium and Italy; recently, a proposal to regulate online uses through a "radio" model was advanced by the Dutch consumer association.[4]

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2 On the notion of "permitted-but-paid", see J. Ginsburg, 'Fair Use for Free or Permitted-But-Paid?' (2014) 28 Berkeley Technology Law Journal 1384. There is significant research on schemes external to copyright but with similar effects. An influential work is P. Aigrain, *Sharing – Culture and the Economy in the Digital Age* (Amsterdam University Press 2012). For convenience, "ACS" is adopted here as an umbrella term to refer also to those proposals.

3 For an overview of in this field, see *supra* note 1. Influential sources in legal scholarship are, e.g., N.W. Netanel, 'Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing' (2003) 17 Harvard Journal of Law & Technology 1; P. Eckersley, 'Virtual Markets for Virtual Goods: The Mirror Image of Digital Copyright?' (2004) 18 Harvard Journal of Law & Technology 85; W.W. Fisher, *Promises to Keep: Technology, Law, and the Future of Entertainment* (Stanford University Press 2004); S. Dusollier and C. Colin, 'Peer-to-Peer File Sharing and Copyright: What Could Be the Role of Collective Management?' (2011) 34 Columbia Journal of Law & the Arts 809; S. von Lewinski, 'Certain Legal Problems Related to the Making Available of Literary and Artistic Works and Other Protected Subject Matter Through Digital Networks' (2005) UNESCO E-Copyright Bulletin 1.

4 See Partido Comunista Português (Grupo Parlamentar), 'Projeto de Lei No. 228/XII/1.a: Regime Jurídico Da Partilha de Dados Informáticos' 1; L'ALLIANCE public.artistes, 'PRESS KIT. Downloading and Sharing Files on the Internet. An Alliance against Legal Proceedings. An Alliance for a Global Licence' 1; Caroline Colin, 'Etude the Faisabilite de Systemes de Licences Pour Les Echanges d'Oeuvres Sur Internet' (2011); Proposition de loi visant a adapter la perception du droit d'auteur a l'evolution technologique tout en preservant le droit a la vie privee des usagers d'Internet [Bill to Adjust Copyright Law to Technological Developments While Preserving Internet Users' Right to Privacy] (Sen. Benoit Hellings and Freya Piryns), Mar. 2, 2010, S.4–1686; Proposition de loi visant a adapter la perception du droit d'auteur a l'evolution technologique tout en preservant le droit a la vie privee des usagers d'Internet [Bill to Adjust Copyright Law to Technological Developments While Preserving Internet Users' Right to Privacy] (Sen. Jacky Morael and Frey Piryns), Dec. 9, 2010, S. 5-590; Beltrandi and others, 'CAMERA DEI

In the EU copyright field, recent interest in these models can be tied to judicial and institutional developments related to digital private copying. At the judicial level, two recent cases on private copying (*ACI Adam* and *Copydan*) raised the need to reconsider the private copying system in the digital environment, beyond a rekindling of the debate on phasing out levies.[5] Both cases provide a restrictive interpretation of the limitation that arguably fails to reach a fair balance of competing interests, with possible negative effects on the Internal Market.

In *ACI Adam*, the Court of Justice of the European Union (CJEU) excluded copies from *unlawful sources* (e.g. downloading films from unauthorized websites) from the scope of the private copying limitation. This judgement clarifies that a significant number of daily acts of Internet users qualify as infringing, and simultaneously disallows a type of private copying for which there was a strong economic case. In *Copydan*, the CJEU's ruling on the *use of third party devices for copying* – which it considered to be outside the scope of Directive 2001/29/EC – may have implications for the legal status of Cloud services that provide technical means for users to make or request their own copies, such as virtual storage spaces and online 'personal video recorders' for audiovisual works.[6]

At the institutional level, it is important to recognize the Commission's efforts to update and reform the private copying system,[7] as well as those of the EU Parliament. The latter, which in 2011 commissioned a study on content flat-rates, passed in 2014 a Resolution recommending the examination of the possibility to levy Cloud services, a scenario which would approximate private copying to an ACS for certain digital reproductions.[8] Indeed, an early version of the

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DEPUTATI N. 2963. PROPOSTA DI LEGGE – Modifiche Alla Legge 22 Aprile 1941, N. 633..." (presented 27 July 2007); Beltrandi and others, 'CAMERA DEI DEPUTATI N. 187. PROPOSTA DI LEGGE – Modifiche Alla Legge 22 Aprile 1941, N. 633..." (Presented 29 April 2008); Consumentenbond and others, 'Brief Consumentenbond, Mede Namens Ntb En FNV KIEM Aan Vaste Kamercommissie V&J Tbv AO Auteursrecht' (12 May 2014).

5 CJEU Case C-435/12 *ACI Adam BV and Others v. Stichting de Thuiskopie, Stichting Onderhandelingen Thuiskopie vergoeding* (10 April 2014), ECLI:EU:C:2014:254 [***ACI Adam***]; CJEU Case C-463/12 *Copydan Båndkopi v Nokia Danmark A/S* (5 March 2015), ECLI:EU:C:2015:144 [***Copydan***]. On phasing out of levies, see P.B. Hugenholtz, L. Guibault and S. van Geffen, 'The Future of Levies in a Digital Environment' (2003).

6 For a detailed analysis of *ACI Adam*, see J.P. Quintais, 'Private Copying and Downloading from Unlawful Sources' (2015) 46 IIC 66. For a case note on *Copydan*, see J.P. Quintais, 'Everything You Always Wanted to Know about Private Copying but Were Afraid to Ask (Case C-463/12 Copydan Båndkopi v Nokia Danmark A/S), Kluwer Copyright Blog, 16.03.2015.

7 See European Commission, 'Report on the Responses to the Public Consultation on the Review of the EU Copyright Rules' 1, 72–77; A. Vitorino, 'Recommendations Resulting from the Mediation on Private Copying and Reprography Levies' (2013).

8 On the study referred see A. Modot and others, 'The "Content Flat-Rate: A Solution to Illegal File-Sharing?' (2011). See also: European Parliament Resolution on private copying levies (2013/2114(INI)), adopted 11.2.2014; Report on private copying levies (2013/2114(INI)), 17.2.2014

draft resolution mentioned the need "to examine the possibility of legalizing works sharing for non-commercial purposes so as to guarantee consumers access to a wide variety of content and real choice in terms of cultural diversity".[9] In other words, it posited the need to examine the viability and feasibility of ACS.

III. Legal models and challenges

ACS can be implemented through different legal models imposing varying degrees of restriction on the nature or exercise of exclusive rights. It is beyond the scope of this short presentation to discuss the legal issues raised by these models. However, some general remarks are possible.

Among the most relevant schemes discussed in scholarship are voluntary collective licensing, extended collective licensing, mandatory collective management, legal (compulsory or statutory) licenses, and state-run remuneration, compensation or reward systems.[10]

These models are either offered as stand-alone solutions to regulate the acts in question or combined in myriad ways, for example to regulate different rights involved in mass online use of works by individuals. A common configuration is the extension of the private copying limitation to all acts of reproduction (irrespective of lawfulness of source) and the application of mandatory or extended collective licensing to the making available right. For the most part, this design is guided by concerns with legal compliance. Chief among those is the consideration that the application of a statutory license (and therefore an exception or limitation) to the online right of communication to the public is not admissible under the three-step test.[11]

Committee on Legal Affairs, Rapporteur: Françoise Castex [***Castex Report***], para. 30. The topic has been picked up by some scholars, but only tentatively. See, e.g., M. Senftleben, 'The International Three-Step Test. A Model Provision for EC Fair Use Legislation' (2010) 1 jipitec 67; Quintais, 'Private Copying and Downloading from Unlawful Sources', *supra* note 6.

9 *Castex Report*, *supra* note 8, para. 27. The suggestion was dropped in the final version of the document.

10 Generally identifying these models, see, e.g. von Lewinski, 'Certain Legal Problems Related to the Making Available of Literary and Artistic Works and Other Protected Subject Matter Through Digital Networks', *supra* note 3; C. Bernault and A. Lebois, 'Peer-to-Peer File Sharing and Literary and Artistic Property A Feasibility Study Regarding a System of Compensation for the Exchange of Works via the Internet' (2005); Colin, *supra* note 4; Dusollier and Colin, *supra* note 3.

11 See, e.g., A. Peukert, 'A Bipolar Copyright System for the Digital Network Environment' (2005) 28 Hastings Communications & Entertainment Law Journal 1; B. Rietjens, 'Copyright and the Three-Step Test: Are Broadband Levies Too Good to Be True?' (2006) 20 International Review of Law, Computers & Technology 323.

In addition, there is debate on the legal qualification of mandatory collective management. In particular, it is discussed whether this model goes beyond a restriction on the options of the exercise of the right and affects a change to its exclusive nature, transforming it into a compensated copyright limitation. The consequence is that, for the type of blanket license desired to implement an ACS, a model that does not qualify as an exception or limitation is not subject to the three-step test, but rather to the arguably less stringent requirements of collective rights management. Mandatory collective management, it is also said, would be better suited to address (substantive and territorial) fragmentation and participation problems typically attached to voluntary collective licensing.[12]

IV. The IViR research project

Since 2012 the Institute for Information Law (IViR) at the University of Amsterdam is conducting an interdisciplinary research project on the legal and socio-economic feasibility of ACS. The empirical research was based on *two surveys* conducted in November 2013 with a panel constituted by a representative sample of the Dutch population, aged over sixteen, including those with and without Internet. What follows is a brief description of the main results of the surveys. For a detailed explanation of the methodology and analysis of the data collected, I refer to the respective papers.[13] Importantly, neither of these papers

12 Representative examples of this debate can be found in S. von Lewinski, 'Mandatory Collective Administration of Exclusive Rights – A Case Study on Its Compatibility with International and EC Copyright Law' [2004] UNESCO E-Copyright Bulletin 1; von Lewinski, 'Certain Legal Problems Related to the Making Available of Literary and Artistic Works and Other Protected Subject Matter Through Digital Networks', *supra* note 3; M. Ficsor, 'Collective Management of Copyright and Related Rights Form the Viewpoint of International Norms and the Acquis Communautaire' in Daniel Gervais (ed), *Collective Management of Copyright and Related Rights* (2nd edn, Kluwer Law International 2010); C. Geiger, 'The Role of The Three-Step Test in the Adaptation of Copyright Law to the Information Society' [2007] UNESCO E-Copyright Bulletin 1; C. Geiger, 'Challenges for the Enforcement of Copyright in the Online World: Time for a New Approach' [2014] Max Planck Institute for Innovation and Competition Research Papers 1. For the ALAI's position, see ALAI, 'ALAI Resolution "Affirmation Droit Exclusif" (14 Janvier 2006)' (2006). Specific discussions on the legal nature of extended collective licensing can be found in T. Riis and J. Schovsbo, 'Extended Collective Licenses and the Nordic Experience: It's a Hybrid but Is It a Volvo or a Lemon?' (2010) 33 Columbia Journal of Law & the Arts 471; C. Rydning, *Extended Collective Licences – The Compatibility of the Nordic Solution with the International Conventions and EC Law* (Norwegian Research Center for Computers and Law 2010).

13 The papers in question are: Vallbé and others, *supra* note 1; C. Handke, B. Bodó and J.-J. Vallbé, 'Going Means Trouble and Staying Makes It Double: The Value of Licensing Recorded Music Online' [2015] Journal of Cultural Economics. For additional information on the project, see *supra* note 1.

addresses legal compliance issues, such as the compatibility of ACS with the three-step test.[14]

The *first survey* regarded individual media consumption habits for three types of content – music, audiovisual and books – in relation to different online and offline (lawful and unlawful) channels. In the *second survey* we conducted a discrete choice experiment, defining the ACS payment mechanism as a surcharge on the Internet subscription fee of households, and the functioning of the system under statutory regulation. In simple terms, different types of ACS were defined through a combination of *attributes* abstracted from legal analysis of existing proposals: *allowed uses* (downloading, sharing and modification), *subject matter* (music, audiovisual, and books), *catalogue completeness* (complete, partial, temporal restrictions), *monitoring* (anonymous or no monitoring), *distribution of revenues* (freedom of contract or minimum 50% for creators) and *price* (six 5-euro price points from € 5 to € 30).[15]

As this panel focuses on legal license models, it is appropriate to report the results of research as they apply to *mandatory* ACS, which would translate into a statutory license for the online rights of reproduction and communication to the public.

In a *first paper* we used the results of our research to examine whether such an ACS for recorded music would be welfare increasing. Our main findings were the following.[16]

- A well-designed ACS for recorded music makes users and rights holders better off, increasing their total welfare compared to the status quo even when the results are corrected for overestimation, in the best case scenario by about € 600 million.
- A € 1.74 surcharge on ISP subscription for all households with Internet connection would equal the entire revenues in the Dutch *physical and digital* market for recorded music in 2012, including all conventional purchases of recorded music of approximately € 144 million.[17]

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14 Issues of compliance are addressed in my forthcoming book, based on my doctoral dissertation: João Pedro Quintais, *Copyright in the Age of Online Access. Alternative Compensation Systems in EU Copyright Law* (Working Title), Kluwer Information Law Series (Forthcoming, 2017).

15 For a more detailed explanation of the methodology, see ibid, *supra* note 13; Vallbé and others, *supra* note 1.

16 See Handke, Bodó and Vallbé, *supra* note 13.

17 *Revenues* are calculated resorting to industry statistics, such as IFPI, 'IFPI Digital Music Report 2013. Engine of a Digital World' (2013), which estimates rights holders revenues in the Dutch recorded music market at €143.6 million. The focus is on revenues rather than profits, due to the lack of reliable information on *costs*. Data on private copying levies collected in the Netherlands for recorded music were taken from WIPO, 'International Survey on Private Copying. Law & Practice 2013' (2013). The results assume the unlikely scenario that an ACS substi-

- Users' willingness to pay ("WTP") is € 9.25 per month for a mandatory ACS, despite low-risk associated with private copying from unauthorized sources (as the survey preceded *ACI Adam*) and widespread availability and use of online music subscription platforms.
- Results were calculated on the basis of a 100% substitution effect of the net revenues of rights holders identified above. Even if the measured € 9.25 price point overestimates WTP by a factor of three, the proposed ACS would improve the current revenues of the recorded music industry in the Dutch market.
- For *rights holders* in general, there will be economic advantages of monetizing previously unenforced and uncompensated uses, as well as savings in copyright enforcement. For *authors*, a mandatory claim of fair compensation (e.g. 50% of collected sums) would likely improve their current rights revenues.

In a *second paper* we studied whether the idea of an ACS enjoys public support in the Netherlands and attempted to identify how that support is structured. Our main findings were the following.[18]

- Nearly half (49%) of Dutch consumers do not use digital access channels to consume music, audiovisual content and books. This is mostly due to hold-out groups, characterized by older less educated people that do not consume culture online (29%) and older educated people who prefer print (but not e-) books (20%).
- Age is the dividing line for digital uses. Younger generations show "promiscuous" consumption patterns that include use of free/paid and legal/illegal channels. They can be divided into the following clusters: *occasional consumers* (28.88%), *digital consumers* (6.36%), and *pirates* (16.02%).
- *Occasional consumers* are infrequent and low intensity digital consumers, mostly focused on free sampling (complemented by purchase of physical copies).
- *Digital consumers* and *pirates* account for a disproportionate large share of the overall cultural consumption, and it is almost impossible to separate pirates from digital consumers. Indeed, *pirates are a subset of digital consumers*.
- There is substantial consumer support for ACS, especially among those already using legal access channels, namely pirates and digital consumers, but also occasional consumers. In fact, *increased usage of legal channels indicates increased inclination to support ACS, and higher WTP*.

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tutes all current sales of recorded music (perfect substitution) and provides no cost-savings. See Handke, Bodó and Vallbé, *supra* note 13.

18 See Vallbé and others, *supra* note 1.

– The likely reason is discontent with the status quo. Possible sources of discontent are linked to the insufficiencies of current offers in what concerns *allowed uses/user rights* and *subject matter/types of content*. In essence, users want to be able to do more than *download* or *stream music*; they desire the freedom to share (make available) that extends to additional content, offered to them by unauthorized channels.

V. Concluding remarks

Enforcement alone is not a solution to digital piracy or to regulate unauthorized use of works by individuals. The emerging streaming model in the online environment is proving inadequate to compensate creators and other rights holders. ACS provide a different option to regulate and remunerate large-scale non-commercial uses through legal models that are internal to copyright and familiar to the European legal culture and tradition.

A mandatory ACS can be implemented through a statutory license for non-commercial online acts of reproduction and communication to the public by individuals. This system could be based on a compensated limitation for these uses, which would require articulation with existing compensated and uncompensated limitations in the Directive (temporary and transient copy, private copy, quotation, incidental inclusion, parody) and duly take into consideration *de minimis* uses. It would also require regulation of the relationship with the legal protection of technological measures (Article 6 Directive 2001/29/EC). The resulting fair compensation ought to require a mandatory and inalienable claim for creators, which would not only better align the system with the aims of copyright but also constitute a marked improvement over the status quo.

Naturally, where a ACS relies on a compensated limitation, it must pass the three-step test. For that, it is necessary that the limitation(s) have a strong non-economic motivation (here: freedom of expression and information, privacy and personal data, freedom to conduct a business for certain intermediaries), but also a careful delimitated of scope, so as to not conflict with the normal exploitation of works. To meet the conditions of the test, it is likely that a flexible interpretation of the same would have to be followed.[19] To be sure, some scholars

19 Along the lines suggested by C. Geiger, R. Hilty and J. Griffiths, 'Declaration A Balanced Interpretation Of The "Three-Step Test" In Copyright Law' (2008) 6 IIC 707; C. Geiger and F. Schönherr, 'Limitations to Copyright in the Digital Age', *Research Handbook on EU Internet Law* (Edward Elgar 2014); C. Geiger, D. Gervais and M. Senftleben, 'The Three-Step-Test Revisited: How to Use the Test's Flexibility in National Copyright Law' (2014) 29 American University International Law Review 581; M.Senftleben, 'How to Overcome the Normal Exploitation Obstacle : Opt-Out Formalities , Embargo Periods and the International Three-Step Test' (2014) 1 Berkeley Technology Law Journal Commentaries 1.

would argue that a statutory license of this type would indeed conflict with normal exploitation of works online.[20]

The IViR research project provides interesting empirical data to inform the political debate on this type of copyright reform, but also quantitative elements necessary for legal analysis. This is for example the case with the definition of normal exploitation, adequate compensation, and measurement of competing legitimate interests to be balanced in a proportionate manner. Chief among the findings are the willingness of users to pay for and participate in an ACS, its quantification and, using the case-study of recorded music, the realization that such a model holds the promise of being welfare increasing. It also illuminates the significant amount of remuneration rights holders and especially creators – due to their weakened bargaining position – have left on the 'virtual' table. In other words: the price of exclusivity.

20 On the obstacles raised by the second step of the test to ACS proposals based on statutory licensing, see, e.g., Dusollier and Colin, *supra* note 3, 829; Eckersley, *supra* note 3, 155–156; Peukert, *supra* note 11, 32, 43; Rietjens, *supra* note 11; Geiger, 'The Role of The Three-Step Test in the Adaptation of Copyright Law to the Information Society', *supra* note 12, 9; Colin, *supra* note 4, 51–55; Geiger and Schönherr, *supra* note 18, 135.