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Hugenholtz, P.B.; Quintais, J.P.

Publication date
2018

Document Version
Final published version

Published in
Copyright Reconstructed

License
Article 25fa Dutch Copyright Act

Link to publication

Citation for published version (APA):
Hugenholtz, P. B., & Quintais, J. P. (2018). Towards a Universal Right of Remuneration: Legalizing the Non-commercial Online Use of Works. In P. B. Hugenholtz (Ed.), *Copyright Reconstructed: Rethinking Copyright's Economic Rights in a Time of Highly Dynamic Technological and Economic Change* (pp. 241-281). (Information Law Series; Vol. 41). Wolters Kluwer.

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Copyright Reconstructed

Information Law Series (INFO)

VOLUME 41

Editor

Prof. P. Bernt Hugenholtz, Institute for Information Law, University of Amsterdam.

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Introduction & Contents

The advent of the information society has put the field of information law squarely on the map. Information law is the law relating to the production, marketing, distribution, and use of information goods and services. The field of information law therefore cuts across traditional legal boundaries, and encompasses a wide set of legal issues at the crossroads of intellectual property, media law, telecommunications law, freedom of expression, and right to privacy. Recent volumes in the Information Law Series deal with copyright enforcement on the Internet, interoperability among computer programs, harmonization of copyright at the European level, intellectual property and human rights, public broadcasting in Europe, the future of the public domain, conditional access in digital broadcasting, and the 'three-step test' in copyright.

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Copyright Reconstructed

Rethinking Copyright's Economic Rights in a Time of
Highly Dynamic Technological and
Economic Change

Edited by

P. Bernt Hugenholtz

Published by:
Kluwer Law International B.V.
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
E-mail: international-sales@wolterskluwer.com
Website: lrus.wolterskluwer.com

Sold and distributed in North, Central and South America by:
Wolters Kluwer Legal & Regulatory U.S.
7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.service@wolterskluwer.com

Sold and distributed in all other countries by:
Air Business Subscriptions
Rockwood House
Haywards Heath
West Sussex
RH16 3DH
United Kingdom
Email: international-customerservice@wolterskluwer.com

Printed on acid-free paper.

ISBN 978-90-411-9103-8

e-book: ISBN 978-90-411-9124-3
web-PDF: ISBN 978-90-411-9125-0

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Printed in the United Kingdom.

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Chapter 8

Towards a Universal Right of Remuneration: Legalizing the Non-commercial Online Use of Works

P. Bernt Hugenholtz & João Pedro Quintais

8.1 INTRODUCTION

The digital revolution has brought advanced information technology and broadband connections to the average household. Ever since, the law of copyright has been in a state of deep crisis. Despite vigorous efforts by the copyright industries to enforce their rights against individuals, or against online intermediaries and platforms, copyright content is routinely being illegally reproduced and 'shared' by hundreds of millions of users worldwide.[1] This strongly suggests a growing gap between copyright norms and social norms in the digital environment.[2] The exclusive right that allows right holders to make access to a work conditional upon prior authorization and payment is increasingly perceived not as an incentive to produce and

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1. J. Poort, J. Leenheer, J. van der Ham, & C. Dumitru (2014). 'Baywatch: Two Approaches to Measure the Effects of Blocking Access to the Pirate Bay', *Telecommunications Policy*, 38(4), 383–392.
2. *See* D. Gervais (2004). 'The Price of Social Norms: Towards a Liability Regime for File-Sharing', *Journal of Intellectual Property Law*, 12, pp. 39–73; N. W. Netanel (2003), 'Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing'. *Harvard Journal of Law & Technology*, 17(1), pp. 1–84; J.-J. Vallbé, B. Bodó, C. Handke, & J. P.

disseminate creative works, but as an obstacle to cultural freedoms and the principle of unlimited access.[3]

As empirical research points out, the overall welfare effects of mass unauthorized uses may be positive rather than negative,[4] particularly in digital networked environments where costs of distribution are close to zero.[5] This runs counter to the logic of copyright, i.e., to foster the production and dissemination of creative content by granting creators a temporary monopoly over their works. Thus technological change challenges not only the legal and economic landscape of copyright, but also its moral and socio-cultural underpinnings. However, as surveys also indicate, the idea that creators deserve a just reward for their creative endeavours is still generally endorsed.[6] In sum, while the exclusive right that has always been an essential feature of copyright has become practically unenforceable and is losing moral ground, the rights of creators to fair remuneration retain public support.

The spectacular market success of recently introduced *all-you-can-eat* content services, such as Spotify and Netflix, illustrate the need for non-exclusive approaches towards copyright. However, these business models appear to be flawed insofar as the revenue they generate is not fairly distributed among authors and artists.[7] More importantly, as empirical research also reveals, the introduction of these and similar new services has not eliminated the market for illegal sharing or streaming services.[8] While Spotify and its competitors seem to have somewhat reduced digital 'piracy' in the music sector, general levels of copyright infringement online have remained stable.[9] And despite the enormous market penetration of Netflix and similar audiovisual subscriber services in recent years, online piracy of audiovisual content, in particular television series, is still on the rise.[10]

Despite immense enforcement efforts by rights holders and their enforcement agents which have, at times, resulted in financial penalties and

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Quintais (2015), 'Knocking on Heaven's Door. User Preferences on Digital Cultural Distribution'. Amsterdam: IViR, available at https://ssrn.com/abstract=2630519 (accessed 13 December 2017).

3. L. Lessig (2004), *Free Culture: The Nature and Future of Creativity*, The Penguin Press.
4. J. Karaganis (2011), *Media Piracy in Emerging Economies*. Brooklyn, SSRC.
5. Y. Benkler (2006), *The Wealth of Networks: How Social Production Transforms Markets and Freedom*, Yale University Press; A. Huygen et al. (2009), *Ups and Downs. Economic and Cultural Effects of File Sharing on Music, Film and Games*, TNO Report, Delft.
6. B.W. Schermer, & M. Wubben (2011), *Feiten om te delen. Digitale contentdistributie in Nederland*. Amsterdam; Vallbé et al., 2015.
7. R. Kain, (2016), 'Wat de opbrengsten van "Drank & Drugs" leren over de muziekindustrie van nu', *De Correspondent*.
8. TNS/Kantar Media (2017), *Online Copyright Infringement Tracker. Latest wave of research (March 2017) Overview and key findings*, UK IPO (July 2017), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/628704/OCI_-tracker-7th-wave.pdf (accessed 13 December 2017).
9. *Ibid*.
10. *Ibid*. *See also* Poort et al. 2014.

criminal sanctions for individual infringers, court-ordered injunctions against file-sharing facilitating platforms, and site-blocking orders against internet access providers, online piracy has by no means disappeared.

In fact, there is little conclusive evidence that enforcement effectively and significantly reduces online infringement.[11] True, rights holders have over time managed to shut down numerous illegal sharing platforms. However, as the recent take-up of web browser-integrated torrent-based sharing and streaming platforms such as 'Popcorn Time' illustrates, more than fifteen years after the emergence of Napster, unauthorized peer-to-peer (P2P) file sharing seems to thrive as ever before.[12] Empirical evidence suggests that litigation has at best a short-term deterrent effect before demand and supply relapse into infringing practices through alternative channels.[13] Furthermore, complex enforcement approaches, such as graduated-response systems, are costly and rarely efficient.[14] Perhaps the time has come to accept that file sharing will never go away.

Strict copyright enforcement may also be undesirable. On the one hand, it is now apparent that these measures alienate consumers and erode respect for and public legitimacy of copyright law.[15] On the other hand, strict

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11. *See*: R. Giblin, 'Evaluating Graduated Response', *Columbia Journal of Law & the Arts*, 37(2), 147–210; C. Handke, B. Bodó, & J.-J. Vallbé (2015), 'Going Means Trouble and Staying Makes It Double: The Value of Licensing Recorded Music Online', *Journal of Cultural Economics*; G.S. Lunney (2014), 'Copyright on the Internet: Consumer Copying and Collectives'. In Susy Frankel & D. Gervais (eds), *The Evolution and Equilibrium of Copyright in the Digital Age* (pp. 285–311), CUP; Poort et al., 2014; J. Poort, & J. Weda (2015), 'Elvis Is Returning to the Building: Understanding a Decline in Unauthorized File Sharing', *Journal of Media Economics*, 28(2), 63–83.
12. *See*: D. Gervais (2010), 'Collective Management of Copyright: Theory and Practice in the Digital Age'. In D. Gervais (ed.), *Collective Management of Copyright and Related Rights* (2nd edn, pp. 1–28), Kluwer Law International, p. 16, arguing that mass-scale use has brought about a reshaping of the copyright landscape, making it apparent that, short of expelling users from the internet there is no effective way to prevent these practices; and A. Bridy (2009), 'Why Pirates (Still) Won't Behave: Regulating p2p in the Decade after Napster'. *Rutgers Law Journal*, p. 604, noting that '[a]s an empirical matter, the mass lawsuits appear to have had only a transitory deterrent effect'.
13. Poort et al. 2014, pp. 2–4, with further references.
14. *See*: C. Geiger (2014), 'Challenges for the Enforcement of Copyright in the Online World: Time for a New Approach'. *Max Planck Institute for Innovation and Competition Research Papers*, (14), pp. 5–11; R. Giblin, 'Beyond Graduated Response'. In S. Frankel & D. Gervais (eds), *The Evolution and Equilibrium of Copyright in the Digital Age* (pp. 81–112), CUP; Hadopi Drev – Département Recherche Etudes et Veille. (2013). *Accès aux œuvres sur Internet*, 1–14, available at https://hadopi.fr/ressources/etudes/etude-acces-aux-oeuvres-sur-internet-inventaire-et-analyse-des-usages (accessed 13 December 2017); and P. Lescure (2013). *Mission 'Acte II de l'exception culturelle': contribution aux politiques culturelles à l'ère numérique*. Direction de l'information légale et administrative.
15. A. Peukert (2012), 'Why Do "Good People" Disregard Copyright on the Internet?'. In C. Geiger (ed.), *Criminal Enforcement Of Intellectual Property: A Handbook of Contemporary Research* (pp. 151–167), Edward Elgar Publishing.

enforcement of copyright risks impinging on fundamental rights and freedoms of both individuals and intermediaries. In several cases before the Court of Justice of the European Union (CJEU), various enforcement measures such as filtering, blocking, and disclosing internet service providers' (ISP) subscribers' information have been held to potentially conflict with fundamental rights and freedoms protected by the Charter of Fundamental Rights of the European Union (EU Charter),[16] such as freedom of expression and information, privacy in telecommunications, protection of personal data, and freedom to conduct a business.[17] The CJEU's jurisprudence requires that a 'fair balance' be reached between protecting copyright as a right of property and competing fundamental rights, sometimes giving primacy to the latter.[18] At the political level, similar considerations have led the EU legislature to reject systems of graduated response.[19]

This chapter assumes that unauthorized content sharing by individual users on a substantial scale is an inherent feature of the open internet, and will not disappear. It therefore proposes a system that legalizes such exchanges while guaranteeing fair remuneration to creators and other right holders. This is by no means a novel idea. Since the 2000s a rich body of academic literature has proposed and examined mechanisms that would legalize unauthorized P2P file sharing, while ensuring compensation to the authors and right holders concerned.[20] Recent years have seen various such proposals being advocated in the political realm, under various labels such as tax-and-royalty systems, '*licence globale*', content or culture flat-rate, file-sharing levy, sharing licence, or alternative reward systems.[21] These

16. Charter of Fundamental Rights of the European Union, OJ C 364/1, 18.12.2000.
17. *See*, e.g.: Case C-275/06, *Productores de Música de España (Promusicae) v. Telefónica de España SAU*, 29.01.2008, ECLI:EU:C:2008:54; Case C-70/10, *Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*, 24.11.2011, ECLI:EU:C:2011:771; Case C-360/10, *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v. Netlog NV*, 16.02.2012, ECLI:EU:C:2012:85; Case C-314/12, *UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH*, 27.03.2014, ECLI:EU:C:2014:192.
18. In Europe, the legal basis for the cited rights is found in Arts 8 and 10 of the European Convention on Human Rights, and Arts 7, 8, 11, and 16 of the EU Charter.
19. *See* Art. 1(3)(a) of Council Directive 2002/21 of 7 March 2002 on a common regulatory framework for electronic communications networks and services as amended by Directive 2009/140/EC and Regulation 544/2009. *See also* European Parliament, Resolution on the transparency and state of play of the ACTA negotiations, P7_TA(2010)0058, 2010, para. 11.
20. *See*: W.W. Fisher (2004). *Promises to Keep: Technology, Law, and the Future of Entertainment*. Stanford University Press; Gervais, 2004; Netanel, 2003; A. Peukert (2005), 'A Bipolar Copyright System for the Digital Network Environment', *Hastings Communications & Entertainment Law Journal*, pp. 1–80.
21. J.P. Quintais (2014), *Legalizing File-Sharing: An Idea Whose Time Has Come Or Gone? Report from the Information Influx Conference 2014*, Amsterdam: IViR, available at https://ssrn.com/abstract=2510545 (accessed 13 December 2017).

proposals have at times received considerable political support, especially in Germany and France, although they have failed to make it into law.

Alternative compensation systems such as these, however, have an even longer history, and can be traced back to earlier times when low-cost reproduction technologies made mass unauthorized use viable, and copyright difficult or even undesirable to enforce. Drawing on these earlier precedents this chapter proposes a *universal* remuneration scheme that would generally allow reproducing and communicating works of authorship to the public over the internet, by individual users acting without commercial purpose, subject to a right of remuneration. As this chapter will argue, such a scheme would serve the main normative aims of copyright, i.e., to foster the dissemination of cultural works and to reward authors, while protecting users' privacy and freedom of expression and preserving the integrity of the internet. It would most likely also find favour with a majority of consumers.

The outline of this chapter is as follows. After a short glance in the rear-view mirror of copyright history in section 8.2, the contours of the proposed universal right of remuneration are outlined in section 8.3. As this section demonstrates, the proposed model of legalization might take on different legal forms – from voluntary collective agreements to a statutory (legal) licence. Section 8.4 thereafter discusses normative aspects of the proposed model, and queries to what extent the model would fit the general rationales of copyright, as expressed in EU secondary law. Section 8.5 speculates on the economic and social impact of the model, on the basis of recent empirical work carried out at the University of Amsterdam's Institute for Information Law (IViR). Section 8.6 offers conclusions.

8.2 LESSONS FROM THE PAST

The archetypal alternative compensation system is that of the private copying levies that emerged in Europe during the second half of the twentieth century. Not unlike file sharing in the early twenty-first century, private copying arose on a mass scale as reproduction technology (particularly tape recording equipment) became widely available and affordable for general consumer use in the course of the 1950s and 1960s. As attempts by the copyright industries to enforce copyright against consumers proved deeply unpopular, and risked impinging on citizens' rights of privacy and data protection, levy systems that compensated right holders while permitting private copying emerged as a socially viable and fair alternative legal solution.[22]

22. P.B. Hugenholtz (2012), 'The Story of the Tape Recorder and the History of Copyright Levies'. In B. Sherman & L. Wiseman (eds), *Copyright and the Challenge of the New* (pp. 179–196), Kluwer Law International.

The latter part of the last century also witnessed the emergence of several other new communication technologies that have similarly challenged traditional models of copyright exclusivity and enforcement, such as reprography and cable retransmission. This section briefly examines these precedents. Can the solutions developed for these problems of the past be applied *mutatis mutandis* to the problems of the digital future?

8.2.1 Private Copying Levies

As one of the authors of this chapter has described elsewhere in some detail, the emergence of tape recorders as a consumer product in the 1950s and 1960s gave rise to a range of problems that have haunted the law of copyright until today.[23] With the introduction of recording technology in private homes, which allowed normal consumers to produce high-quality copies of musical works with the proverbial 'push of a button', copyright law for the first time entered the private sphere.

In response to the early copyright claims made in Germany against manufacturers and owners of tape recording equipment, the *Bundesgerichtshof* (German Federal Court of Justice) produced an impressive body of case law that directly dealt with, and anticipated, many vexing questions that persist in the field of copyright until this day. Should copyright extend to, and be enforceable in the private sphere? Are copyright management systems compatible with privacy protection? Can manufacturers of reproduction technology be held accountable for facilitating copyright infringement, or is such technology essentially 'neutral'? How to fairly compensate authors for unauthorized use that is difficult or impossible to monitor and prohibit?

While some may disagree with the way the German Federal Court of Justice mediated between the competing claims of copyright and privacy, the tape recorder case law that the Court produced between 1953 and 1965 is remarkable, and deserves praise for the way the Court has attempted to reconcile the seemingly irreconcilable. Whereas the Court held that copyright protection does not stop short of the private sphere, and that authors deserve remuneration for home copying, it would not accept that copyright be enforced at the expense of the end users' right to informational privacy. Whereas the Court held manufacturers of recording equipment liable for facilitating copyright infringement without 'GEMA notice', the manufacturing of tape recording equipment was never actually prohibited. In retrospect, the Court's 'invention' of a levy scheme in its final and most famous tape recorder decision – *Personalausweise* of 1964 – was the logical consequence of its previous rulings: a pragmatic compromise between protecting authors'

23. *Ibid*.

interests, respecting consumers' privacy, and allowing a prosperous electronics industry to flourish.[24]

Following this series of remarkable judicial decisions, the German legislator introduced a statutory licence for private copying in the new copyright act of 1965. The new provision allowed private users to copy works for personal use subject to a levy. Initially, the statutory licence was aimed at home taping of sound recordings and audiovisual works. However, the system eventually extended to private copying of works on any medium, including digital media. As a consequence, a growing array of devices and media eventually became targets of the levy. Manufacturers and importers of these devices and media were made debtors of the levy, but were expected to pass it on to consumers. Due to the transaction costs of managing the system, the right to remuneration was subject to mandatory collective management.[25]

Having been 'invented' by the German Federal Court of Justice in 1964 and adopted into law in Germany in 1965, private copying levies became a staple of copyright law in most Member States of the EU, and many countries outside Europe. At EU level, an optional private copying limitation, combined with a right of 'fair compensation', eventually made its way into Article 5(2)(b) of Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society ('InfoSoc Directive'). With the notable exception of Cyprus, Malta, and the common law countries of the UK and Ireland, where private copying has never been fully legalized, most Member States gradually introduced a system of private copying levies and implemented the InfoSoc Directive's limitation.[26] Levies are imposed on the importation and manufacture of copying equipment, blank media, or both, collected by collective rights management organizations (CMOs) representing authors, performing artists, film producers and publishers, and ultimately paid for by consumers.

Aggregate private copying levy income in the EU has gradually risen over time, to more than EUR 700 million for the year 2014.[27] As tape recorders were replaced by digital recording and reproduction devices, levies have gradually spread into the digital realm, and thereby rekindled old

24. *Ibid*.
25. J.P. Quintais (2017), *Copyright in the Age of Online Access: Alternative Compensation Systems in EU Law*, Kluwer Law International.
26. *See*: European Commission, 'Copyright and the Challenge of Technology', Green Paper, COM (88) 172 final, Brussels, 7.06.1988, pp. 102 et seq.; Hugenholtz, 2012, pp. 191–192; WIPO, & Stichting de Thuiskopie (2016), *International Survey on Private Copying Law & Practice 2015*, Geneva. The UK introduced the limitation in 2014, but it was overturned during the course of 2015 due to issues with the lack of a fair compensation requirement in the national implementing regulations. *See* High Court of Justice of England and Wales, 17.07.2015, Case No. CO/5444/2014, [2015] EWHC 2041 (Admin).
27. WIPO & Stichting de Thuiskopie 2016, pp. 14–16.

discussions.[28] An example is the current debate on applying levies to cloud services.[29] With the scope of the private copying regime constantly expanding, the levy scheme has come to approximate a general compensation scheme for digital copying.[30] Private copying levies, it is noted, remain on the Commission's agenda to this very day as an 'on-going initiative'.[31]

8.2.2 Reprography

Another 'copyright crisis' of the past was prompted by the rise of photocopying in the 1970s.[32] In many countries this has similarly led to levy schemes on reproduction equipment,[33] ranging from traditional photocopying and fax machines to digital scanners and printers. In other countries reprography was legalized by way of a variety of legal mechanisms. At EU level, Article 5(2)(a) of the InfoSoc Directive allows Member States broad

28. P.B. Hugenholtz, L. Guibault, & S. van Geffen, (2003), *The Future of Levies in a Digital Environment*, Amsterdam: IViR.
29. *See* European Parliament resolution of 27 February 2014 on private copying levies (2013/2114(INI)), paras 28–30. On the private copying issues associated with cloud-based services, *see* M. Senftleben (2013), 'Breathing Space for Cloud-Based Business Models Exploring the Matrix of Copyright Limitations, Safe Harbours and Injunctions', *Jipitec*, 4(2), pp. 91–93. On stakeholders' concerns surrounding the interaction between cloud services and private copying, *see* Report on the responses to the Public Consultation on the Review of the EU Copyright Rules, Directorate General Internal Market and Services, Directorate D – Intellectual property, D1 – Copyright, July 2014, available at http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/contributions/consultation-report_en.pdf (accessed 13 December 2017), pp. 72–77. *See also* Case C-265/16, *VCAST Limited v. R.T.I. SpA*, 29.11. 2017, ECLI:EU:C:2017:913, on the application of the private copying exception to cloud services for the remote video recording of works.
30. The Draft Report on private copying levies, 2013/2114(INI), Committee on Legal Affairs (Rapporteur: Françoise Castex), para. 27, 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'. This paragraph was dropped in the final version of the document.
31. *See*: M. van Eechoud, P.B., Hugenholtz, S. van Gompel, L. Guibault, & N. Helberger (2009), *Harmonizing European Copyright Law: The Challenges of Better Lawmaking*, Kluwer Law International, p. 7; and J. Poort, & J.P. Quintais (2013), 'The Levy Runs Dry: A Legal and Economic Analysis of EU Private Copying Levies', *Jipitec*, 4(3)3, 205–224. *See also* European Commission, *The EU Single Market*, *Copyright and Neighbouring Rights*, *Private copying levies*, available at http://ec.europa.eu/internal_market/copyright/levy_reform/index_en.htm, (accessed 13 December 2017).
32. P.E. Geller (1991), 'Reprography and Other Processes of Mass Use', *Journal of the Copyright Society of the U.S.A.*, 38(21), 21–40.
33. A 2014 WIPO/IFFRO report identifies twenty-nine such countries worldwide. *See* WIPO & IFRRO (2014), *International Survey on Text and Image Copyright Levies*, Geneva.

freedom in legalizing reprography exemptions, subject to the provision of fair compensation for authors and other holders of the reproduction right.[34]

For example, Germany has established a legalization cum remuneration system for photocopying similar to the levy model developed for home taping, imposing a levy on both manufacturers of photocopying equipment and those who operate the equipment – educational and research institutions including schools, universities, and vocational training institutions and public libraries, as well as copy shops.[35]

France, on the other hand, has subjected the exercise of reprography rights to a system of compulsory collective rights management,[36] while the Nordic countries (unsurprisingly) apply their oft-praised system of extended collective licensing to photocopying by schools, government, and businesses.[37]

In the Netherlands, state entities, such as schools and libraries, and commercial enterprises, benefit from a statutory licence that allows these entities broad freedoms to make photocopies of news articles and scientific works, against a state-determined tariff of 4.5 Eurocents (formerly, 10 Dutch cents) per photocopy of copyright protected text. [38]

Finally, the UK permits educational photocopying by prescribing limited exemptions in default of negotiated licences; subjecting licences to review by the Copyright Tribunal; and authorizing the Secretary of State to expand the licence to encompass similar works.[39]

Like the rules on private copying, the EU reprography regime has gradually spread into the digital realm. In the *VG Wort* case, the CJEU validated this development by clarifying that the notion of 'reproductions effected by the use of any kind of photographic technique or by some other process having similar effects' within the meaning of Article 5(2)(a) of the InfoSoc Directive extends to digital copying processes, and 'must be

34. Article 5(2)(a) reads: 'Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases: (a) in respect of reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects, with the exception of sheet music, provided that the rightholders receive fair compensation'.
35. WIPO & IFRRO 2014, pp. 69–77.
36. Articles L. 122-10 through L. 122-12, French Intellectual Property Code.
37. T. Koskinen-Olsson & V. Sigurdardottir (2016), 'Collective Management in the Nordic Countries'. In D. Gervais (ed.), *Collective Management of Copyright and Related Rights* (3rd edn, pp. 243–262), Kluwer Law International, p. 246.
38. D. Visser (2012), 'Private Copying', In P.B. Hugenholtz, A.A. Quaedvlieg, & D.J.G. Visser (eds), *A Century of Dutch Copyright Law: Auterswet 1912-2012* (pp. 413–441), De Lex, pp. 424–428.
39. UK Copyright, Designs and Patents Act 1988 §§36, 136–137, 140–141. *See also* P. Goldstein & P.B. Hugenholtz (2013), *International Copyright. Principles, Law, and Practice* (3rd edn), OUP, pp. 382–383.

interpreted as including reproductions effected using a printer and a personal computer, where the two are linked together'. [40]

8.2.3 Cable Retransmission

Yet another noteworthy precedent for de facto legalization is the special copyright regime for cable retransmission that has existed in the EU since 1993. During a large part of the 1970s and 1980s retransmission of television programmes by (then emerging) cable networks was carried out without permission, until courts gradually confirmed that cable retransmission was a restricted act.[41] The ensuing complexities of rights clearance eventually led to Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission ('SatCab Directive').

Articles 9–12 of the SatCab Directive contain a special regime for the cable retransmission right. The right applies only to simultaneous, unaltered, and unabridged retransmissions by cable of television or radio programmes originating in another Member State (thus excluding purely national retransmissions) following an initial broadcast over the air or by wire.[42] The definition of the right thus requires a primary transmission and the use of the specific technology of cable as the means for the secondary transmission.[43]

The regime is unique in EU law as it is the only case of mandatory collective management of an *exclusive right*. Article 9 of the SatCab Directive elucidates that CMOs manage the right to refuse or grant authorization to a cable operator for cable retransmission, even if rights holders have not transferred the management of their rights to a CMO. In this case, the CMO managing rights in the same category is deemed mandated to manage the rights of non-members. If more than one such CMO exists, rights holders may freely choose between the authorized CMOs. Only the original broadcasting organizations themselves are exempt from this system. [44]

Even before the SatCab Directive was adopted, collective management of cable rights had already become normal practice in many EU Member

40. Case C-457/11, *Verwertungsgesellschaft Wort (VG Wort) v. Kyocera and Others* (C-457/11) *and Canon Deutschland GmbH* (C-458/11), *and Fujitsu Technology Solutions GmbH* (C-459/11) *and Hewlett-Packard GmbH* (C-460/11) *v. Verwertungsgesellschaft Wort (VG Wort)*, 27.06.2013, ECLI:EU:C:2013:426.
41. M. de Cock Bunning (2012), 'Cable Retransmission and Other Secondary Use', in: *A Century of Dutch Copyright Law: Autersweet 1912–2012*, De Lex; S. Depreeuw (2014), *The Variable Scope of the Exclusive Economic Rights in Copyright*, Kluwer Law International, pp. 309–318.
42. Articles 1(3) and 8 SatCab Directive.
43. On the requirements of initial transmission and retransmission by cable, *see* Depreeuw 2014, pp. 393–400.
44. Article 9(1) and (2) SatCab Directive. Art. 10 SatCab Directive exempts broadcasting organizations from this regime.

States. In some cases, this practice was aided by (the threat of) compulsory licensing, as permitted under Article 11*bis* of the Berne Convention for the Protection of Artistic and Literary Works (BC). The directive would eventually reject the possibility of compulsory licensing for cable retransmission, in favour of its system of mandatory collective rights management.[45]

The SatCab Directive's regime of mandatory collective rights management seeks to ensure that cable operators are in a position to acquire all rights necessary to allow cable retransmission of broadcast programmes, and to avoid a situation in which holders of rights in parts of broadcast programmes who are not represented by a CMO enforce their exclusive rights individually vis-à-vis cable operators, thereby causing 'black-outs' in retransmitted programmes.[46] For all practical purposes, the SatCab Directive's special regime has created a situation whereby cable retransmission of broadcast television programmes is effectively legalized, subject to permission of the broadcasting organization and payment of remuneration to the rights holders through a CMO.

8.2.4 Lessons from the Past

What the legal models discussed in this brief historical account have in common is that they reconcile several competing social and economic goals: (1) facilitating rights management in situations where effective individual licensing and enforcement are difficult, impossible, or undesirable; (2) promoting access and use by private and institutional users to extensive catalogues of culturally and/or scientifically important works; (3) respecting rights to privacy and data protection by avoiding undue monitoring and enforcement within the private sphere; and (4) guaranteeing fair remuneration to authors and other right holders.

The result has been restriction of the nature or exercise of the exclusive right in favour of non-voluntary licensing regimes. In that process, remuneration and access have replaced exclusivity and enforcement at the centre of the regulation of mass use of copyright works.

Another common thread is that while these models of legalization were originally designed for 'analogue' uses of works, most if not all of these

45. On the rationale for the rejection of compulsory licensing of the cable retransmission right in the SatCab Directive, *see* Proposal for a Council Directive on the coordination of certain rules concerning copyright and neighbouring rights applicable to satellite broadcasting and cable retransmission, COM(91) 276 final – SYN 358, 11 September 1991, pp. 22–23 (paras 35, 36), and Recital 21 SatCab Directive. *See also* Depreeuw 2014, pp. 387–405.
46. *See*: Depreeuw 2014, pp. 402–406; Explanatory Memorandum SatCab Directive (n. 45), pp. 20, 24, 32; J. Rosén (2014), 'The Satellite and Cable Directive', in: I. Stamatoudi & P. Torremans (Eds.), *EU Copyright Law. A Commentary*, Edward Elgar, pp. 234–235.

regimes have proliferated into the digital domain. Viewed in this light, consolidating the existing array of use-specific systems, such as private copying, reprography, and cable retransmission, into a more general legalization and compensation scheme would not be a revolutionary step.

8.3 DRAWING THE CONTOURS OF A UNIVERSAL RIGHT OF REMUNERATION

The scheme proposed in this chapter would permit acts of reproducing and making available to the public online works of authorship *by individual users acting for non-commercial purposes*, while guaranteeing remuneration from intermediaries (e.g., ISPs and/or other platforms) to authors and other right holders through a CMO. Under the proposed system such acts would no longer infringe relevant rights of reproduction and communication to the public/making available, while eliminating secondary liability for facilitating such acts. Conversely, intermediaries would be obliged to fairly remunerate authors, performing artists, and (other) affected right holders (e.g., film producers, phonogram producers, and broadcasters).

8.3.1 Legal Qualification and Structure

The proposed model would permit qualifying users to use eligible content without the prior authorization of the right holders. Drawing inspiration from the schemes briefly discussed in section 8.2, one could imagine such a model taking on different legal forms, subject to varying degrees of legislative intervention: (a) voluntary collective licensing; (b) extended collective licensing; (c) mandatory collective management; (d) statutory licensing combined with a copyright limitation; and (e) tax models. These schemes would impose gradually increasing restrictions on the exercise and nature of the exclusive rights of reproduction and communication to the public, as currently designed and adopted in international treaties and EU law, most notably in Articles 2 and 3 of the InfoSoc Directive.

8.3.1.1 Voluntary Collective Licensing

The least interventionist model would be that of a voluntary collective licence. This is also the least restrictive form of collective rights management.[47] In this system, a CMO enters into a contract with users for the rights it represents. Depending on how the system is set up, a commercial user (e.g., an ISP) may contract directly with a CMO and obtain the right to sublicense its customers, or act as a mere intermediary obtaining licences for the benefit

47. Gervais 2010, p. 26.

of clients or subscribers, i.e., the actual end users of works.[48] It is possible to envisage a system where agreements are entered into by a consortium of CMOs and other (major) individual right holders on the one hand, and internet intermediaries and platforms, on the other.[49]

Depending on the subject matter and scope of the agreement, this collective licence would contractually legalize a variety of online consumptive and distributive uses of, e.g., musical works, phonograms, audiovisual works, and books, by the subscribers of these platforms. Note that since under prevailing copyright doctrine passive intermediaries are not deemed to commit acts of direct copyright infringement, the intermediaries would not – technically speaking – be the licensed agents. Instead, they would be entering into the licensing arrangement *on behalf of* their subscribers. Assuming *arguendo* that (most or all) holders of rights affected by such online uses would be represented in such voluntary agreement(s), no need for legislative intervention would arise. In other words, and in theory, this model could be realized immediately – if and when all parties concerned were to reach agreement.

In most EU Member States, voluntary collective licensing has been a common phenomenon for nearly a century, particularly in the area of music.[50] For example, the two main modes of (primary) exploitation of musical works – mechanical reproduction and broadcasting – have been licensed collectively since virtually the introduction of these technologies. In practice however, these voluntary collective licensing schemes closely resemble a model of statutory licensing.

National laws on the collective administration of rights, as recently harmonized by Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market ('CRM Directive'), and general rules of competition law, have left CMOs little room to refuse licences to users willing to pay a fair price. The directive, for instance, requires that negotiations with users for the purposes of licensing be carried out in good

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48. C. Colin (2011) (sous la supervision et avec la participation de la Prof. Séverine Dusollier), *Etude the Faisabilite de Systemes de Licences pour les Echanges d'Oeuvres sur internet. Rapport pour la SACD/SCAM – Belgique*, CRIDS, Facultés Universitaires Notre-Dame de la Paix – Namur, pp. 64–77. *See also* S. Dusollier & C. Colin (2011), 'Peer-to-Peer File Sharing and Copyright: What Could Be the Role of Collective Management?', *Columbia Journal of Law & the Arts*, 34, 823–824, arguing that the later use is known in civil law jurisdictions as a 'stipulation for another person'. It is also conceivable that certain licence agreements qualify ISPs as sub-licensors with the authority to license end users.
49. Gervais 2004.
50. *See* Commission Staff Working Document Impact Assessment Accompanying the document Proposal for a Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market, SWD(2012) 204 final, Brussels, 11.7.2012, pp. 2–7, on the use of voluntary licensing in the field of music.

faith, in a timely manner, with disclosure of the necessary information, and that licensing terms be subject to objective and non-discriminatory criteria. In the same vein, refusals to license a particular service must be presented to users in a reasoned statement.[51] Moreover, collective rights management is subject to ever-intensifying government oversight and transparency rules, especially in the EU.[52]

Although organizations, of authors and performing artists in particular, have lobbied for the extension of this broadcasting model ('radio model') to the online world,[53] it seems unlikely that all stakeholders concerned would buy into such a voluntary arrangement in the foreseeable future, even if empirical research does suggest that such a system could significantly enhance royalty income for all right holders.[54] The current state of the online management of music rights in the EU is illustrative of this, showing that for certain rights, rights holders (in this case phonogram producers) are unwilling to entrust CMOs with their rights, preferring to manage them directly or through other vehicles, such as independent management entities.[55]

The participation problem is compounded for sectors of the content industry where – unlike the music, visual arts, and photography sectors – collective management of online rights is not common practice.[56] Examples include 'film producers, book publishers, journal and magazine publishers or games publishers', who typically handle mono- and multi-territorial licensing of online rights in Europe without the intervention of CMOs.[57] In the audiovisual sector, for instance, collective management is an accepted practice only for cable retransmission of audiovisual works.[58] It is therefore

51. *See*, e.g., Art. 16(1)–(3) and Recital 32 CRM Directive.
52. In this respect, *see* e.g., the rules on transparency and reporting in Arts 18–22 of the CRM Directive.
53. *See* e.g., letter of the Dutch Consumers' Union, NTB and FNV/KIEM to the Dutch Parliament (Second Chamber), 12 May 2014, available at http://goo.gl/Kbm2i4 (accessed 13 December 2017).
54. *See infra* 8.5.
55. The CRM Directive (Arts 23–32) prescribes a special regime for multi-territorial licensing of authors' online rights in musical works, which can be viewed as a model of reinforced voluntary collective licensing. Art. 3(b) CRM Directive defines 'independent management entity' as 'any organisation which is authorised by law or by way of assignment, licence or any other contractual arrangement to manage copyright or rights related to copyright on behalf of more than one rightholder, for the collective benefit of those rightholders, as its sole or main purpose, and which is: (i) neither owned nor controlled, directly or indirectly, wholly or in part, by rightholders; and (ii) organised on a for-profit basis'.
56. SWD CRM Directive 2012 (n. 50), p. 12.
57. *Ibid*. (& n. 50).
58. *See* AGICOA: Association of International Collective Management of Audiovisual Works, *Frequently asked questions*, available at http://www.agicoa.org/english/toolsandhelp/faq.html#1c (accessed 13 December 2017). *See also* SWD CRM Directive

unlikely that a sufficiently high number of copyright owners in this sector would entrust the management of their online rights to CMOs.

In light of these challenges, this chapter proceeds on the assumption that legislative change is required for such a model to be put in place.

8.3.1.2 Extended Collective Licensing

An alternative that would require only modest legislative intervention would be to implement the proposed scheme under a system of extended collective licensing (ECL). This is a type of collective management that allows the offering of blanket licences for the entire repertoire(s) represented by a CMO.[59] In this system, a CMO first enters into voluntary agreements with rights holders. When the organization meets a representativeness criterion – meaning that it is authorized to manage a category of rights by a substantial number of domestic and foreign right holders – a statutory presumption extends its representation powers to non-member rights holders. This de jure extension increases the organization's repertoire and simplifies acquisition of rights.[60] In this way, ECL aims to solve the problem of providing 'fully covering licenses in cases of mass uses'.[61]

This legal mechanism was first developed and applied successfully in the Nordic countries (Denmark, Finland, Iceland, Norway, and Sweden) from the 1960s,[62] and is rapidly gaining popularity in other regions.[63] At EU

2012 (n. 50), p. 57 ('Collective licensing of film is essentially limited to cable retransmissions. These are licensed for each territory in which a cable network operates.')

59. SWD CRM Directive 2012 (n. 50), p. 197, defining blanket licence. *See also* T. Riis & Jens Schovsbo (2010), 'Extended Collective Licenses and the Nordic Experience: It's a Hybrid But Is It a Volvo or a Lemon?', *Columbia Journal of Law & the Arts*, 33(4), 473 & n. 4, noting that the first proposal for an ECL model is attributed to the Swedish law professor Svante Bergström.
60. SWD CRM Directive 2012 (n. 50), p. 45. *See also* D. Gervais (2016), 'Collective Management of Copyright: Theory and Practice in the Digital Age', In D. Gervais (ed.), *Collective Management of Copyright and Related Rights* (3rd edn, pp. 3–30). Kluwer Law International, p. 24, and Riis & Schovsbo 2012, pp. 935–939.
61. Koskinen-Olsson & Sigurdardottir 2016, p. 250.
62. Riis & Jens Schovsbo 2010, pp. 472–474, noting that ECL was initially developed to respond to administration of broadcasting rights in 1961 and in 1974 begun to be used in a coordinated way for the management of copyright.
63. Gervais 2010, p. 21, 2016, pp. 23–24; Riis & Jens Schovsbo 2010, pp. 472, 478; SWD CRM Directive 2012 (n. 50), pp. 45–46. On the proposed application of ECL in the US, *see* P. Samuelson (2016), 'Extended Collective Licensing to Enable Mass Digitisation: A Critique of the US Copyright Office Proposal', *European Intellectual Property Review*, 38(2), 75–82. For central and Eastern Europe, *see* M. Ficsor & M. Chatalbashev (2016), 'Collective Management in Central and Eastern Europe', In D. Gervais (ed.), *Collective Management of Copyright and Related Rights* (3rd edn, pp. 111–138), Kluwer Law International, pp. 130–133. Remarkably, a new copyright act of 2015 in Slovakia contains an ECL mechanism that applies *inter alia* to the making available right. *See* M. Gera (2016), 'Extended Collective Licensing under the New Slovak Copyright Act', *Journal of Intellectual Property Law & Practice*, 11(3), 170–171.

level, the SatCab Directive permits ECLs between CMOs and broadcasting organizations in respect of the exclusive right of communication to the public by satellite. The regime, which does not cover cinematographic works, requires that the act of communication simulcasts a terrestrial broadcast by the same broadcaster, and that the unrepresented rights holder has the right to opt out of the system.[64]

As noted, an ECL extends by operation of the law the terms of a voluntary collective licence to right holders not directly or indirectly represented by the licensing CMO. An ECL-based model thus presupposes the existence of a voluntary licence agreed between a CMO and one or more users. Likewise, the amount of remuneration would be contractually negotiated. It also assumes the presence of a CMO sufficiently representative for the category of rights and rights holders involved in the licence agreement.

A necessary prerequisite for the scheme proposed in this chapter to operate under an ECL would therefore be a mature and functional rights management infrastructure in all creative sectors concerned. While such an infrastructure is already in place for music, and rapidly developing for literary, journalistic, and visual works, this might be more problematic in the realm of audiovisual production, where copyright in respect of online uses is commonly owned by film producers who are generally unwilling to have their online rights collectively managed.[65]

Another likely requisite is the adoption of secondary EU law imposing an ECL framework for non-commercial acts of reproduction and communication to the public online, including a country of origin rule to enable cross-border effect for the national licences.[66] It would also have to address the possibility for rights holders to opt out of the system. Most, but not all, ECL provisions currently in force allow non-represented right holders to opt out of the collective licence. The opt-out consists of a declaration from rights holders to the CMO managing the ECL to the effect that they do not wish the organization to represent them. The declaration will come into effect after a reasonable deadline, following which the CMO will exclude the represented works or subject matter from its repertoire. As a whole, the procedure should be simple and not burdensome.[67]

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64. Article 3(2)-(4) SatCab Directive.
65. *See supra* 8.3.1.1.
66. *See* L. Guibault (2015), 'Cultural Heritage Online? Settle It in the Country of Origin of the Work', *Jipitec* (6), 173–191, proposing the establishment of ECL systems as a solution for the clearance of rights for the digitisation and making available of works contained in the collection of a cultural heritage institution. Guibault argues 'that the only workable solution to the problem of extra-territorial application of ECL schemes would be to formally establish a "country of origin" principle'.
67. M. Ficsor (2016), 'Collective Rights Management from the Viewpoint of International Treaties, with Special Attention to the EU Acquis', In D. Gervais (ed.), *Collective Management of Copyright in Europe* (3rd edn pp. 31–79), Kluwer Law International, p. 68.

For the system to work, rights holders would have to, in the first place, adhere to collective management in large enough numbers to meet a representativeness threshold sufficient to trigger the extension effect. As noted above for voluntary collective licensing, the challenge is particularly great in sectors that do not have an established practice in collective rights management of online rights. Even if the challenge is met, the possibility of opting out is a constant threat to the viability of the system. Although in Nordic practice opt-outs rarely occur,[68] the question arises whether a universal remuneration scheme crafted in the form of an ECL including an opt-out could lead to a massive withdrawal of rights by reluctant holders, such as film producers, and thus undermine the entire scheme.

8.3.1.3 Mandatory Collective Rights Management

A variant of the ECL approach would be to subject the exercise of relevant rights in respect of acts of non-commercial reproduction and communication to the public to a system of mandatory collective rights management. Mandatory collective management is the most restrictive model of collective licensing. It prevents rights holders from directly exploiting their works, imposing by law the transfer or assignment of the exercise of rights to a CMO, which will act on their behalf.[69]

Mandatory collective management aims 'to ease copyright clearance, to reduce transaction costs for users and to limit fragmentation of copyrights'.[70] Due to the restrictions it imposes, the application of mandatory collective management to *exclusive* rights is subject to strict requirements and should be considered only when voluntary models prove unsuitable for exercise of the right.[71]

This variant of a legalization scheme would resemble the existing system of mandatory collective exercise of cable retransmission rights imposed by the SatCab Directive, explained above. Like the ECL model, this variant would build on existing structures of collective rights management. Likewise, the amount of remuneration would be negotiated between CMOs and intermediaries. A major difference however is that the mandatory collective management model would not allow any opt-outs, making this

68. P.B. Hugenholtz, S. van Gompel, L. Guibault, & R. Obradović (2014), *Extended collective licensing: panacee voor massadigitalisering?*, Onderzoek in opdracht van het Ministerie van OCW. Amsterdam, p. 33.
69. L. Guibault (2002), *Copyright Limitations and Contracts: An Analysis of the Contractual Overridability of Limitations on Copyright*, Kluwer Law International, p. 26.
70. Dusollier & Colin 2011, p. 819.
71. *See* D. Gervais (2001), *Collective Management of Copyright and Neighbouring Rights in Canada: An International Perspective*, Canadian Heritage, available at http://works.bepress.com/daniel_gervais/28/ (accessed 13 Dec. 2017), pp. 37–38, and D. Sinacore-Guinn (1993), *Collective Administration of Copyrights and Neighboring Rights: International Practices, Procedures, and Organizations*, Little, Brown, p. 379.

model more akin to the system of statutory licensing discussed below. The similarities extend to procedural aspects, such as the determination of remuneration.[72]

However, these similarities do not necessarily result in identical legal qualification or effects on the exclusive right. In particular, it is often debated whether the application of mandatory collective management to exclusive rights affects their nature, turning them into remuneration or compensation rights, and thus justifying the analogy to a limitation-based statutory licence.[73] Although it is impossible for this chapter to address the issue in depth, some general remarks are justified.

Proponents of the broader applicability of this regime to exclusive rights argue that the effect of a statutory licence is to place copyright uses 'outside the field of exclusiveness',[74] meaning that the permission to use a work does not flow from the rights holder but from the law. In contrast, in mandatory collective management, the powers to authorize and enforce copyright shift from the authors to their representative – the CMO – whose sole purpose is to act for the collective benefit of its members; these, furthermore, have a say in defining the terms and conditions of licensing and distribution.[75] As a result, the argument goes, mandatory collective management merely modulates the options for exercise of copyright.[76]

Article 9(1) SatCab Directive is a case in point: the positive dimension of the right (to grant an authorization) remains intact, but there is some regulation of its exercise.[77] While moral rights are left untouched, the economic right remains transferable by contract or legal presumption. This can happen for example in the case of a 'broadcasting organization initially

72. Guibault 2002, p. 26, noting that the process is analogous in mandatory collective management and compulsory licences, insofar as it relies on negotiation between all stakeholders involved and, failing an agreement, is subject to fixation by an administrative or judicial body.
73. *See* Quintais 2017, pp. 118–124, for a summary of this discussion.
74. C. Geiger (2007), 'The Role of The Three-Step Test in the Adaptation of Copyright Law to the Information Society', *UNESCO E-Copyright Bulletin* (January-March), p. 10.
75. *Ibid*. *See also* S. von Lewinski (2004), 'Mandatory Collective Administration of Exclusive Rights – A Case Study on its Compatibility with International and EC Copyright Law' *UNESCO E-Copyright Bulletin*, pp. 1–14.
76. *See* Geiger, 2007, p. 10, citing *IFPI Simulcast* (Commission Decision 2003/300/EC) and *Uradex* (Case C-169/05, *Uradex SCRL v. Union Professionnelle de la Radio et de la Télédistribution (RTD) and Société Intercommunale pour la Diffusion de la Télévision (BRUTELE)*, 1.06.2006, ECLI:EU:C:2006:365, where in relation to Art. 9(2) SatCab Directive the CJEU 'reaffirms that the Directive has, for legal certainty and simplification of procedures, implemented a mandatory collective management of the exclusive right of cable retransmission'. *See also* T. Dreier (2010), 'Satellite and Cable Directive', In M. Walter & S. von Lewinski (eds), *European Copyright Law: A Commentary*, OUP; P.B. Hugenholtz (2006), 'Satellite and Cable Dir.', In T. Dreier & P.B. Hugenholtz (eds), *Concise European Copyright Law*, Kluwer Law International; Dusollier & Colin 2011, p. 827.
77. Dreier, 2010, p. 451. *See also* Hugenholtz 2006, pp. 280–281.

transmitting the subject matter', provided no prior transfer of the right was made to a CMO. Where a transfer to the broadcaster occurs, the right cannot be subject to collective exercise.[78]

This view would be consistent with Recital 12 of the CRM Directive, which lists mandatory collective management as a type of arrangement 'concerning the management of rights', along with individual management or ECL.[79] It would also be consistent with the fact that this model of collective rights management is left out of the exhaustive menu of limitations and exceptions in Article 5 of the InfoSoc Directive.[80] In this light, from a legal-technical standpoint, to qualify it as a limitation appears inconsistent with the *acquis*.[81]

The 2016 decision of the CJEU in *Soulier and Doke* could, however, call into question this interpretation. The case concerns Articles L. 134-1 to L. 134-9 of the French Intellectual Property Code, which impose a hybrid model of mandatory collective management for certain acts of digital exploitation of out-of-print books. [82]

According to the CJEU, authors have an exclusive right to authorize or prohibit the use of their works, subject to the exhaustive list of limitations in the InfoSoc Directive. This exclusive right is preventive in nature, and therefore requires prior consent for the use of works.[83] Still, under certain conditions, that consent may be expressed implicitly.[84] For the implicit consent to be valid 'every author must actually be informed of the future use of his work by a third party and the means at his disposal to prohibit it if he so wishes'. [85]

In light of *Soulier and Doke*, the policy space available for mandatory collective management of exclusive rights under the InfoSoc Directive seems fairly limited. However, it is noted that the judgment does not address

78. Dreier 2010, pp. 451–452; Hugenholtz 2006, pp. 280–281. This interpretation is confirmed by Recital 28 SatCab Directive.
79. *Contra* Ficsor 2016, pp. 56–57.
80. von Lewinski 2004, pp. 13–14. *See also* G. Mazziotti (2008), *EU Digital Copyright Law and the End-User*, Springer, p. 265 & n. 872.
81. *See*: C. Bernault & A. Lebois (2005), *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*, Institute for Research in Private Law, University of Nantes (Translated from the French by Leigh Smith and Cedric Palazzetti), p. 67; Colin 2011, p. 44; Geiger 2014, p. 19 (& 81); Guibault 2002, pp. 26–27; P.B. Hugenholtz & R. L. Okediji (2008), *Conceiving an International Instrument on Limitations and Exceptions to Copyright*, Study supported by the Open Society Institute (OSI), available at https://ssrn.com/abstract=2017629 (accessed 13 December 2017); von Lewinski, 2004, p. 6. Reaching a similar conclusion with regard to the SatCab Directive, *se* A. Modot et al. (2011), *The 'Content Flat-Rate: A Solution to Illegal File-Sharing?'* Brussels, p. 121.
82. *See* Case C-301/15, *Marc Soulier and Sara Doke v. Premier ministre and Ministre de la Culture et de la Communication*, 16.11. 2016, ECLI:EU:C:2016:878, paras 14–16.
83. *Ibid.*, paras 33–34.
84. *Ibid.*, para. 35.
85. *Ibid.*, para. 38.

non-commercial use, or even clearly qualify mandatory collective rights management as a per se copyright limitation. As such, it is unclear whether a legalization proposal based on this rights management scheme would need to pass the three-step test, as would be the case for a limitation-based statutory licence.

8.3.1.4 Statutory Licensing Based on a Copyright Limitation

The most interventionist approach would be to structure the scheme in the form of a statutory licence combined with a compensated limitation or exception, similar to the above-mentioned rules on private copying and photocopying that exist in multiple Member States.

In this option, the exclusive rights of reproduction and making available to the public in Articles 2 and 3 InfoSoc Directive would be subject to one or more limitations covering the relevant online use of works by individuals. These limitations would be combined with a remuneration or compensation right, and complemented by rules setting up a system to administer and enforce the right, including the calculation, collection and distribution of compensation.

Following this approach, the law would precisely define the scope and subject matter of the legal authorization, designate the CMO charged with receiving remuneration on behalf of the rights holders, and identify the intermediaries that would be liable for payment of the remuneration/compensation. The law might also set the tariff, delegate this to a government or independent authority, or leave the tariff setting to a tripartite negotiation process between the CMO, intermediaries, and consumer representatives. [86]

The main benefit of a limitation-based statutory licence in this field is that it would efficiently solve most challenges associated with territorial and substantive fragmentation, as well as legal uncertainty, representing a comparative advantage in relation to pure collective management systems. However, in light of the limited scope available for statutory licensing in international law, a legalization model of this type would affect the nature of the exclusive rights of reproduction and communication to the public, transforming them (for the licensed uses) into non-exclusive rights of remuneration or compensation. Thus, in contrast to the legal structures discussed above, a limitation-based statutory licensing model would clearly need to comply with the 'three-step test' enshrined in EU law and various

86. *See* SWD CRM Directive 2012 (n. 50), p. 197, with a definition of compulsory licence that includes many of these elements.

international treaties.[87] Such issues of compliance are, however, outside the scope of this chapter.[88]

Also largely outside the scope of this chapter, but discussed briefly in section 8.3.2 below, are other aspects that should be addressed in the event a new copyright limitation is included in the *acquis* in the terms proposed above. These include, but are not limited to: the optional or mandatory nature of the proposed limitation; its articulation with existing (compensated and non-compensated) limitations to the affected exclusive rights, namely temporary and transient copying, private copying, quotations, incidental inclusion, caricature, parody, and pastiche[89]; the design of the remuneration or fair compensation right; and its relation to the right of fair compensation for digital private copying and to pre-existing contractual licences. [90]

8.3.1.5 Tax Model

Assuming the overall positive welfare effect of a combined system of legalization of content sharing and fair remuneration of creators, one might also consider a tax-based legalization system. Precedents for tax models in the field of copyright can be found in the fields of private copying and public lending.

Although most EU Member States have implemented Article 5(2)(b) InfoSoc Directive with device or media based levy systems, at least three countries – Norway (since 1995), Spain (between 2012 and 2016), and Finland (since 2015) – have adopted systems whereby fair compensation to rights holders is paid out of the state budget.[91] The Norwegian Copyright Act, for example, states that authors shall receive fair compensation through annual grants via the state budget.[92] The fair compensation is 'funded by the Norwegian Government, as a post on the national budget', and subsequently collected by an umbrella CMO (Norwaco), which then distributes it to member (secondary) organizations representing national and foreign categories of rights holders.[93]

There are doubts as to whether such schemes are compatible with EU law. In the recent *EGEDA* case, for instance, the CJEU noted that under the

87. *See*: Art. 9(2) Berne Convention for the Protection of Literary and Artistic Works; Art. 10(1) and (2) WIPO Copyright Treaty; Art. 16(2) WIPO Performances and Phonograms Treaty; Arts 13, 17, 26(2), and 30 TRIPS Agreement; Art. 5(5) InfoSoc Directive.
88. For an analysis of the compliance of such a limitation-based system with the three-step test Quintais 2017, pp. 263–315.
89. Article 5(1), 5(2)(b), 5(3)(d), (i), and (k) InfoSoc Directive.
90. *See* Quintais 2017, for an analysis of these aspects.
91. WIPO & Stichting de Thuiskopie, 2016, p. 8. *See also* Opinion of Advocate General Szpunar delivered on 19.01.2016, Case C-470/14, *EGEDA and Others v. Administración del Estado and Others*, ECLI:EU:C:2016:24, para. 16.
92. *See* Art. 12 Norwegian Copyright Act.
93. WIPO (2012), *International Survey on Private Copying. Law & Practice 2012*, Geneva, pp. 102–103. The most recent WIPO survey on private copying confirms that '[t]he

Spanish law at issue the revenue allocated to the payment of fair compensation was financed from the general budget resources, i.e., by all taxpayers, including legal persons.[94] Furthermore, the law did not contemplate exemptions for legal persons in this respect, or allow for their reimbursement.[95] Therefore, because it failed to 'guarantee that the cost of compensation is ultimately borne solely by the users of private copies', the Spanish scheme was deemed incompatible with Article 5(2)(b) of the InfoSoc Directive.[96] However, this judgment does not preclude a system that finances fair compensation for private copying through the state budget, provided the same ensures payment of fair compensation to rights holders and guarantees its actual recovery, while excluding payments from legal persons. [97] Be that as it may, the *EGEDA* ruling in fact led the Spanish Supreme Court to annul some of the controversial provisions of the Spanish law at issue.[98]

Similar tax-based remuneration schemes exist in the field of public lending. Over the course of the twentieth century, the increase in lending activities by public libraries caused several European countries to introduce a public lending right for authors.[99] In most cases, national laws' initial implementation of this right was done outside the copyright system.[100] This

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remuneration is funded by the Norwegian government as an item on the national budget' and '[t]he rate is set unilaterally in the national budget each year'. *See* WIPO & Stichting de Thuiskopie 2016, p. 123.

94. Case C-470/14, *EGEDA and Others v. Administración del Estado and AMETIC*, 09.06.2016, ECLI:EU:C:2016:418, para. 39.
95. *Ibid*., para. 40.
96. *Ibid*., paras 41–42. On this point the CJEU strays from the AG's Opinion, according to which financing the compensation from the General State Budget is consistent with the InfoSoc Directive, 'since this is not a matter of extending the scope of a levy to all taxpayers, but of a system of financing based on a different rationale'. *See Opinion AG in EGEDA*, para. 52.
97. *EGEDA*, para. 37. For example, national laws could provide for a scheme for exempting legal persons' taxes from inclusion in this budgetary item or, alternatively, allow legal persons to seek reimbursement of their taxes used for this purpose. Another possibility, briefly addressed by the AG, would be to introduce a specific tax or duty on natural persons to finance fair compensation. *See Opinion AG in EGEDA*, para. 51. Whether any of these variants is practical or cost-effective is, of course, a separate empirical question.
98. Supreme Court Spain, 10.11.2016, Case No. 4832/2016, ECLI:ES:TS:2016:4832.
99. 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) 502 final, Brussels, 12.09.2002, p. 3.
100. *Ibid.*, pp. 3–4. *See also* ALAI (1983), *Public Lending Right. Reports of an ALAI-Symposium and Additional Materials*, H.C. Jehoram (ed.), Amsterdam: Kluwer Law and Taxation Publishers: 'it is possible to distinguish two main groups: countries that do not recognize and those that apply the public lending right. Among the latter, some have sought a solution outside the province of copyright, and in fact only one, the Federal Republic of Germany, has accepted public lending right as an integral part of its copyright law'. Countries that did not recognize any public lending right were Italy, France, and Belgium (to the extent that the existing law was considered a 'dead letter'). For a description of the UK example of the 1979 Public Lending Right Act, *see ibid*.

occurred through multiple mechanisms, including national funds constituted by library subscription taxes, and direct budget allocation of taxes. Only later was the public lending right incorporated into national copyright laws and, eventually, into EU law through a harmonized exclusive or (optional) remuneration right.[101]

For mass online use of works, a tax-based scheme would have the clear advantage of reduced transaction costs compared with the collective licensing models discussed above. No requirement for negotiating tariffs between CMOs and intermediaries would arise. Tariffs could be simply set by the state.

Like the statutory licensing model discussed above, a tax-remunerated legalization scheme would need to pass the 'three-step test'. This would, *inter alia*, require that the state funds allocated to the scheme are clearly earmarked, and that a link between the permitted use of works and remuneration paid to rights holders is preserved.

In terms of political viability this model clearly ranks lower than the models previously discussed. Allocating general state funds to compensate creators is hardly a popular proposition in times of economic crisis and budgetary restraints.

8.3.2 Scope of the Proposed Scheme

What uses of which types of content would be allowed under the proposed scheme?

8.3.2.1 Authorized Non-commercial Use

A first question concerns the scope of the scheme. Should the model be technology-neutral, and therefore apply to all acts of reproduction and making available to the public, or should it be limited to online uses? While a truly 'universal' scheme would imply its technology-neutral application to all kinds of copyright-relevant use, whether online or 'in the analogue world', the main *raison d'être* of the scheme would not necessitate such an all-encompassing reach. Given the scheme's underlying premise, i.e., that copyright is no longer effectively and efficiently enforceable in the online world, it would be disproportionate to extend it beyond the digital realm. The scheme would, therefore, only apply to digital content exchange and use of

101. Articles 2(1)(b) and 6 of Council Directive 92/100/EEC, of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, 1992 O.J. (L 346/61) as republished and amended by Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 (codified version), 2006 O.J. (L 376/28). For an analysis of the public lending right in several countries prior to the implementation of this directive, *see* ALAI, 1983.

works over the internet, including other interconnected wired or wireless networks.

The proposed scheme would distinguish between *non-commercial* uses that would be permitted, and other uses for which the exclusive rights remain intact. While distinguishing a commercial motive (subjective aspect) or nature (objective aspect) of an act may not always be an easy task, a test of 'commerciality' is not unknown in copyright law or in the law of intellectual property generally.

For example, Article 5(2)(b) of the InfoSoc Directive permits exceptions or limitations:

> 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 rightholders receive fair compensation […].

The term 'commercial' also regularly occurs elsewhere in Article 5 of the directive, be it a test of 'commercial nature', 'commercial purpose', or 'commercial advantage'.[102]

Moreover, Article 5(3) of the recently adopted CRM Directive mandates that CMOs ensure rights holders have:

> 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.

For another example, Article 61 of the Agreement on Trade-Related Aspects of Intellectual Property Law (TRIPS) uses the objective concept of 'commercial scale', which has been interpreted as referring to 'counterfeiting or piracy carried on at the magnitude and extent of typical or usual commercial activity with respect to a given product in a given market'.[103]

Like the existing regime for private copying, the proposed scheme would allow individual users to reproduce and make available content without direct or indirect commercial motive. To be sure, the notion of 'commercial' is a much narrower concept than – and should not be confused with – the notion of 'economic'. Whereas non-commercial acts of file sharing or streaming would be exempted under the proposed scheme, they would likely have an economic impact.

Thus, the concept of 'non-commercial' use should refer to online activities carried out by individuals for personal enjoyment/consumption of works and outside the market sphere. The concept should exclude online use of a work for profit, within the context of a business activity of an individual,

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102. *See* Art. 5(2) and (3) InfoSoc Directive.
103. WTO, China – *Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/15, 26.01.09, para. 7.577.

or directed at a commercial advantage or monetary compensation.[104] For example, such a licence would not cover online use of works combined with advertisement or similar activities intended to generate income for the user or for him and a third party.[105] The third parties here are digital platforms, like Google, whose main business model is online advertisement.[106] The proposed scheme would also not extend to content services provided by entrepreneurs, either because they are not individuals or because their use triggers the application of an exclusive right and does not qualify as non-commercial. As presently, these service providers would, therefore, require licences from right holders.

8.3.2.2 Subject Matter Covered

A second question is whether the model should be applied to all types of content, including content categories that to date have remained largely exempt from statutory or collective licensing, such as software, databases, and video games.

Considering the model's main aim of providing wholesale legalization, one would ideally envisage a licence covering a broad spectrum of copyright protected works. On the other hand, one could justify a more limited, category-based approach given the fact that the scale of online 'piracy' differs markedly per sector. For example, while piracy is (and remains) rampant for audiovisual content and – to a more limited extent – also for music, illegal exchanges of software, databases, and games seem to be less pervasive.[107]

These diverging piracy rates are due to a number of factors, including the effectiveness and consumer acceptance of digital rights management, and in particular the gradual shift towards service-based models in sectors such as software, databases, and games, making them less vulnerable to piracy.[108]

Moreover, a category-based approach could more easily build on infrastructures of collective rights management that have developed and matured in certain sectors, such as music and literature, but are less advanced or even non-existent in others.

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104. Quintais 2017, pp. 391–394. Note that such a design would correspond well with the current case law of the CJEU on the online right of communication to the public, which relies on a 'for-profit' condition to determine whether a user has knowledge of the unlawful nature of the source of a work to which he is linking, and whether such act is ultimately restricted by copyright. Cf. Case C-160/15, *GS Media BV v. Sanoma Media Netherlands BV and Others*, 8.09.2016, ECLI:EU:C:2016:644, paras 47–52.
105. Quintais 2017, pp. 391–394.
106. N. van Eijk et al. (2015), *Digital Platforms: An Analytical Framework for Identifying and Evaluating Policy Options*. TNO, IViR, and Ecorys, available at http://hdl.handle.net/11245/1.504534 (accessed 13 December 2017), pp. 12–13.
107. TNS/Kantar Media, 2017.
108. *Ibid*. *See also* Quintais 2017, pp. 388–389, with further references.

In sum, a more proportionate approach would be to limit the model to traditional categories of copyright and neighbouring rights protected creations: music, text, visual, and video.

The scheme should certainly only apply to works lawfully published or made available online. It would not however impose a requirement of lawfulness of source of the copy of a work for its subsequent online use by individuals, or else the model's aim of general legalization would be defeated. This would be a marked difference from the current approach of CJEU case law on exclusive rights, which imposes liability for private reproductions made from unauthorized sources and for the posting of hyperlinks to works made available online without the consent of copyright holders.[109]

8.3.2.3 Intermediaries

Perhaps the most vexing issue is to define the categories of intermediaries that would be obliged to remunerate creators. This enquiry does not require a preliminary analysis of the liability of intermediaries – whether primary or secondary – for acts of copyright infringement committed by individuals using their services. Like with existing private copying levy models, the obligation to pay remuneration could be largely separated from copyright liability issues. In the online context, such separation would be inevitable anyway, given the safe harbours established for these actors in Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('E-Commerce Directive').[110]

What is more important is to designate intermediaries that are capable of efficiently and reliably paying remuneration to right holders or their CMOs, and of subsequently passing on the costs to the users. Another pragmatic (and political) factor could be to look for the types of intermediary that currently 'suffer' most from enforcement actions on the part of the right holders, and would therefore be inclined to commit to a compensation model.

All this makes broadband ISPs the obvious candidates,[111] since they: (1) have 'deep pockets', (2) have an existing billing relationship with users/ consumers, and (3) are increasingly targeted by copyright holders – and in

109. On the reduction of the scope of the private copying limitation, *see* C-435/12, *ACI Adam BV and Others v. Stichting de Thuiskopie and Stichting Onderhandelingen Thuiskopie* vergoeding, 10.04.2014, ECLI:EU:C:2014:254, and its progeny. On hyperlinking to unauthorized sources, *see GS Media*.

110. *See* Arts 12–15 E-Commerce Directive.

111. ISP involvement in such a system would be economically efficient. Not only would a (flat or metered) surcharge on the internet subscription payment for households reduce transaction costs among users, but it would also facilitate the provision of adequate compensation to rights holders. *See* Handke, Bodó, & Vallbé 2015, analysing the recorded music market in the Netherlands.

future policy scenarios might be legally charged with increasing degrees of 'responsibility' for copyright compliance. For instance, the current policy orientation of EU institutions and industry stakeholders is towards increasing the role and collaboration of online intermediaries in enforcement measures, such as filtering and blocking, which entail costs and additional liability exposure for these intermediaries.[112] Together, these factors might inspire ISPs to more easily buy into a future model of alternative compensation.

Other possible candidates are content sharing platforms such as YouTube or Facebook. While the pockets of these platforms may be even deeper, these intermediaries are not as well-positioned to transfer the costs of the licence to the end users, since they do not usually have a direct billing relationship with consumers. Moreover, in recent years, YouTube, Facebook and similar platforms have invested in and developed sophisticated automated content filtering and identification systems to reduce the amount of unauthorized content uploaded by their users, further offering different modalities of individual content licensing.[113] In addition, many platforms have entered into collective licensing agreements. [114] All this would appear to make these platforms less likely candidates, despite increasing calls to that

112. At institutional level, *see*, e.g.: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *on 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 (24.05.2011), pp. 22–23; Commission Staff Working Document *E-commerce Action plan 2012-2015 – State of play 2013*, SWD(2013) 153 final, 23.04.2013, pp. 17–18; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Digital Single Market Strategy for Europe*, COM(2015) 192 final (6.5.2015), pp. 7–8 (discussing a novel 'duty of care' on intermediaries), pp. 11–12; Commission Staff Working Document *A Digital Single Market Strategy for Europe – Analysis and Evidence*, SWD(2015) 100 final (6.5.2015), pp. 55–57; European Parliament resolution of 9 July 2015 on the implementation of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (2014/2256(INI)), para. 66 ('stresses the need to adjust the definition of the status of intermediary in the current digital environment'); Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Towards a modern, more European copyright framework*, COM(2015) 626 final (9.12.2015), pp. 10–11. *See also* Giblin, 2014 (n. 11), pp. 58–59, describing the enforcement strategy of the content industries since 2007 against online intermediaries.
113. *See*, e.g., YouTube, *How Content ID Works*, available at https://support.google.com/youtube/answer/2797370?hl=en (accessed 13 December 2017); and Facebook, Rights Manager, available at https://rightsmanager.fb.com (accessed 13 December 2017).
114. *See*, e.g., N. Rauer (2016), 'Germany: YouTube and GEMA reach a licensing agreement on music videos', *Lexology*, available at https://www.lexology.com/library/detail.aspx?g=4446f517-d42c-4ccd-8d15-8f67c2b70f4e (accessed 13 December 2017).

effect and legislative proposals to increase their liability for acts of end users.[115]

Prima facie, file sharing facilitators such as The Pirate Bay (TPB), Popcorn Time, and similar torrent-based platforms seem to be the prime candidates for paying remuneration. Upon further reflection, however, they are not. Rogue operators such as TPB are clearly not bona fide and reliable debtors, nor are they in a position to directly pass on the costs of remuneration to consumers. In fact, whether these operators actually exist de jure as natural or legal persons is doubtful. More likely, these actors are merely 'brands' used by fluid groups of loosely organized individuals – an important reason why legal actions against TPB and its offspring have remained largely ineffective.[116]

Past experience with private levying schemes teaches us another lesson. For an alternative compensation scheme to operate successfully, it should be targeted and not proliferate indiscriminately across all media.[117] This is yet another powerful argument to impose the universal compensation scheme obligation on ISPs, and not extend it to providers of value-added services at higher levels in the communications hierarchy.

To make this system effective, ISPs should be allowed to pass on the 'broadband levy' to end users in the price of their household (but not professional) subscriptions. As a matter of transparency, this surcharge should be visible to end users, as is the levy in existing private copying systems.[118]

8.3.2.4 Compensation

A fourth question concerns the issue of compensation. Under this heading, at least two main topics should be addressed. The first relates to the basic

115. *See* recent proposals to subject YouTube and similar platforms to a statutory remuneration right. *See* P. Sirinelli, J.-A. Benazeraf, & A. Bensamoun (2015), High Council for Literary and Artistic Property (France), *Mission to Link Directives 2000/31 and 2001/29: Report and Proposals*. On legislative efforts at EU level, note the so-called value gap proposal in Art. 13 and Recital 38 of the Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, COM(2016)593. Art. 13 aims to regulate the use of protected content by information society providers giving access to large amounts of works and other subject matter uploaded by their users. For criticism, *see* S. Stalla-Bourdillon et al. (2016), 'A Brief Exegesis of the Proposed Copyright Directive', available at https://ssrn.com/abstract=2875296 (accessed 13 December 2017).
116. Poort, Leenheer, van der Ham, & Dumitru 2014.
117. Hugenholtz, Guibault, & van Geffen 2003.
118. As with certain debtors of the private copying levy, ISPs may choose to compete on price by absorbing the broadband levy. *See* A. Roßnagel, S. Jandt, C. Schnabel, & A. Yliniva-Hoffman (2009), *The Admissibility of a Culture Flat-Rate under National and European Law,* Saarbrücken/Kassel, p. 22.

operation and management of the system, including the calculation, collection, and distribution of the compensation. The second refers to the nature of the universal remuneration or compensation right. As we shall see, the two topics are intertwined.

The main questions regarding the management of the system are how to determine: (1) the total amount of compensation generated by the proposed system; and (2) the specific amount paid by the users for the authorized use.

So far as the total amount generated by the system is concerned, in collective rights management models that quantum is determined through contractual negotiation and tariff setting by CMOs, and is usually not too problematic. In statutory licence or tax-funded models, the determination of the level of the tariffs is imposed by law, subject to a general standard of 'fair' compensation or 'equitable' remuneration. This process could include intervention by a government agency and/or stakeholder negotiations (involving right holders, intermediaries, and consumers), subject to judicial or administrative review.[119]

In this regard, the aforementioned empirical work carried out by IViR may be helpful. This research suggests a general consumer preference for a flat fee structure, and a willingness to pay a substantial monthly fee for the right to download and exchange a wide range of works. More specifically, the research concludes that a limitation-based statutory licence for the rights of reproduction and communication to the public applying to online recorded music has the potential to fully compensate rights holders. For instance, EUR 1.74 surcharge on the ISP subscription for all households with internet connection would equate to the entire revenues in the Dutch physical and digital market for recorded music in 2012, including all conventional purchases of recorded music, of approximately EUR 144 million.[120] As users are willing to pay a monthly amount well above that price point, this system would be welfare increasing, even after correcting the results for overestimation. [121]

Collection of compensation is usually the competence of a CMO designated in the system. For example, the law may mandate an umbrella CMO to administer the system, including collection and subsequent distribution to second-level organizations that represent different categories of

119. Quintais 2017, pp. 143–150.
120. Revenues are calculated by resorting to industry statistics, such as IFPI (2013), *IFPI Digital Music Report 2013: Engine of a digital world*, available at http://www.ifpi.org/downloads/dmr2013-full-report_english.pdf (accessed 13 December 2017), which estimates rights holders' revenues in the Dutch recorded music market at EUR 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 was taken from WIPO, 2013. The results assume the unlikely scenario that an alternative compensation system substitutes all current sales of recorded music (perfect substitution) and provides no cost savings. *See* Handke et al. 2015.
121. *Ibid*.

rights holders. As noted above, the CMO will collect the amount from an intermediary debtor (an ISP or online service provider), who may then have the right to pass it on to the final user.

The distribution of the compensation involves several elements familiar to collective rights management. First, it is necessary to define the beneficiaries of the compensation, namely the categories of rights holders entitled to it. Assuming the universal remuneration right is designed as a compensated limitation to the rights of reproduction and communication to the public in the InfoSoc Directive, it would make sense to design it as a fair compensation right benefiting the rights holders identified in Articles 2 and 3 thereof.[122] This qualification also has implications for the calculation of amounts, as fair compensation should reflect the *harm* suffered by creators and other holders of the affected exclusive rights.[123]

The allocation of the sums collected to each category is determined by law or stakeholder negotiation. Here, again, if we follow the *Luksan* and *Reprobel* approach, creators should be allocated a fixed share due to the unwaivable nature of their fair compensation rights. [124]

The subsequent issue is how to divide the compensation between individual rights holders within a category. Individual distribution could be the competence of second-level CMOs representing each category or even, if judged efficient, the umbrella organization administering the system. It is common in proposals for the legalization of file sharing to suggest distributing the compensation based on measurements of online use, surveys, contingent valuation methods, or negotiated distribution keys.[125]

Methods for measurement of online use include anonymous monitoring, sampling, tracking, census, or a combination thereof. Proposals that rely on monitoring online use typically require some type of registration of works or rights management information in a central registry to enable this measurement. More sophisticated proposals consider the length of works and trace units of consumption (e.g., download or stream counts), or use decentralized metrics or contingent valuation surveys (e.g., by having end users assume a role in distribution through voting mechanisms or user

122. Case C-462/09, *Stichting de Thuiskopie v. Opus Supplies Deutschland GmbH and Others*, 16.06.2011 ECLI:EU:C:2011:397, para. 34; and Case C-572/13, *Hewlett-Packard Belgium SPRL v. Reprobel SCRL*, 12.11.2015, ECLI:EU:C:2015:750, paras 44–49. *See also* European Copyright Society (2015), Position paper on the Opinion of the Advocate General in the case *HP Belgium v. Reprobel* pending before the Court of Justice of the EU (*Hewlett-Packard Belgium SPRL v. Reprobel SCRL*, C-572/13), available at https://europeancopyrightsocietydotorg.files.wordpress.com/2015/12/opinion-in-case-c572_13-hp-belgium-reprobel-2015.pdf (accessed 13 December 2017).
123. Case C-467/08, *Padawan SL v. Sociedad General de Autores y Editores de España (SGAE)*, 21.10.2010, ECLI:EU:C:2010:620, paras 40–42; *Reprobel*, paras 36, 48–49.
124. Case C-277/10, *Martin Luksan v. Petrus van der Let*, 9.02.2012, ECLI:EU:C:2012:65, paras 88 et seq.; *Reprobel*, paras 44–49.
125. Quintais 2017, pp. 146–150.

sampling).[126] Whatever the method, it should by design ensure protection of the right to privacy and personal data of end users, as that constitutes a core normative justification for legalization as an alternative to copyright enforcement. For the same reason, the system should also restrict the possibility for end users to 'pay' with personal data as a counter-performance or consideration for the licence to use works, a payment method expressly recognized in the proposed Digital Content Directive.[127]

8.4 NORMATIVE CONSIDERATIONS

Whereas alternative compensation schemes such as the one explored in this chapter are on the fringes or beyond the exclusivity paradigm of classic copyright law, the model proposed here would not necessarily run counter to the normative considerations (the rationales) underlying EU copyright law. Judging from the preambles of the ten copyright directives currently in place – in particular the InfoSoc Directive–,[128] and from the growing body of case law of the CJEU, copyright law in the EU is based on an amalgam of utilitarian (i.e., economic) and moral considerations – reflecting the main traditions of copyright law in Europe: British *copyright* and continental *authors' rights*. In the EU, copyright is also informed by the economic freedoms of the Treaty on the Functioning of the European Union (TFEU), and by the fundamental rights and freedoms enshrined in the EU Charter.[129]

The mixed foundations of EU copyright law do not, therefore, present a single benchmark against which the proposed model can be unequivocally tested. Rather, the rationales of EU copyright law are multi-layered, and at times seem contradictory.

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126. For an example of the first, *see* Fisher, 2004. For examples of the second, *see* P. Aigrain (2008), *Internet & création: comment reconnaître les échanges hors-marché sur internet en finançant et rémunérant la création?* In Libro Veritas; D. Baker (2003), *The Artistic Freedom Voucher: An Internet Age Alternative to Copyrights*, CEPR – Center for Economic and Policy Research; P. Eckersley (2012), *Digital Copyright & The Alternatives. An Interdisciplinary Inquiry*, University of Melbourne.
127. *See* Arts 3 and 13 of the Proposal for a Directive of the European Parliament and the Council on certain aspects concerning contracts for the supply of digital content, COM/2015/0634 final – 2015/0287 (COD). *See also* A. Metzger (2016), 'Dienst gegen Daten: Ein synallagmatischer', *Archiv für die Civilistische Praxis*, *216*, pp. 817–865.
128. The InfoSoc Directive is of particular importance as it is based on principles and rules already laid down in the directives in force in the area of intellectual property. *See* Recital 20 InfoSoc Directive, and Joined Cases C-403/08 and C-429/08, *Football Association Premier League Ltd and Others v. QC Leisure and Others* (C-403/08) *and Karen Murphy v. Media Protection Services Ltd* (C-429/08), 4.10.2011, ECLI-:EU:C:2011:631, para. 187 (and case law cited). For our purposes, it is particularly relevant because it harmonizes the exclusive rights and limitations that form the framework in which a legalization scheme would integrate.
129. The EU Charter, of course, has 'the same legal value as the Treaties'. Cf. Art. 6(1) first subpara. of the Treaty on European Union.

For example, Recital 4 of the InfoSoc Directive seems to espouse a utilitarian policy of industrial development. According to this recital, EU copyright is to 'foster substantial investment in creativity and innovation, including network infrastructure', which 'will safeguard employment and encourage new job creation'.[130] By contrast, Recitals 10 and 11 primarily reflect the rationales of traditional *droit d'auteur*, focusing on the material interests of authors and performers, in particular the need to receive an 'appropriate reward', 'safeguarding the independence and dignity of artistic creators and performers'.[131] Recital 9 for its part confirms that harmonization of copyright and related rights should guarantee 'a high level of protection' (an oft-repeated mantra in the case law of the CJEU), while at the same time mentioning the interests of 'consumers' and 'the public at large'.[132]

Interestingly, nowhere in these foundational recitals is there mention of exclusive rights as an essential feature of the system of EU copyright. Rather, the system of exclusive rights and corresponding limitations is seen as the primary instrument for achieving the various goals set out in the preamble.

The EU Charter has become the primary source of fundamental rights law in the EU since its adoption in 2000. Its Article 17(2) expressly recognizes that '[i]ntellectual property shall be protected', as part of the Charter's general guarantee of property in Article 17(1). In the landmark *Luksan* case the CJEU applied Article 17 to a film director's claim for fair compensation in the following way:

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130. Recital 4 InfoSoc Directive states: 'A harmonised legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property, will foster substantial investment in creativity and innovation, including network infrastructure, and lead in turn to growth and increased competitiveness of European industry, both in the area of content provision and information technology and more generally across a wide range of industrial and cultural sectors. This will safeguard employment and encourage new job creation.'

131. Recital 10 InfoSoc Directive reads: 'If authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work. The investment required to produce products such as phonograms, films or multimedia products, and services such as "on-demand" services, is considerable. Adequate legal protection of intellectual property rights is necessary in order to guarantee the availability of such a reward and provide the opportunity for satisfactory returns on this investment.' Recital 11 InfoSoc Directive reads: 'A rigorous, effective system for the protection of copyright and related rights is one of the main ways of ensuring that European cultural creativity and production receive the necessary resources and of safeguarding the independence and dignity of artistic creators and performers.'

132. Recital 9 InfoSoc Directive: 'Any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large. Intellectual property has therefore been recognised as an integral part of property.'

> 68 Finally, it should be pointed out that, under Article 17(1) of the Charter of Fundamental Rights of the European Union, everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest. Article 17(2) provides that intellectual property is to be protected.

Importantly, the CJEU does not interpret Article 17 of the EU Charter as an unqualified guarantee of an absolute, exclusive right. Rather, the Court accepts that 'in the public interest and in the cases and under the conditions provided for by law' exclusive rights of authors may be substituted by a right to 'fair compensation being paid in good time for their loss'.

Note that *Luksan* and later *Reprobel* also imply that the economic rights protected under EU copyright, and any rights of remuneration derived therefrom, belong *ab origine* to the authors, not to film producers or other 'right holders', such as publishers.[133]

Of course, the EU Charter also recognizes important fundamental rights that provide additional, and powerful, justifications for replacing exclusive rights with rights of remuneration, notably freedom of expression and information (Article 11) and rights to privacy (Article 7) and protection of personal data (Article 8).

Indeed, the law of copyright and neighbouring rights in the EU is already rife with instances where exclusive rights have made way for rights of remuneration for creators, as previously discussed.[134] Examples abound. The public lending right harmonized by the 1992 Rental and Lending Directive, while conceptualized as an exclusive right similar to the right of commercial rental, is subject to such wide-ranging (optional) compensated exceptions that it is, for all practical purposes, reduced to a right of remuneration.[135] Private copying, an optional exception under Article 5(2)(b) of the InfoSoc Directive, although technically subject to the exclusive right of reproduction, is similarly legalized and replaced by a right to 'fair compensation' in nearly all Member States. By the same token, reprographic reproduction, which according to the case law of the CJEU also includes certain acts of digital copying,[136] is broadly permitted subject to the payment of 'fair compensation' under Article 5(2)(a) of the InfoSoc Directive.

The law of neighbouring rights in the EU offers even more examples, the most wide-ranging of which is the absence of an exclusive right for

133. *Luksan*, para. 67; *Reprobel*, paras 44–49.
134. *See supra* 8.2 and 8.3.1.
135. Article 6 Rental and Lending Directive.
136. *VG Wort*, paras 68–72 (as regards the *means* of reproduction).

performers and phonogram producers to oppose the broadcasting of their recorded performances. Instead, Article 8(2) of the Rental and Lending Directive provides for the right to 'a single equitable remuneration', to be paid by the broadcasters and to be shared between performers and phonogram producers.[137]

As this brief excursion into substantive EU copyright law illustrates, substituting an exclusive economic right with a right to remuneration can hardly be called exceptional in EU secondary law. Moreover, in addition to the compensated limitations and exceptions that EU law allows, various other legal mechanisms of de facto legalization, such as mandatory collective rights management and ECL, are explicitly or implicitly recognized in EU law.[138]

Would a universal right of remuneration as proposed in this chapter stand up against the various normative goals of EU copyright identified above?

One might easily argue that by replacing copyright's exclusive right with a right to remuneration for non-commercial online use of works rights holders are not granted a sufficiently 'high level of protection' as envisaged in the preamble of the InfoSoc Directive. Considering, however, that the exclusive rights of authors to oppose digital file sharing and similar online uses by private individuals have proven to be largely unenforceable, while not generating any income from these large-scale illegal uses, this objection becomes less convincing. Would an enforceable right of remuneration not be more effective than an unenforceable exclusive right in safeguarding a 'high level of protection' for authors?

In fact, a high level of protection cannot mean an 'absolute' level of protection. Such an interpretation would support broadening of exclusive rights *ad infinitum* irrespective of the possibility and desirability of individual management and enforcement of copyright. From the economic perspective, '"excessive protection" may have a negative impact on creativity and innovation'. [139] Thus, a 'high level of protection' should best be understood as an *optimal* level of protection of rights holders. In this light, a right of remuneration for mass non-commercial online use by individuals

137. It is noteworthy that the concepts of equitable remuneration and fair compensation are considered distinct autonomous concepts of EU law. On the one hand, the CJEU interprets the concept of equitable remuneration as based on the 'value of the use in trade' and following a logical balance between competing interests. *See*, e.g.: Case C-245/00, *Stichting ter Exploitatie van Naburige Rechten (SENA) v. Nederlandse Omroep Stichting (NOS)*, 6.02.2003, ECLI:EU:C:2003:68, paras 36–37; and Case C-192/04, *Lagardère Active Broadcast v. Société pour la perception de la rémunération équitable (SPRE) and Gesellschaft zur*, 14.07.2005, ECLI:EU:C:2005:475, para. 50. On the other hand, fair compensation is based on the notion of 'harm'. *See*, e.g., *Padawan*, paras 39–40.
138. *See supra* 8.2.3 and 8.3.1.
139. T. Dreier (2016), 'Thoughts on Revising the Limitations on Copyright under Directive 2001/29', *Journal of Intellectual Property Law Practice*, 11(2), 1, 140.

would likely provide more adequate protection for the material interests of rights holders than a largely unenforceable exclusive right.

By legalizing the mass copyright infringement that has plagued the creative sector and the internet for decades, the proposed scheme would likely 'foster substantial investment in creativity and innovation, including network infrastructure', as envisaged in Recital 4 of the InfoSoc Directive. Legalization would obviate or at least substantially reduce the need for costly and inefficient copyright enforcement measures, and take away the significant burden on internet intermediaries to remove or block access to infringing content, or otherwise cooperate with copyright enforcement strategies. The result would be to free up valuable resources for both creators and network providers to invest in creativity and innovation, assisting in the promotion of technological development and the information society – public interest goals undeniably served by a well-functioning internet.[140]

The proposed universal right of remuneration would, most likely, be highly beneficial to authors and performing artists who until now have only marginally profited from 'legal' all-you-can-eat online business models, such as Spotify and Netflix,[141] and have not been compensated at all by hosts of illegal services, such as TPB and Popcorn Time. While the meagre income that authors and artists currently derive from existing legal services is at least partly due to unfair contractual practices, the study of which is outside the scope of the present chapter, it is important to realize that remuneration schemes have an obvious potential to outperform exclusive rights in terms of actually rewarding authors and artists.[142]

Legalization of non-commercial digital exchanges of copyright protected works would surely also benefit 'consumers' and 'the public at large', who would be given legal access to an unlimited catalogue of works (for the subject matter covered by the licence) at modest additional cost.[143]

Most importantly, legalization would be consistent with fundamental rights and freedoms. On the one hand, it would foster freedom of expression and information, by preserving an open internet, which has become an essential medium for the enjoyment and effective exercise of this fundamental freedom.[144] This freedom includes the right to impart, seek, and receive

140. A. Peukert (2015), 'Copyright and the Two Cultures of Online Communication', In P.L.C. Torremans (ed.), *Intellectual Property Law and Human Rights* (3rd edn, pp. 366–395), p. 380, citing BGH, 17.07.2003, I ZR 259/00 ('Paperboy'), which identifies search engines and hyperlinking as essential components to secure the proper functioning of the internet.
141. Flowers 2015; Vallbé, Bodó, Handke, & Quintais 2015, pp. 1–4.
142. Geiger 2010.
143. Note that the proposed remuneration scheme would apply to intermediaries, and not directly charge consumers, although it is likely that these costs would be passed on directly to consumers.
144. Article 19 (2013), *The Right to Share: Principles on Freedom of Expression and Copyright in the Digital Age*, available at https://www.article19.org/data/files/

information and ideas online,[145] and extends to the enjoyment of digital cultural goods, including reading, listening to, viewing, browsing, hyperlinking, and sharing works online.[146]

On the other hand, legalization would better protect privacy and personal data, by not subjecting individual citizens to modalities of copyright enforcement that encroach upon the private sphere, such as individual content use monitoring. This is especially true if a legalization scheme respects the privacy of users in electronic communications, prohibiting the unjustified processing of personal data in this context, ensuring anonymous monitoring of online exchanges for purposes of collection and distribution of rights revenue, and avoiding the payment of data as consideration for the licence to use works.[147]

Additional normative underpinnings could be derived from various other sources of law and doctrine external to EU law, such as the doctrine of '*Sozialbindung*' (social function) of property rights in Germany, or the cultural rights and freedoms framed in international human rights treaties.[148] In this line, Geiger suggests rethinking copyright as an access (rather than prohibition) right. To do so would require adapting the rules of copyright 'to its initially dual character: (1) of a right to secure and organize cultural participation to creative aspects (access aspect); and (2) of a guarantee that the creator participates fairly in the fruit of the commercial exploitation of his works (protection aspect)'.[149]

In sum, while the proposed scheme would probably be difficult to implement within the framework of existing EU copyright law,[150] it would probably not run counter to the various normative considerations underlying EU and national copyright law.

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medialibrary/3716/13-04-23-right-to-share-EN.pdf (accessed 13 December 2017), p. 7. *See* European Court of Human Rights, *Ahmet Yıldırım v. Turkey* (App. No. 3111/10), 10.12.2012, ECLI:CE:ECHR:2012:1218JUD000311110, para. 54.

145. Article 19, 2013, p. 13.
146. European Copyright Society (2013). *The Reference to the CJEU in Case C-466/12 Svensson*, available at https://ssrn.com/abstract=2220326 (accessed 13 December 2017); Y. H. Lee (2015), *Copyright and Freedom of Expression: A Literature Review*, CREATe Working Paper Series No. 4, pp. 16–17. On hyperlinking, *see GS Media*, para. 45.
147. *See supra* 8.3.2.4 *See also* Quintais 2017, pp. 306, 405.
148. *See* e.g.: Art. 15(1)(c) International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3; Art. 27 Universal Declaration of Human Rights, adopted in Paris on 10 December 1948. *See also* C. Geiger (2015), 'Copyright as an Access Right, Securing Cultural Participation Through the Protection of Creators' Interests'. In: R. Giblin, K. Weatherall (eds.), *What if We Could Reimagine Copyright?,* ANU Press, 2017, pp. 73–109.
149. Geiger 2015, pp. 75–76.
150. This compliance analysis is outside the scope of this chapter. On this topic, *see* Quintais, 2017.

8.5 ECONOMIC AND SOCIAL IMPACT

Responses to proposals such as the scheme presented in this chapter – i.e., to legalize non-commercial digital uses subject to a right to remuneration – are often predictably negative. Such a scheme would undermine the exclusive right that is the main driver and backbone of the copyright industries; would legalize piracy; would cannibalize emerging 'legal' business models offering 'all-you-can-eat' content services; and would more generally harm the economic interests of authors and right holders. Moreover, consumers want all content to be free, and would probably not be willing to bear the costs of such a scheme. [151]

The results of empirical work conducted by IViR in recent years, however, strongly suggest otherwise. [152] From 2013 to 2015 IViR conducted a large-scale empirical study of legalization systems that, for a small monthly fee, would authorize non-commercial online uses by individuals, including the downloading and sharing of protected works (such as music, films, and books), while compensating rights holders. The results of the research, which included a survey among a large sample (N = 5,000) of Dutch consumers, indicate that respondents are generally dissatisfied with the currently available legal content channels, and regularly resort to illegal channels. As the research suggests, a majority of Dutch consumers would support the introduction of, and would be willing to pay for, a model of legalization cum remuneration. The results also show that such a legalization system, if implemented, would generate significant additional revenue for the content industries, even assuming that the scheme would lead to complete substitution of existing legal services (which seems unlikely). [153]

The main aim of the survey and study was to determine consumers' willingness to pay (WTP) for a legalization scheme that would be limited to musical recordings. This was done in the form of a discrete choice experiment among a large sample of Dutch households. Different types of compensation scheme were offered as a choice to the sample, with a distinction being made between mandatory participation, voluntary participation, and voluntary participation with stricter copyright enforcement.

151. *See*, e.g., S.J. Liebowitz, & R. Watt (2006), 'How Best to Ensure the Remuneration of Creators in the Market for Music? Copyright and its Alternatives' *Journal of Economic Surveys,* 20(4), 513–545; Handke et al., 2015, pp. 232–233; and ALAI (2016), Resolution following the 2015 Bonn Congress of ALAI concerning proposals to base the exploitation right on a comprehensive system of remunerations (Rome, 14 September 2016), available at http://www.alai.org/en/assets/files/resolutions/20160914-resolution-Bonn_en.pdf (accessed 13 December 2017).
152. Handke et al. 2015; Vallbé et al. 2015.
153. Handke et al. 2015; Vallbé et al. 2015. *See also* J.P. Quintais, (2016), 'Alternative Compensation Models for Large-Scale Non-Commercial Online Use of Works'. In S. von Lewinski (ed.), *Remuneration for the Use of Works – Exclusivity vs. Other Approaches* (pp. 298–306), De Gruyter.

Variations were possible as to the allowed uses, catalogue completeness, monitoring, and price. The results of the survey indicate broad popular support for a scheme permitting both downloading and sharing as allowed uses, with only temporal restrictions applying to the catalogue of available works, and without individual monitoring. The results show that the mean WTP for such a scheme amounts to EUR 9.25/month, while right holders in the Dutch music industry are already fully compensated at EUR 1.74/month, assuming perfect substitution.[154]

With well over 75 million broadband-connected households in the entire EU, the proceeds of EUR 9.25 compensation scheme for the right holders (12 x 9.25 x EUR 75 million = EUR 8.325 million) would far exceed the amount of revenues lost to the consumption of recorded music from illegal sources in the EU, which the European Union Intellectual Property Office (EUIPO) recently estimated at EUR 170 million for the year 2014.[155] Based on these figures, right holders in the EU music sector would be fully compensated by an alternative compensation scheme (for music exchanges only) set at a measly EUR 0.19/month, again assuming perfect substitution.

These results strongly suggest that consumers, creators, and other right holders would benefit enormously from the introduction of a legalization scheme, even in a sector such as music where 'legal' all-you-can-eat models have already very successfully penetrated the market.

The survey's results, as indicated, assume full substitution of currently legal content services by (currently illegal) content sharing that would become legal under the proposed model. Complete substitution is, however, highly unlikely – for multiple reasons. For one, the current market situation suggests that licensed content services can actually co-exist, and compete, with illegal (and free) sharing models.[156] Apparently, illegal sharing does not fully substitute legal offerings. By implication, it is unlikely that legalized (remunerated) content sharing would crowd out licensed services entirely.

As various economic studies on illegal file sharing have demonstrated, unauthorized file sharing may affect legal markets in both negative and positive ways. While a measure of substitution is likely to occur, file sharing also has beneficial effects on the market in that it allows consumers to 'sample' new content, i.e., it may introduce consumers to works, artists, and genres which increases their demand for these or other works by the same artists or in the same genre.[157] This sampling effect will also occur where legalized content sharing allows consumers to access works not (yet) available through licensed content services.

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154. Handke et al. 2015.
155. EUIPO, N. Wajsman, C. Arias Burgos, & C. Davies. (2016). The Economic Cost of IPR Infringement in the Recorded Music Industry, Alicante: EUIPO.
156. Vallbé et al. 2015.
157. *See* the chapter by J. Poort in this volume.

While it is therefore plausible that the introduction of a legalization system would have an overall positive welfare effect, and would directly benefit creators, right holders, and consumers engaging in or keen on content sharing, requiring all internet households/subscribers to pay lump-sum remuneration could be deemed unfair for those not interested in content sharing. Similar arguments have been made in the past, and continue to be made against private copying levies imposed on reproduction equipment and media that can, and will, be put to uses other than reproducing works for private purposes.[158]

This problem could be approached in different ways. One would be to simply accept the 'roughness' of the justice, as one generally accepts the inherent unfairness of non-negotiable commercial tariffs of, e.g., cable operators for a package of television programmes. Here too, low-volume users are subsidizing high-volume consumers.

Another approach would be to allow subscribers to opt out of the legalization scheme. For example, professional users and other non-consumers having broadband connections could be permitted to withdraw from the scheme, on the condition of proof of their non-consumer status. Allowing consumers to opt out might however severely undermine the system; if large volumes of subscribers leave the system right holders could feel compelled to reinstate copyright enforcement measures against them and their network providers. A variant of this approach could be to combine an opt-out with content filtering; users opting out of the scheme would have to accept that content flowing through their broadband connections is monitored for copyright infringement. This would however put users' privacy rights at risk, again defeating the purpose of legalization.

Yet another approach would be to exempt from payment certain categories of end users, thereby increasing the fairness of the system. It is a well-known fact that not all users engage in file sharing or consume digital culture online to the same extent. For example, a recent study in the Netherlands shows that 49% of Dutch consumers, including those without internet access, do not access digital channels to consume music, audiovisual content, or books.[159] Therefore, similar to the payment of utilities, the proposed scheme could differentiate between users and targeted households. Using the cited study as an indicator, an alternative compensation system in the Netherlands could include exemptions or reductions of the broadband levy for certain categories of household, such as households whose residents are above a certain age or below a pre-defined income level. The levy could also be lower for slower internet connections. In the future it could even be

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158. Hugenholtz et al. 2003, p. 40.
159. Vallbé et al. 2015, attributing this result to holdout groups, characterized by older, less educated people who predominantly use TV and radio ('non-consumers'), and older, educated people who prefer books ('bookworms'). The non-consumers amount to c.a. 29%, whereas bookworms amount to 20%.

possible to vary the levy based on the number of residents per household, and introduce the possibility for users to choose between fixed or metered surcharges (dependent on internet speed and usage).[160] These variations could lead to a fairer system that better approximates actual use and leverages consumers' willingness to participate and pay for this alternative.[161]

Assuming that the applicable tariff could indeed be set at a very modest level, its overall beneficial effects for society would justify a measure of 'rough justice' inherent to the system, combined with empirically justified exemptions or reductions of the levy for certain categories of household.

8.6 CONCLUSION

This chapter proposes the introduction of a universal right of remuneration to replace exclusive rights in respect of currently illegal online content sharing between individuals. As this chapter argues, despite over twenty years of vigorous copyright enforcement online content sharing still persists on a massive scale. Assuming that online piracy will not substantially decrease in the near future, this chapter proposes legalizing non-commercial content sharing, subject to a right to remuneration. The scheme proposed would permit acts of reproducing and making available to the public of online works of authorship by individual users acting for non-commercial purposes, while guaranteeing remuneration from ISPs to right holders through a CMO. Under the proposed system such acts would no longer infringe relevant rights of reproduction and communication to the public, while eliminating secondary liability for merely facilitating such acts. ISPs would be obliged to fairly remunerate authors, performing artists, and other rights holders.

Although this chapter presents several alternative ways of implementing the proposed legalization scheme, it could be based on a carefully crafted copyright limitation to the relevant exclusive rights, and be modelled after existing statutory licence schemes, such as those for private copying and reprography. In delimiting its scope, the scheme would distinguish between permitted 'non-commercial' uses, and other uses for which the exclusive rights remain intact. The scheme would not apply to all categories of copyright protected content, but be limited to traditional categories of creation: music, text, visual works, and video. Other content sectors, such as software, databases, and video games, are less vulnerable to piracy, and therefore less in need of the proposed solution.

The proposed scheme would impose the obligation to fairly remunerate creators upon broadband internet providers, since they have sufficiently

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160. This general approach is envisaged by multiple legalization proposals. *See*, e.g., Colin 2011, p. 99.
161. Vallbé et al. 2015. *See also* Handke et al. 2015, regarding recorded music.

'deep pockets' and can easily pass on the costs of the remuneration to consumers. Moreover, ISPs have much to gain from legalization, since this would avoid the high costs of copyright compliance and – more importantly – leave intact their role as neutral conduits.

While the proposed scheme would probably be difficult to implement within the framework of existing EU copyright law, it would conform to most, if not all, of the normative considerations underlying EU copyright law. It would guarantee substantive direct income streams to currently disenfranchised authors and performers, while keeping the internet open, and thus fostering innovation and the circulation of culture, as well as freedom of expression and information online. It would also benefit consumers and the general public, by avoiding potentially privacy-invasive copyright enforcement strategies.

As recent empirical research suggests, such a scheme would likely have the support of consumers. Moreover, the amount that consumers are willing to pay for such a scheme far exceed total levels of current consumer spending on digital content and total revenues lost by right holders due to online piracy. In other words, even the 'content industries' that would be most inclined to oppose the scheme would have a lot to gain.

Finally, in light of the ongoing proliferation of statutory remuneration schemes for private copying and reprography in the digital realm, the proposed universal right to remuneration would, in practice, be far less radical than it is sometimes portrayed – more of an evolution than a revolution.