The Right to Reasonable Exploitation Concretized: An Incentive Based Approach

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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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The Right to Reasonable Exploitation Concretized: An Incentive Based Approach
Ole-Andreas Rognstad & Joost Poort*

5.1 THE RIGHT TO REASONABLE EXPLOITATION REVISITED

In a previous article, an alternative model for defining the economic rights in copyright was sketched out.¹ This alternative model is predicated on the notion that there is a need for a simplified structure of the economic rights which at the same time is apt to meet the technological challenges of the twenty-first century. The model implies that the right holder has an exclusive right to reasonable exploitation of the work (or other protected subject matter), the further scope of which should be specified in statutory provisions. The model is intended to serve as a 'one stage assessment' for the

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delineation of the rights, depending on what is to be considered as reasonable exploitation, instead of the current ‘six stage assessment’: definitions of exclusive rights, limitation to them, secondary liability, safe harbour and protection of technical protection measures (TPMs) with pertaining exceptions. This implies the abandonment of the traditional rights structure based on a positive definition of acts subject to the exclusive rights, such as reproduction, communication to the public and distribution, which in turn are subject to exceptions that need justification. Furthermore, problems that under the current rights structure are handled under secondary liability and special rules on protection of TPMs are integrated in the right to reasonable exploitation. This means that under the alternative model the rights are delineated through the requirement that the exploitation subject to exclusive rights must be reasonable. This formulation implies, in turn, that copyright shall not expand beyond its purpose and that the alternative model will bring it closer to its rationale than what results from the current structuring of the economic rights.

This chapter intends a further elaboration of this model by developing two main issues. First, the concept of ‘reasonable exploitation’ is analysed and elaborated on (section 5.2). Subsequently, it is operationalized from a consequentialist, welfare economic perspective (section 5.3). Next, a number of case studies illustrate how the concept may be implemented into the model (section 5.4). These case studies are based on welfare economic reasoning and considerations that are not presented in detail here, but in a separate chapter of this volume.2 Regarding these case studies, it should be borne in mind that in the previous article it was suggested that statutory provisions could provide partly for general guidelines and partly for a catalogue of examples demonstrating the further scope of the concept of reasonable exploitation. The analysis of the further concretization of the right to reasonable exploitation will be predicated on this way of implementing the alternative model. Still, as with the previous article, it is not the intention to provide a full-fledged copyright reform proposal; rather the purpose of this chapter is to elaborate on the further implications of the proposed right to reasonable exploitation. This includes demonstrating how both the approach to and the outcomes of certain problems will differ compared to how the same problems are treated under current copyright systems (section 5.5). It should also be borne in mind that although the model as such will apply equally to copyright and related rights, the analysis – as in the previous article – will be limited to copyright in works.3

2. See the chapter by J. Poort, elsewhere in this volume. That chapter follows a welfare economic approach without placing it into the context of a right to reasonable exploitation or any other legal structure.

5.2 THE CONCEPT OF ‘REASONABLE EXPLOITATION’

5.2.1 BASELINES

The basic idea behind the right to reasonable exploitation is that it is a ‘one stage’ test which implies that the delineation of the right lies in the definition of what is reasonable rather than in what constitutes an ‘exploitation’.4 The concept of ‘exploitation’ is to be understood in its widest sense: it is intended to cover all kinds of behaviour and business models that are in the current or future financial interest of the right holder, including those that rely on advertising revenues or reputation building rather than direct monetary transfers. The concept is to be open-ended, intended to cover not only existing but also yet to be developed exploitation models. As a result, the exclusive right to reasonable exploitation can cover any action that may conflict with these interests of the right holder, including actions that under the current system are handled under doctrines of secondary liability (contributory infringement etc.).

Having said that, the idea is that the delineation of the exclusive rights does not follow from a classification of what constitutes an act of ‘exploitation’ but rather from what is considered as a reasonable exploitation.5 This means that it is most pertinent to elaborate on the concept of reasonable. As the purpose of the previous article was to outline the model as a different, and alternative, way of structuring the economic rights, the scope of what is ‘reasonable’ was not discussed beyond stating that the word ‘reasonable’ is highly ambiguous ... depending also on different copyright traditions whether utilitarian or more non-consequentialist oriented, including natural rights concepts,6 and that it ‘will be up to the legislator, within the framework of international obligations, including also human right conventions, to further decide on the implications of that concept’.7 When elaborating on the possible implications of the model, as is the purpose here, it is, however, necessary to take a normative position on the content of the concept of reasonable exploitation. At the same time, it is important to underline that the model may be implemented in different ways from what is suggested here, including in the sense that different approaches to the concept of ‘reasonable’ may be taken.

Here, it will be suggested that, bearing in mind that the model is meant to be universal,8 the concept of ‘reasonable’ should to some extent bridge

4. Ibid. 511.
5. Ibid. 513.
6. Ibid.
7. Ibid. 515.
8. Ibid. 508.
different copyright doctrines leaving room for both utilitarian and non-consequentialist ideas. In the previous article, it was suggested that inspiration for the guiding principles that should be laid down in the legislation and even serve as overarching guidelines for the courts, could be found in the so-called mid-level principles presented by Robert P. Merges in his book 'Justifying Intellectual Property'. These 'mid-level principles' are 'concepts that run through and tie together disparate doctrines and practices, and provide a common policy vocabulary that bridges different foundational viewpoints such as Kantian and utilitarian'. In Merges' view there are four mid-level principles in IP law: non-removal (i.e., the public domain), proportionality, efficiency and dignity. Although the basis for, and the function of, these mid-level principles has been subject to discussion and criticism, they are here considered as useful guidelines for mapping out the content of 'reasonable', precisely because they reflect some basic principles that may be founded in various justification grounds for copyright protection. For this purpose, it is considered appropriate to add two other guiding principles: freedom of expression and, in a European context, the principle of market integration.

The natural starting point for determining the scope of 'reasonable exploitation' would be efficiency. It should not be denied that the utilitarian goal of social welfare maximization is a key element in justifying modern copyright rules. If that is accepted, hard-core economists would hold that, in theory, the welfare economic framework could (and should) include other norms (except for distributional concerns) through their welfare effects, including the other guiding principles mentioned above. The ambition of such economists would be for those principles, or more precisely the effect on them of certain acts or policy measures, to be measured and expressed in monetary terms or abstract 'utility' to allow for a comparison within the unified welfare economic framework. For instance, the value attributed to privacy or freedom of speech and its importance to democracy, are in theory part of the long-term welfare function an economist maximizes.

In practice, however, it will prove complicated enough to assess the static and dynamic market effects of copyright issues and other more direct economic effects such as transaction costs, without integrating these other guiding principles into the same framework. Rather, these other principles can give reason to amend the normative welfare economic stance in cases where they point in different directions. For instance, it could be decided that the economic position based solely on efficiency would lead to over- or under-protection when efficiency is balanced with the norm on freedom of speech. Amending the normative economic stance on the basis of these other principles therefore seems a more pragmatic and much more viable solution than aiming to express all guiding principles in welfare economic terms. There is a fine line between this approach and Merges' statement that '[e]fficiency cannot explain or justify the foundations of IP law, but as an operational principle it can guarantee that this body of law works smoothly'. The method suggested here for determining the concept of reasonable exploitation is to start from the efficiency principle, and to

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11. Ibid.


14. See e.g., Recital 2 of the Infosoc Directive (Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ No. L 167/10, 22 June 2001) emphasizing that '[c]opyright and related rights play an important role [in the context of the existence of an internal market for new goods and services] as they protect and stimulate the development and marketing of new products and services and the creation and exploitation of their creative content'. See also Recital 9. In the US, reference is made to Art. 1 Sec. 8 Clause 8 in the US constitution, which empowers the Congress to 'promote the Progress of Science and useful Arts, by securing for limited Times to Authors ... the exclusive Right to their respective Writings'.

15. In recent scholarship, claims have been made that the economic approach to the utilitarian goal is based on maximization of income or GDP as a proxy for wealth, and it is therefore criticized for not being concerned with well-being as such, see e.g., E. Derclaye & T. Taylor, 'Happy IP: Replacing the Law and Economics Justification for Intellectual Property Rights with a Well-Being Approach', European Intellectual Property Review (EIPR) 37 (2015): 197–209. As far as we are concerned, the concept of wealth as used in the early Law & Economics literature (such as R.A. Posner, 'Utilitarianism, Economics, and Legal Theory', The Journal of Legal Studies 8 (1979): 103–140) is very similar to the concept of welfare as used in this chapter and in the seminal paper on the economics of copyright by W. Landes & R.A. Posner, 'An Economic Analysis of Copyright Law', The Journal of Legal Studies 18 (1989): 325–363. It can in theory encompass anything we value as a society.

16. In comparison, economists C.N. Teulings, A.L. Bovenberg & H.P. van Dalen, De Calculus van het publieke belang (Den Haag Kenniscentrum voor Ordeningsvraagstukken, 2003), 10–11 argue that ultimately, there are only two goals for public policymaking: efficiency and distributional issues. Ideally, these should be decided on independently. A few years earlier, the Dutch Scientific Council of Government Policy had identified five separate principles for good governance: democratic legitimation, equality before the law, legal certainty, effectiveness and efficiency. In response, Teulings et al. argue that effectiveness is not fundamentally distinct from efficiency, while they consider the first three principles to be procedural criteria, which are not goals in themselves but means to achieve the public interests of efficiency and an acceptable distribution of welfare.


18. Merges (2011), 153. The basis for the stand being efficiency 'cannot explain large features of the IP landscape (moral rights being one of many examples)’ and ‘try as we might, law and economic scholars have never established an efficiency based (or utilitarian) justification for the field. There is no lock-solid proof that overall social welfare would decline if IP protection were suddenly removed. True, there are plenty of indications,
consider adjusting the outcome in case it conflicts with the other principles above. The approach will be explained further in section 5.2.3.6 below.

Starting from the point of efficiency, it should be borne in mind that there are aspects of current copyright law other than the scope of the economic rights that can be questioned from the angle of efficiency, e.g., the concept of a 'work', the lack of formality requirements and the term of protection. The fact that we are concentrating on the scope of the economic rights does not imply an ignorance of other aspects of copyright law in need of reform. Still, we believe that the scope of the economic rights can be studied separately from, for example, the term of protection, and that the argument that the term of protection of copyright may be too long from the perspective of efficiency, is no legitimate reason to curb the scope of the rights beyond what is reasonable.

5.2.2 Efficiency

When starting with efficiency, it is important to remember that in general, the economic literature on copyright links the rationale for copyright protection to the incentive to create works of literature, science and art, at the cost of creating a temporary monopoly over these works. As will be discussed below, static welfare losses due to this monopoly are justified by dynamic welfare gains from new creation. Put simply, this exclusive right to certain acts of exploitation enables a right holder to generate revenues and to recoup the investment made to create the work. As for many other economic activities, the costs precede the benefits and will only be incurred if future benefits can be expected.

Of course, this is a simplification as intrinsic motivation is generally accepted to be highly important for understanding the professional activities of creators and performers. In addition, a sense of fairness can be relevant as an incentive: a survey among a large number of Dutch creators and performers showed overwhelming support for introducing legislation to entitle them to additional revenues if their work becomes a great success (the so-called bestseller clause), even though such a clause can be detrimental for them from a strictly rational economic perspective, when taking account of the effect it is likely to have on lump-sum advances in initial contracts. Apart from arguments in terms of fairness, this support for a bestseller clause may also be understood from behavioural economic insights, namely loss aversion or prospect theory (overweighting small chances). Nonetheless, wages and other financial incentives have been shown to play an important role for authors and performers, much like for any other profession. Moreover, economic motivations are essential for publishers and other commercial entities in the copyright industries.

In the economic literature, copyright aims to prevent a situation in which anyone could decide to create and sell copies of a work without permission once the costs of its creation are incurred, thereby reducing the revenues for the initial creator. This would reduce the incentives for the creator to invest in the creation and exploitation of works, leading to a loss of welfare in the long run. In economic terms, the rents from creation are not (or are insufficiently) excludable without intervention and this 'public good' market failure related to the creation of a work can justify copyright legislation. Contractual arrangements — private ordering — are a potential substitute for copyright protection. In that sense, the clause 'without permission' at the start of this paragraph is crucial: in a world with perfect enforceable private contracts, no copying without permission will occur and hence no copyright protection is required. The viability of private ordering as a substitute for copyright will depend on the enforceability and transaction costs of private contracts, as well as on the limits to contractual freedom and the enforcement of contracts on behalf of, for instance, competition policy, unfair business practices and privacy protection.

The optimum scope of copyright in the economic literature follows from the optimum long-term effect it has on total welfare, taking account of the dynamic effects of copyright on the creation and quality of works, and on the incentives it provides for their active exploitation. That is, consumer and producer welfare (surplus) are given equal weight and neither right holders nor consumers enjoy a privileged status. In the digital age, the costs of making good quality copies of many kinds of work have decreased sharply relative to the initial costs of creation. This applies not only to the initial creator or right holder but also to others, despite the development of TPMs which aim to prevent unauthorized copying or distribution, which implies that without certain forms of copyright protection others can undermine the exploitation potential for the creator. As a result, and despite the fact that the

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costs of creating many types of work have also decreased because of technological progress, the economic need for some form of copyright protection in the digital age may be stronger than ever before: the costs and quality deterioration of copying no longer provide a 'natural protection', but at the same time the enforcement of copyright seems more difficult than ever before.

There are, however, also costs (welfare losses) associated with copyright protection, which need to be taken into account. Landes & Posner mention the costs of administering copyright, which are likely to increase with the number of works created and with the strength of protection. The transaction costs of licensing copyright or obtaining consent for certain acts which may be copyright-relevant are considered to fall within the same broad category of transaction costs of copyright.22

A second general type of cost of copyright protection stems from the fact that whenever it allows works to be priced above their marginal costs, this is likely to cause demand to decrease below the level that is optimum from a static perspective. This entails a static loss of welfare through so-called dead-weight losses, and in a static framework marginal cost pricing would be preferable to a uniform price above marginal costs. Alternatively, refined price schemes may be used to minimize dead-weight losses.

A third type of cost is related to the former but appears in a dynamic perspective.23 Works protected by copyright often serve as an input for other works and stronger economic rights will generally limit the possibilities for new creators to access works for inspiration or study, since they will cause works to be supplied at a higher price and prevent a free exchange of copies of earlier works. Moreover, it will limit their ability to utilize works for transformative use as this would likely be an infringement. Relatedly, uncertainty about the scope of copyright and whether or not certain acts will be an infringement will discourage risk-averse agents from making certain uses of works or even developing certain business models, leading to so-called chilling effects. These notions imply that there is an inverted u-shaped relation between the strength of economic rights and creation: beyond the strength of copyright protection that yields the maximum level of creation, a further increase in the strength leads to a decrease in the number of works created.

22. Landes & Posner (1989), 326. Posner (2005) adds that these costs also increase over time, as identifying a copyright holder to license from usually becomes more difficult over time: the copyright holder may well be the heir of the initial creator, or a company obtaining the rights after the bankruptcy of a first company which the initial creator transferred her economic rights to, etc. These increasing costs over time limit the optimal duration (term) of copyright. Although copyright term could also be studied from a perspective of reasonable exploitation and economic welfare, it falls outside the current chapter and should be studied independently from the scope of copyright, see the closing remarks in s. 5.2.1 above.

23. For example see Landes & Posner (1989), 332.
5.2.3.2 Public Domain

Reference to the public domain implies that not all information can or shall be protected with IP rights. In copyright law, this is reflected in various kinds of rules, for example the distinction between non-protected ideas and protected expression, the originality criterion and the term limitation. From a utilitarian point of view these limitations to copyright protection may be explained through its efficiency enhancing functions designed to maximize social welfare. In fact, economic studies seem to suggest that the current rules, e.g., on term of protection, are not in full accordance with economic reasoning. Still, preserving the public domain may be claimed to be of concern beyond the question of measurable costs and benefits, and, to the extent that may be the case, the principle of public domain may supplement or adjust the outcome based on efficiency. As regards the scope of the economic rights and thus the right to reasonable exploitation, discussions about the right to public lending and data mining for research purposes are examples where the principle of public domain may play a role even beyond mere efficiency considerations.

5.2.3.3 Dignity

The concept of dignity may from one point of view refer to the interests protected by moral rights in copyright, implying that the creator of the work should be respected and recognized. It is, however, also possible to have a broader take on dignity, referring to the special role copyright works play in relation to the enjoyment of the cultural life of the community, cf. also Article

31. See e.g., R. Pollock, "Forever Minus A Day? Calculating Optimal Copyright Term", Review of Economic Research on Copyright Issues 6 (2009): 35–60, who, based on theoretical and empirical grounds, comes to the conclusion that the optimal copyright term from an economic point of view is around fifteen years, i.e., considerably shorter than any current copyright legislation would provide for.
33. Merges (2011), 157–158. It is to be noted that moral rights have been largely ignored in any economic analysis of copyright, see e.g., M. Rushon, "The Moral Rights of Artists: Droit Moral ou Droit Pécuniaire?" Journal of Cultural Economics 22 (1998): 15–32, although there are recent studies of cultural economics that offer a different view from standard copyright economics, see Towse (2006).

27(2) of the Universal Declaration of Human Rights (UDHR). Deriving from non-consequentialist natural rights thinking, like the Lockean moral desert and Kantian and Hegelian personality theories, more than utilitarian efficiency based considerations, the concept of dignity may supplement efficiency considerations.

5.2.3.4 Freedom of Expression

Freedom of speech and expression is a fundamental right laid down both in international and transnational human rights instruments and various national laws. Pursuant to the guidelines outlined in the foregoing, it is possible to claim that freedom of expression is implicit in the principles of public domain and proportionality, in the sense that freedom of expression may speak in favour of leaving certain kinds of use of the copyright work to the public domain, and that it also reflects a social value to which the exclusive right must be related. When freedom of expression is enumerated here as a principle on its own, it is under the consideration that copyright also enhances cultural expression, not only limits it. Thus, when stating above that other social or legal norms, like freedom of expression, can give reason to amend the position derived from efficiency considerations, the implication is not necessarily that it gives the right holder a weaker position than that which follows from the incentive rationale. The main point here is that freedom of expression is a guiding principle on its own, which although may be included in a welfare economic framework, will serve as an independent argument when assessing the scope of the right to reasonable exploitation.

5.2.3.5 Market Integration

Under EU law, market integration has a similar position to freedom of expression. Market integration concerns may also be included in efficiency considerations, but the way it has been treated under EU law is not necessarily in compliance with the latter. Thus, the market integration
rationale seems to apply irrespective of whether or not it enhances efficiency. There are reasons to question this policy, but on the other hand it is hard to ignore the significance of a rationale that has been applied more or less consistently by the CJEU for six decades. When discussing the content of ‘reasonable exploitation’ in a European context, the market integration rationale should at least be taken into account. One of the advantages of the proposed model is that it is aimed at revealing the policy considerations at stake, instead of concealing them within concepts like reproduction, distribution, communication to the public and so on.

5.2.3.6 The Role of the Other Guiding Principles vis-à-vis Efficiency

The outline of the various guiding principles that should contribute to the understanding of the principle of ‘reasonable exploitation’ underscores the complexity of copyright policy. Rather than taking a pure instrumentalist approach to the purpose of copyright, where everything may be explained through a narrow conception of economic efficiency, it is acknowledged that the basis for modern copyright policy is best found in a mix between consequentialist and non-consequentialist considerations. The various guiding principles, other than efficiency, are meant to reflect this. A problem, however, with the starting point whereby various values are emphasized simultaneously, is that it easily ends up with a ‘weighing’ exercise – the so-called balancing test – where incommensurable values are held against each other in order to try to reach a compromise based on what seems to be the ‘right’ balance between various values and interests. It goes without saying that this is an exercise that does not lead to very precise results and much ambiguity exists as to ‘how to strike the appropriate balance’. Here, a different method for how to approach the question of what is a ‘reasonable exploitation’ is proposed.

Following up on what was said about the relationship between efficiency and other values in section 5.2.1 above, the concept of ‘reasonable exploitation’ will be built on a preliminary presumption that results based on incentive based efficiency considerations will be compatible with the other guiding principles. In other words, these results are presumed to be proportional, in line with the interest of the public domain, in compliance with the principle of dignity in the wider sense, and apt to enhance freedom of expression and market integration. Thus, an adjustment of the efficiency based outcome to account for the other guiding principles will only need to be considered when efficiency and the other principles appear to be in conflict. This method is to be applied both ex ante and ex post, i.e., both when drafting legislation that will implement the right to reasonable exploitation, including the example catalogue that will be further elaborated on in section 5.5 below, and in case law interpreting the legislation. It should be emphasized, however, that the right to reasonable exploitation is only meant as a model for drafting ‘internal’ copyright rules within a specific copyright regime. It is not the intention to create a system that internalizes ‘external norms’, like for example international human rights, since this will not be compatible with the current legal order. Thus, even though the ambition with the model is to create an environment that does not conflict with ‘external norms’, the implication is not that it is immune against ‘intervention’ from such norms. The case studies in this chapter suggest, however, that in many instances there is no reason to actually adjust the outcome of an efficiency based analysis.

5.3 THE RIGHT TO REASONABLE EXPLOITATION
OPERATIONALIZED

5.3.1 IMPLEMENTATION OF ‘THE ALTERNATIVE MODEL’: PRINCIPLES AND CATALOGUE REGULATION

In the previous article on the right to reasonable exploitation, it was suggested that the model be implemented by way of a combination of general principles and a catalogue of examples demonstrating where the concrete boundaries for what is considered as reasonable exploitation are to be drawn.38 The idea is that both the general principles and the catalogue should be established in statutory provisions. The purpose of this kind of regulation is to seek an optimal balance between the need for predictability, legal certainty and transparency on the one hand, and the urge for flexibility resulting from the ever-changing technological and economic conditions on the other. This goes into the general discussion about rules versus standards as regulatory instruments, and the method of regulation is supported by studies suggesting that catalogue regulation would be ‘preferable to both rules and standards and better enhance the foundational values of the legal system’.39

As already indicated above, the scope of the right to reasonable exploitation may be determined with reference to efficiency, proportionality, public domain, dignity, freedom of expression and market integration, which may serve as guiding principles both ex ante and ex post. That is, these principles should guide legislators when further specifying the boundaries of

the right to reasonable exploitation, that perhaps being their most important function. They may also play a role ex post for courts applying the rules, although the operationalization discussed below, as well as the 'catalogue of examples', and analogizing from it, will be more instrumental in this respect.

As also pointed out above, efficiency should be the starting point when concretizing reasonable exploitation. And to be sure, creating optimal incentives for creation of works is often cited as the core aim of current copyright law. Our allegation is, however, that this is barely reflected in the way the economic rights are defined and structured today. This is not least so because the economic rights in terms of reproduction, communication to the public and distribution no longer seem to match with the digital environment. Even though these acts are broad and general in the sense that they can be applied to music, books, films, etc., they appear to be more adequate and relevant in an analogue environment than in a digital environment. In EU law one can observe the CJEU struggling with these concepts to take a position on relatively common issues such as linking and embedding, resale of digital content and making copies of digitally acquired content. In an analogue environment, it may have been logical (if only for the sake of enforcement) to make reproduction an important element of the exclusive right of the creator, for instance, but in the current digital environment, this no longer seems the case. Accidental or transient copies of works, for instance, are continually made in the process of consuming or distributing works, but these do not affect the exploitation by the right holder. Reproducing a work without distributing these copies, for instance, seems harmless for the incentives for the creator to create or to exploit a work. Also, it is disputable whether the welfare costs of the protection of economic rights (transaction costs as well as static and dynamic dead-weight losses) in a digital environment are sufficiently taken into account.

Therefore, when operationalizing the right to reasonable exploitation, there is a need for a different take on these problems. For an economic assessment of the exclusive right to reasonable exploitation, one needs to go back to the economic foundation of copyright protection, which is resolution of the 'public good' market failure associated with the creation of works, so as to provide proper incentives for the creation and exploitation of works. As a general principle, one would only want to give a creator exclusive rights with respect to acts that, as a consequence of this public good market failure, negatively and significantly affect the current or future exploitation opportunities for the right holder and hence negatively interfere with these incentives. Acts that do not meet this criterion can be considered 'copyright irrelevant' or may even benefit the right holder. Hence, they do not fall within the exclusive right to reasonable exploitation.

Here, it is essential to realize that exploitation can take many forms other than a simple exchange of a physical carrier – a copy of a work – for money. Exploitation can take the form of providing digital access to works on a permanent or temporary basis – for instance in digital download models such as iTunes and streaming models such as Spotify and Netflix. Moreover, a monetary payment by the end user in exchange for a work or access to a work is just one of several possible business models. Others may rely on advertising revenues (e.g., YouTube, Spotify Free, Ready), collecting data about consumers, creating an environment of cross-selling other works or products, building a fan base or reputation which can be monetized in the future, and whatnot. For the right holders of works on free platforms such as YouTube or SSRN, the number of views or downloads can be an important incentive for creating and posting works, as views or downloads may be monetized directly through a share in advertising revenues, or indirectly as a proof of reputation or fame which contributes to the career opportunities of the right holder. When the challenges of copyright in the digital age became apparent, in particular in the context of unauthorized file sharing, an often-heard recommendation was that the content industry develop new business models. Now that various such business models have emerged, it is important that the existence of a variety of exploitation models is borne in mind when operationalizing reasonable exploitation. This does not imply that any current exploitation model must be respected and protected by copyright. But it does mean that the concept of reasonable exploitation should be broad enough to allow for many of the current exploitation models and general enough to account for new models that are yet to be developed.

5.3.2 Conditional Control as the Operationalization of Reasonable Exploitation

In this section we will operationalize the economic foundation – the efficiency function – of the economic rights. This operationalization, which also is intended to be laid down in statutory provisions, serves to make the economic rationale behind the exploitation rights concrete and to formulate the core of it.

The central notion implicit in the exclusive rights to exploitation of the work, even under the current framework, is that of control, which enables the right holder to exchange access to a work for something which has direct or indirect commercial value for him, be it money, website traffic, attention or personal data. A right holder exploiting a work can control who can consume a work and under what circumstances, and choose an exploitation model which seems fit. This ability to control the exclusion of consumers is what is lacking without copyright protection due to the 'public good' nature of a work. However, from an economic incentive perspective, control is only justified to the extent that, due to this public good market failure, a lack of control would negatively and significantly affect the current or future

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exploitation opportunities for the right holder and thereby reduce the incentives to create, publish or exploit works.

Still, even if a negative and significant effect may occur, the various 'costs' of copyright protection need to be considered. First, transaction costs may justify curtailing copyright and placing certain acts still outside the realm of copyright, even though they negatively and significantly affect the current or future exploitation opportunities for the right holder.

Dead-weight losses that result from above marginal cost pricing and chilling effects that stem from uncertainty about the scope of copyright are a difficult issue. In theory, the interests of society at large and the right holders to minimize such costs are aligned, but in practice, given the fact that perfect price discrimination is not achievable, a right holder will be inclined to accept such dead-weight losses if it helps to maximize revenues. Thus, reasonable exploitation may involve limits on the ability of right holders to price above marginal costs, in particular vis-à-vis new creators where it will cause dynamic inefficiencies.

Following from the costs of copyright protection outlined in section 5.2.2, four questions can be formulated to assess whether or not a certain act would fall within or outside the realm of copyright as a right to reasonable exploitation:

1. Does an act relate to the public good nature of works and thereby affect the control of a creator over exchanging access to a work for something which has direct or indirect commercial value for him?
2. If so, does it negatively and significantly affect the current or future exploitation opportunities for the right holder and thereby reduce the incentives to create, publish or exploit works?
3. If so, are the transaction costs of considering an act to be copyright relevant small in comparison to the benefits to the creator and in particular his incentives for creation and active exploitation?
4. If so, are the dead-weight losses and chilling effects of considering an act to be copyright relevant small in comparison to the benefits to the creator and in particular his incentives for creation and active exploitation?

The notion that the intervention to introduce copyright is justified by the 'public good' nature of works implies that, as a default, control over a work should not extend beyond its first exploitation any more than what is the case today for tangible copies due to the exhaustion rule: once a digital or physical copy of a work has been sold, the market failure that justified copyright legislation has been resolved with respect to this specific copy. Like for any other product which does not suffer from this market failure, there is in general no economic justification for granting the initial creator control over the secondary market or over the value created with the product downstream in the value chain. However, a market failure may exist where the buyer of a copyright work could extend the market by selling multiple copies or by granting several new consumers access to the work. Thus, the initial buyer becomes a new seller, not just of what he bought, who can undercut the original creator because he has no investment in the initial creation to recoup. This reintroduces the initial 'public good' market failure and can in certain circumstances justify intervention for the initial creator to regain control. These mechanisms will be studied in more detail below, in particular when discussing the issue of private copying and digital exhaustion.

In the following sections, some proposals for concretization of the right to reasonable exploitation will be made against the background of an analysis of certain issues that for the most part have been dealt with in recent case law of the Court of Justice of the European Union (CJEU). First, we discuss instances of the use of authorized material, after which we turn to the use of unauthorized content. The analysis will outline how the questions are to be solved by applying the operationalization of efficiency formulated in the preceding section and possible adjustments to it on the basis of other guiding principles. The more concrete implications of the right to reasonable exploitation will have to be laid down in the catalogue of examples, which will demonstrate the outcome of this operationalization of the efficiency principle, along with the guiding principles.

5.4 'CASE STUDIES' THROUGH THE LENS OF REASONABLE EXPLOITATION

In the following sections, some proposals for concretization of the right to reasonable exploitation will be made against the background of an analysis of certain issues that for the most part have been dealt with in recent case law of the Court of Justice of the European Union (CJEU). First, we discuss instances of the use of authorized material, after which we turn to the use of unauthorized content. The analysis will outline how the questions are to be solved by applying the operationalization of efficiency formulated in the preceding section and possible adjustments to it on the basis of other guiding principles. The solution is contrasted with the outcomes of the CJEU case law.

5.4.1 STARTING POINT: CONDITIONAL CONTROL

Conditional control implies that the right holder should be in a position to decide when and under what conditions the work is communicated to the

41. Note that the answers to questions (3) and (4), which balance the costs and benefits of copyright protection, could in theory differ between different kinds of works. This chapter does not elaborate on such potential differences.

42. In this context see also the discussion of the fallacious concern over 'pecuniary externalities' (as opposed to 'technological externalities') in: J.F. Duffy, 'Intellectual Property Isolationism and the Average Cost Thesis', Texas Law Review 83 (2005): 1077–1095.
outside world for the first time. Otherwise, he would be deprived of his current (and most likely also his future) exploitation opportunities. In this respect, the principles of efficiency and dignity go hand in hand.

After a work has been made public for the first time, the question is what kind of use should fall under the right holder’s control. As pointed out above, the starting point for this analysis should, under the right to reasonable exploitation, be the assessment of whether, against the background of the public good nature of works, the right holder’s control is necessary in order to secure the current and future exploitation of the work, where transaction costs, dead-weight losses and chilling effects relating to the control should also play a role as to what kind of solution should apply.

When outlining solutions that are believed to comply with this, a distinction, at least for presentational purposes will be made between exploitation or use of material that has been acquired or accessed with the right holder’s consent, and exploitation or use based on unauthorized access. In the latter case, the right holder obviously lacks all control over the access to the work and in many instances there is a strong presumption that the exploitation or use will affect the right holder’s current or future exploitation possibilities, so the assessment is likely to be different from situations where the exploitation or use is based on authorized access and control can largely be exercised. In the following section, proposals are made as to how certain situations are to be handled under the right to reasonable exploitation where the exploitation or use is based on authorized access, also taking into account the necessity of adjustments to the outcome based on the guiding principles other than efficiency. Thereafter we will, on the same premises, deal with some (of the same) situations where the exploitation or use is based on unauthorized access.

As pointed out, the main purpose here is to outline possible solutions. As was said in the introduction, the solutions are based on economic considerations that will not be presented in detail here, but in a separate chapter of this volume.

5.4.2 USE OF AUTHORIZED MATERIAL

5.4.2.1 Private Copying

To assess the extent of reasonable exploitation vis-à-vis private copying, it is useful to distinguish different kinds of private copies:

(1) Making ‘clone copies’ of or ‘format shifting’ CDs, DVDs and media files, or storing streaming audio and video for offline playback (also known as stream ‘ripping’ or ‘capture’).

(2) Making backup copies of works.

(3) Making copies of broadcast works for time shifting, such as storing radio or TV content on a recording device to watch it another time, and repeatedly if desired.

(4) Making clone copies or format shifting to share works with family and friends.

(5) Making clone copies or format shifting of works from media rented or borrowed from libraries or commercial renters.

A central parameter for assessing these situations against the background of conditional control is indirect appropriability. The concept refers to the economic mechanism according to which, under certain conditions, the demand for originals will reflect the value that consumers place on both the originals and subsequent copies they may make. As a result, the value of private copying can be priced into the initial purchase and, by doing so, this value is indirectly appropriated.

It is presumed that in situations (1) and (2) the value of private copying can largely be priced into the initial purchase and, therefore, these acts are copyright irrelevant. The reason for this is that in these situations the circle of consumers that derive utility from an original unit is not extended: no ‘copying groups’ are formed in which copies become competitors to the original. Some occasional additional sales could be foregone as a result of such copying, for instance when a person would have bought his favourite CD twice to play it at home and in his car or to replace a CD which has been damaged. But to the extent that consumers can broadly anticipate their copying behaviour, the option to copy can be priced into the initial purchase by right holders. Consequently, making copies for format shifting and backup purposes should not be considered to affect the right holder’s current or future exploitation possibilities and hence the incentive to create, publish or exploit works in a negative way and should therefore not fall under any exclusive right or be compensated for by way of a copyright levy. Consideration for the other guiding principles such as proportionality and dignity does not seem to suggest otherwise. To the contrary, they are aligned with this outcome based on efficiency arguments. Moreover, the results should be media neutral and also ‘carry over’ to situations where copying for the purposes above are made in cloud lockers on the Internet. Also, in the latter situation no harm on the part of the right holder seems to be implied since the benefits of making such private copies can be priced into the purchase and the right holder retains control over who can access the work.

The same arguments largely hold for time shifting copies (situation (3)). However, where time shifting also involves systematically skipping advertisements (or time shifting to a moment in time when the ads surrounding a
radio or television broadcast no longer have their initial commercial value), it may undermine the exploitation opportunities for the right holder to some extent. Such a case may be looked upon differently and may justify an alternative way of remuneration for right holders, such as a levy on welfare economic grounds, provided the transaction costs and dead-weight losses of such levies do not outweigh the positive incentive effects and the levy system does not raise concerns in relation to the other guiding principles, such as proportionality with respect to consumers privacy concerns.

For situations (4) and (5) the picture is different in that they extend the circle of consumers who derive utility from an original unit of content. Here, the point may be made that indirect appropriability depends on the ability to price discriminate: charging a higher price for users who are likely to copy extensively while preventing arbitrage through a secondary market or other ways to circumvent price discrimination.\(^{46}\) With respect to libraries (situation (5)) this can be done by setting a higher price for libraries and a lower price for individuals. The utility of copies of type (5) could in theory be appropriated indirectly by setting the appropriate rental prices, unless restrictions put on the rental price from a public service perspective prohibit doing so. For the right holder, this implies that price discrimination between libraries and commercial renters – who would pay a higher price to account for the utility of subsequent copies\(^{47}\) – and end consumers will be required. If these markets cannot be separated, copying groups will be too variable in size to adequately price copying into the purchase and a levy will be justified.

Regarding copies shared with family and friends (type (4)), the aforementioned private copying might be harmful to copyright holders even though part of the additional utility can be appropriated indirectly. This is partly due to the fact that the size of such copying groups is variable, while right holders cannot observe this group size and hence cannot price discriminate accordingly.\(^{48}\) There might therefore be a need for regulating this situation differently.

### 5.4.2.2 Resale of Digital Content

As pointed out above, an efficiency based approach implies that there is no market failure to justify granting the initial creator automatic control over the secondary market or over the value created from the product downstream in the value chain. This gives an economics based justification for what, under current copyright (and other IP rights), we call the exhaustion (or first sale) rule, and the economic rationale applies in principle irrespective of whether or not the content is tied to tangible objects. As for ‘ordinary’ private goods such as smartphones, cars and jewellery, there is no market failure to justify granting the initial creator automatic control over the secondary market or over the value created with the product downstream in the value chain once a work has been sold. To be sure, the right holder may want to contractually restrict a purchaser’s right to dispose of the content he has bought. The validity of such clauses may be subject to scrutiny under contract law and competition law (and in EU law also taking market integration aspects into consideration), but from an incentive based economic perspective, copyright protected works do not seem to deserve special privileges in this respect.\(^{49}\)

The other guiding principles identified in section 5.2, proportionality, public domain, dignity, freedom of expression and market integration, do not relate to resale of digital content in any way that gives reason to adjust this outcome.

A point which is often raised to argue that resale of digital content is different and therefore should not be allowed, is that digital content does not degrade. As a consequence, first and second-hand copies would become perfect substitutes, spoiling the first-hand market. Several points can be made in this respect. First, just as in the case of jewellery, cars and smartphones, the option to resell may be anticipated by the initial buyer, resulting in a higher average willingness to pay (comparable to the concept of indirect appropriability in relation to private copying). Second, copyright works are typically fast-selling products, which generate most of their revenues within a limited time span, before the second-hand market would gather steam. For works such as video games, versioning strategies can be pursued to support this. Third, most buyers will have a preference for the first-hand market over the second-hand market, even for digital content, for fear of buying a faulty product without a right to reclaim their money.

Yet, there is a need for refining the approach with regard to the possibilities for product and price discrimination: it can be welfare enhancing to prevent discounted student licences for software being resold to companies. Also, partial reselling of multi-user licences would constitute a serious threat to price discrimination, as it would undermine volume based (second degree) price discrimination. On the other hand, in digital markets a provider can try to uphold price discrimination without contractual arrangements, for instance by versioning or offering additional services.\(^{50}\)

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47. Ibid.

48. See S.M. Besen & S.N. Kirby, ‘Private Copying, Appropriability, and Optimal Copying Royalties’, *The Journal of Law & Economics* 32 (1989): 255–280. Like other models discussed in this chapter, the models Besen and Kirby develop ignore possible positive dynamic effects of the consumption of copies on future sales (the so-called sampling effect) and negative effects of lost sales on the future production of content.


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As pointed out above, an obvious problem arises if the secondary market can lead to market extension, where buyers can resell multiple copies or grant several new consumers access to the work, undercutting the original creator because they have no investment in the initial creation to recoup. Therefore, an important precondition for letting the initial purchaser exploit the secondary market will be that he deletes his access to the purchased product, e.g., a software program or an e-book.51

Without TPMs a right holder has next to no possibilities to guarantee that such market extension does not occur: He lacks the possibility of monitoring whether the initial version is deleted or uninstalled after resale. There are two ways to deal with this. The first is simply to accept this and still allow digital resale as a general rule. In this approach, right holders can regain control by implementing strong copy protection by TPMs.52 A disadvantage of this approach is the transaction costs and dead-weight losses it entails, because TPM protected works are in many cases less user-friendly.

A second option, which may be preferable, is only to allow digital resale for works protected by TPMs. As long as this condition is transparent on sale, it need not be an obstacle for consumers, and market places can easily monitor to ensure that only TPM protected works can be resold. For TPM-free material, monitoring the legitimacy of the secondary market is not possible and therefore control is exercised by having exclusive rights to the secondary market.53

5.4.2.3 Linking and Embedding

From the efficiency based perspective of conditional control outlined above, a distinction will have to be made between hyperlinking and embedding. This is irrespective of any distinction between various kinds of hyperlinks, e.g., 'reference links' (links to homepages) and 'deep links' (links to subpages). A common trait with hyperlinks and embedding is that the right holder remains in control of the availability and integrity of the content subject to linking and embedding. If the right holder decides to make changes to the content, the changes will immediately extend to the linking or embedding sites. This is a fundamental difference between linking and embedding on the one hand, and emailing documents downloaded from a website or posting them on a different site on the other. In the latter case, the availability and integrity of the work, but also the environment in which the work can be accessed. Moreover, linking has significant and positive effects for the consumption of the work. The right holder remains in control of the information that is made public as well as the conditions under which it is made public (e.g., payment, registration, advertisements). This is also the case for so-called deep links (links to a 'subpage'), which can even be redirected to the home page, and the contextual information and advertisements surrounding a deep link will still be seen. Hence, in the vast majority of cases, linking can only positively affect the current or future exploitation opportunities for the right holder, if it affects them at all, and it seems hard to argue that linking should infringe on the right to reasonable exploitation. This should consequently also be the default rule. It can, on the other hand, not be excluded that links can be used in a way that affects current or future exploitation opportunities for the right holder. This is only presumed to occur in exceptional cases, for which the right holder should have the burden of argumentation.

Embedding and framing are fundamentally different from hyperlinking in respect of the fact that the right holder in such cases has no control over the environment in which the work is accessed. This can negatively and significantly affect the exploitation opportunities for the right holder, as it entails that the right holder's site does not need to be visited and advertisements or other information on this site are not seen. This could deprive right holders of reasonable forms of exploitation.

However, before jumping to the conclusion that embedding might therefore fall within the scope of copyright as a right to reasonable exploitation, the transaction costs and dead-weight losses of doing so need to be taken into consideration.55 It goes without saying that many right holders 54. With respect to the question of whether there is any negative and significant effect on the current or future exploitation opportunities for the right holder, however, there is a substantial difference between linking and embedding.

In the case of linking, the right holder cannot only control the availability and integrity of the work, but also the environment in which the work can be accessed. Moreover, linking has significant and positive effects for the consumption of the work. The right holder remains in control of the information that is made public as well as the conditions under which it is made public (e.g., payment, registration, advertisements). This is also the case for so-called deep links (links to a 'subpage'), which can even be redirected to the home page, and the contextual information and advertisements surrounding a deep link will still be seen. Hence, in the vast majority of cases, linking can only positively affect the current or future exploitation opportunities for the right holder, if it affects them at all, and it seems hard to argue that linking should infringe on the right to reasonable exploitation. This should consequently also be the default rule. It can, on the other hand, not be excluded that links can be used in a way that affects current or future exploitation opportunities for the right holder. This is only presumed to occur in exceptional cases, for which the right holder should have the burden of argumentation.

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51. Compare the UsedSoft decision by the CJEU (UsedSoft GmbH v Oracle International Corp, CJEU 3 July 2012, case C-128/11, EU:C:2012:407), see further in s. 5.4.4 below.

52. Or by contractually limiting or forbidding such resale, in which case such a contract is subject to general rules concerning fair business practices and antitrust.

53. A solution resembling this has been achieved by the Dutch e-book reseller Tomkabinet, which only accepts an e-book for resale if the seller provides the original download link to the original seller via an on-site login. Thus, Tomkabinet can make sure they are only reselling the same book once at a time. However, they cannot verify that a seller actually erases his own copy. See https://www.tomkabinet.nl/en/faq/ (accessed 1 August 2017).

54. This should not imply that downloading content and emailing it or posting it on a site should be infringements per se. In many cases, right holders do not depend on copyright for their income or otherwise. Think for instance of an academic author writing a research paper, or a politician writing an essay. Often, he or she would not object to people proliferating such a document by email and might even encourage it. They will just want people to read their work and do not care about an exploitation model other than the attribution of the work, or not even that, if it is purely the message they want to get across. It is undesirable for copyright as a right to reasonable exploitation to also stigmatize such acts which right holders often do not object to as infringements. One way to solve this would be to consider such emailing and posting of works acceptable, unless the environment in which the works can be accessed for free obviously qualifies as an exploitation model, e.g., by using advertisements, requiring registration or counting downloads.

55. See questions (3) and (4), s. 5.3.2. above.
do not mind if their content is embedded, or even encourage it. Hence, it would entail enormous transaction costs to require a licence for any such embedding. One possible way to avoid requiring individual licences is to create opt-in or opt-out possibilities, for example by way of some standardized information in the meta-text of a web page which states whether the information can be embedded without consent, either as a ‘do not embed’-line (opt-out), or an ‘okay to embed’-line (opt-in). The preferable choice between the two from an economic perspective is the one which involves the lowest transaction costs. Taking into account the vast number of web pages that currently exist and assuming that a large majority of the website owners do not mind being embedded, an opt-out would be preferable. If a website were to ignore such an opt-out, it could be held liable for enforcement such as a notice and take down, blocking or fines.56

On the other hand, the right holder should not be required to install an effective access restriction whenever he does not appreciate embedding of his content. Even though such restrictions would probably be more effective than a ‘do not embed’ line in the meta-text of a web page, the transaction costs and dead-weight losses of this suggestion will be very large, making it a less efficient solution: it would deprive the website holder of the possibility to offer users easy access without a requirement to log in. The solutions advocated here seem to prove that the efficiency principle plays well along with the other guiding principles. The dignity principle would be an argument in favour of securing the right holder’s control over the environment in which the work is accessed in the embedding situation, and freedom of expression seems to be sufficiently secured by the solutions advocated here.

5.4.2.4 Data Mining

A much-discussed issue in current copyright law is so-called text and data mining (TDM) which, according to one definition is ‘the discovery of interesting, unexpected or valuable structures in large datasets’.57 The copyright relevance of the current framework is undisputed, since TDM will affect the reproduction right. Whether it should fall within the scope of a right to reasonable exploitation to control such actions is more doubtful. The economic arguments for placing TDM within the scope of the economic rights are weak. The possible arguments are that any unlicensed use which has economic significance and generates additional profits as a consequence unreasonably prejudices the legitimate interests of the right holder and therefore should be licensed. Such reasoning resembles the argument criticized in previous sections, i.e., in the case of digital resale, that authors should somehow be entitled to a share of any surpluses created by or with their works in downstream markets. However, while in the case of digital resale the market failure can be considered resolved for any physical or digital copy that is sold, in the case of TDM, it can be observed that there never was a market failure in relation to TDM that needs to be resolved, provided access to articles to engage in TDM is lawfully obtained.

The additional profits generated by TDM have never been part of the incentive system of the authors. This can be linked to the concept of ‘foreseeability’, which is proposed by Balganesh to limit the exclusive rights of copyright. Balganesh states that ‘creators, like actors elsewhere, are incapable of fully anticipating all future contingencies associated with their actions, which in turn limits the effectiveness of incentives’.58 Put differently, there is no point in granting rights that provide ineffective incentives or no incentives at all. In this vein, the emergence of TDM can be considered to have been unforeseeable in the past and can have no retroactive incentives. Now that TDM is an emerging field of research, it may have become foreseeable and part of the incentive system for present-day publishers aggregating large databases of articles. But to the extent that TDM was unforeseen in existing contracts for accessing such databases, this can be assumed not to have been the case.59 In such a case, requiring an additional licence for TDM would give windfall profits to right holders without any incentive effect, while imposing dead-weight losses (as well as transaction costs) on TDM. Turning to the guiding principles other than efficiency, control of TDM may hamper freedom of expression and does not sit well with the principle of proportionality. The copyright relevance of this kind of use can therefore be highly disputed.60 Thus, controlling it should not be considered as a reasonable exploitation of the work.61

56. In principle, such a solution could also be applied to linking but, as discussed, in the case of linking it is much less likely that a right holder has legitimate reasons to prevent linking on the ground of reasonable exploitation.
59. For future contracts, the value users derive from TDM can largely be priced into the purchase without specific contractual clauses.
61. This conclusion is in line with the recommendations in Hargreaves et. al (2014).


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5.4.2.5 Access Controls and Protection of TPMs

The right to reasonable exploitation implies that the regulation of access controls and TPMs is integrated in the exclusive rights and not treated as a separate "layer" of protection. Access controls and TPMs are used by right holders to control the distribution and use of works. They may be used to prevent the unauthorized distribution of works or to bolster price discrimination. The latter is for instance achieved by preventing users from installing software with a single licence on multiple computers, using a basic Netflix subscription on multiple devices simultaneously, or playing DVDs with a US region code in the EU. Also, allowing access to online services from some countries and blocking it from others (geo-blocking) can be argued to fall within this category.

A right holder’s commercial interests in controlling such activities by the use of TPMs is easily understood: unauthorized distribution of works undermines the basic control required for reasonable exploitation while price discrimination between, for instance, single and multiple user licences or between regions can be an important instrument for recouping investments in the fixed costs of creating a work.

From the perspective of the right to reasonable exploitation, however, there may be distinctions between different uses of access control and TPMs. It can be argued that as soon as a work on a physical carrier has been sold, or as soon as access to a work on a subscription basis has been licensed, the public good market failure has been resolved and no further protection is required. This implies that there is no reason for copyright to protect for instance TPMs that aim to price discriminate between regions. There is no market failure to justify copyright works enjoying a privileged position as compared to other products and services in the legal ‘protection’ of strategies for price discrimination. On the other hand, there is no reason to treat copyright works more harshly and to forbid price discrimination categorically. Such practices ought to fall outside the scope of copyright and be dealt with through the lens of fair business practices and antitrust, like for other products and services. The principles of proportionality, public domain, dignity and freedom of expression are well-aligned with this position. In the case of geo-blocking, the principle of market integration may be a justification for discouraging or even forbidding such practices, even though the welfare economic rationale in this specific case is disputable.

TPMs that aim to price discriminate between e.g., single and multi-user licences are different, as they aim to address the public good market failure that forms the economic justification for copyright: installing or ‘copying’ a single licence a large number of times. As a consequence, preventing such multiplication or market extension logically falls within the scope of reasonable exploitation and hence within the scope of copyright, although it could also be dealt with as a breach of a licence contract.

5.4.3 Use of Non-Authorized Material

Having dealt with a number of uses of works that are acquired with the authorization of the right holder, we now turn to a few cases of the use of unauthorized content. For this discussion, some general observations are in place on unauthorized up- and downloading, e.g., by downloading from social media or cyber lockers that are open to all or large numbers of internet users, or by sharing content through peer-to-peer networks.

Regarding such activities, the lack of authorization clearly affects the ability of a creator to control access to works and to exchange it for something which has direct or indirect commercial value for him. The second economic question phrased in section 5.3.2, whether unauthorized publica­tion negatively and significantly affects the current or future exploitation opportunities for the right holder, has proven to be more cumbersome. Drawing on the large body of literature on the effect of unauthorized file sharing, a variety of different and opposing interactions may occur. Still, one conclusion drawn is that ‘the vast majority of the literature ... finds evidence that piracy harms media sales’. Note, however, that this evidence generally suggests a much smaller effect than a one-to-one displacement of sales by illegal copies. According to many studies, the effect is also substantially smaller than the loss of revenues from recorded music that the industry has experienced since the late 1990s. Nevertheless, in general the claim that unauthorized use and exploitation of works negatively and significantly affects the current or future exploitation opportunities for the right holder and may thereby reduce the incentives to create, publish or exploit works seems justified.

5.4.3.1 Private Copying

In line with the general observations above, the economic analysis of making private copies of non-authorized material – which is how downloading from unauthorized sources for private purposes could be construed – differs fundamentally from that of private copies from authorized material in section 5.4.2.1. Copying for private purposes from such unauthorized sources has constant (near-zero) marginal costs while the size of copying groups will differ immensely: a first high-quality torrent of a blockbuster movie may be

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63. Compare this with the discussion of redistribution of purchased material, for which exhaustion applies as a basic principle.
64. See Van Eijk, Poort & Rutten (2010), who distinguish nine different interactions.
downloaded thousands or even millions of times, which implies indirect appropriability is not feasible in the face of online file sharing. Since there is no relation between the uploader (including any unlawful content provider) and the downloader, and the number of copies made from an original will vary dramatically, one cannot charge a buyer of a DVD, CD or e-book for the value downloaders attribute to it were she to put it on a file-sharing site. Hence, there are sound economic arguments for such copies to fall within the exclusive right of the creator, or to introduce some compensation system to the extent that such copying cannot be controlled. Privacy concerns and thus the principle of proportionality could here speak in favour of such a compensation system.

5.4.3.2 Linking and Embedding

So far, we have dealt with the cases of linking to and embedding of lawful sources. Turning to the question of how to consider linking to or embedding of unauthorized sources, the general observations above about the unauthorized use and exploitation of works need to be borne in mind. As a consequence, linking to content that has been published without authorization can negatively and significantly affect the current or future exploitation opportunities for the right holder, irrespective of the fact that the linking (or embedding) party may not himself be publishing without authorization.

This suggests that linking to or embedding of unauthorized content should be deemed infringing, but on the other hand, holding a linking party liable for infringement in all cases, without prior warning, would entail enormous transaction costs and potential dead-weight losses in terms of chilling effects, as a linking party would have to make sure that he is not linking to content that is published without authorization. Thus, linking to unauthorized content may have a significant negative effect on the exploitation opportunities for creators and hence on creation itself, but making such links ex ante infringements would involve perhaps even more significant welfare costs through transaction costs and dead-weight losses. The principle of freedom of expression supports this conclusion.

A way to partially resolve this dilemma would be a procedure of notice and take down for links to illegal content. The idea would be that in general linking and embedding are acceptable and do not require consent or a licence, nor do they require any ex ante knowledge whether the linked content has been published with authorization. Only if the copyright holder alerts the linking site that the content on the linked site is published without authorization, would there be an obligation to remove the link. For a careful procedure and to make sure links are not removed unjustly, one could require a court order. However, this would increase the transaction costs and the response time of such a procedure substantially, and by doing so thwart its effectiveness and efficiency. In practice, a simple procedure without necessary intervention by a court but with a procedure to reinsert links that have been removed unjustly could work – much like the procedure YouTube has for removing unauthorized content.

The suggested approach is primarily ex post, relying on notice and take down in order to avoid undesirable chilling effects and dead-weight losses that would result from a regime which requires a linking party to ascertain the lawfulness of the linked content ex ante. Such an ex post approach has a risk of creating a game of 'cat and mouse' by sites who knowingly link to unlawful content waiting for right holders to give them notice each time. To avoid this, the ex post regime could be supplemented with ex ante liability for linking to 'obviously unlawful sources'.

A final issue remains concerning what can be done about linking sites and linked sites that are outside the jurisdiction of the 'reasonable exploitation copyright legislation'. Taking down such sites has proven to be legally difficult as well as rather ineffective: mirror sites are easily created once a site is taken down. Ordering internet service providers (ISPs) to block access to such individual sites is often proposed and even implemented as a remedy, but – apart from any legal objectives one may have related to e.g., freedom of speech and censorship – is fairly ineffective as well. It can easily be circumvented by using mirror sites and by using VPN connections for instance.

Hence, it is illusory that linking to and (more importantly) downloading and streaming from unauthorized sources can be eradicated entirely. Acknowledging this, several academic authors have proposed introducing some form of 'statutory licensing scheme' with a levy system to compensate for this practice. Such proposals are also known as for instance 'content flat rate' or 'alternative compensation schemes'.

5.4.3.3 Intermediaries' Liability

Unauthorized distribution or exploitation of works undermines the basic control required for reasonable exploitation and, despite the fact that the literature on unauthorized file sharing is less conclusive than one might expect it to be, it is very plausible that it negatively affects the exploitation opportunities for right holders. By doing so, it may reduce their incentives to invest in creating and exploiting works. In the past, unauthorized distribution or exploitation of works occurred on a relatively small scale in the form of

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66. See the chapter by Quintais and Hugenholtz in this volume.


68. The chapter by Quintais and Hugenholtz in this volume provides an example of such a proposal. Further references can be found there.
pirated copies in clandestine markets and shops. Since the turn of the century, it happens on a much larger scale and with negligible marginal costs over the Internet, primarily making use of peer-to-peer software, cyber lockers, social media or newsgroups. Like authorized exploitation, part of the unauthorized exploitation has moved from offering downloading services to streaming services.

The existence and anonymity of such unauthorized distribution platforms underline the fact that contractual arrangements (forbidding a customer to put content on a sharing site for instance) and TPMs (making it hard for customers to put content on a sharing site or making it hard to do so without exposing themselves) do not suffice. An additional reason for this is that unauthorized distribution platforms operate internationally and by doing so can relatively easily stay outside the reach of enforcement.

This raises the question of whether internet access providers, being the parties who provide access to the Internet and by doing so enable end users to access unauthorized material, should have a role in enforcing copyright or might even be liable for the copyright infringements of their clients. A role in enforcement could take different forms: software and equipment could be installed to block the unauthorized exchange of content, websites serving as a platform for the unauthorized exchange of content could be blocked, or ISPs could be forced to supply right holders with names and addresses associated with IP addresses which can be shown to have engaged in the use or distribution of unauthorized material.

Assuming that the negative effect of the use and exploitation of unauthorized material on the exploitation opportunities of right holders is beyond doubt, the question from a welfare economic framework perspective would be to what extent the potential benefits of such enforcement actions outweigh the transaction costs and potential dead-weight losses. On the one hand, this requires an assessment of the benefits of such enforcement: is blocking a sharing website or filtering traffic effective towards its aim to diminish the unauthorized use and exploitation of works? Is going after individuals behind IP addresses an effective way to stop them and others from unauthorized use and distribution? In general, the effectiveness of such enforcement seems limited, but more evidence is needed. On the other hand, an assessment of the costs is required, which first of all involves the transaction costs of blocking, filtering or charging customers engaging in unauthorized use. Second, it involves the dead-weight losses which may occur when platforms and users stop any activity which they fear could be infringing and, by doing so, also stop activities which are not (chilling effects). Related are the costs of false positives, when sites are blocked and activities filtered out, which are (partially or wholly) legitimate, and possible chilling effects on legitimate consumption by consumers who are unsure about the legal status of a provider and fear fines or prosecution. It is as yet an open question whether the welfare benefits of such interventions outweigh the costs, taking into account such transaction costs and chilling effects.

Still, even if the outcome of such a welfare economic cost-benefit analysis were positive, one needs to consider the other guiding principles set out in this chapter, such as freedom of expression and proportionality on behalf of ISPs. In theory, one could try to assess the wider long-term economic effects of e.g., the monitoring and blocking software on such values to incorporate these in the economic framework, but in practice, these arguments can be used to balance the outcome of the partial welfare economic analysis.

5.4.4 CONTRASTING THE RIGHT TO REASONABLE EXPLOITATION WITH CURRENT EU LAW

One of the major ideas behind the model predicated on a right to reasonable exploitation is to bring copyright closer to its rationale, the implied allegation being that current copyright has lost touch with this. The further allegation is that one of the reasons for this lies in the structuring of the economic rights in that the right holder as a point of departure holds exclusive rights to all kinds of behaviour that are classified as acts of reproduction, communication to the public, public distribution and so on, concepts that have only broadened over time. Since these broad concepts set the standard for the scope of the exclusive rights, along with notions that exceptions and limitations have to be interpreted narrowly, and in the EU context the fact that Member States’ freedom to provide for exceptions and limitations is limited through the exhaustive list in the Infosoc Directive as well, there is obviously a risk of over-protection. On the other hand, the fact that the basic concepts are not (anymore) tied to the economic rationale for copyright, in addition to attempts to narrow down the broad conceptions by way of legal interpretations, may represent certain risks for under-protection too. By introducing a different structure based on what is considered as reasonable exploitation, it should be possible to bring copyright closer to its rationale. In the following section, we will demonstrate the possible differences in outcome when approaching the problems discussed above from the angle of reasonable exploitation on the one hand, and current EU law, including recent case law of the CJEU, on the other.

5.4.4.1 Private Copying

Regarding private copying, it is suggested above that it should not be covered by the exclusive right to reasonable exploitation, including an obligation to pay remuneration, to the extent that the possibility to copy may be priced into the initial purchase of access to the work. This contrasts with current EU law, which does not even provide for a mandatory rule on private copying, but a
voluntary option for the Member States to introduce an exception or limitation for such purposes upon the payment of fair compensation for all kinds of private copying. The rule follows a logical legal rationale based on the fact that private copying is an exception to the right holder’s exclusive right to reproduction, and the presumption that such copying may harm the right holders’ interests, but is not concerned with the potential double compensation implicit in the right holder’s opportunity to receive remuneration for private use through payment for the initial access. The latter is underscored by the rulings of the CJEU in the VG Wort and Copydan cases, where the Court held that payment for a licence to make private copies could have no impact on levies paid under private copying rules, since the user had no obligation to pay for such a licence given that private copying is exempted from exclusive rights under the law of the Member State. This rationale, which is obviously based on the main rule versus exceptions structure of current copyright law, clearly conflicts with the reasonable exploitation approach suggested here. On the other hand, the ruling in the ACI Adam case, where the CJEU held that private copying from unlawful sources was not covered by the private copying rule of the Infosoc Directive, is principally in line with the suggestion that the right to reasonable exploitation covers such copying. However, as the consequence of the ACI Adam decision was that Member States may not provide for rules that permit private copying from unlawful sources upon remuneration, it is suggested above that the right to control such copies under the right to reasonable exploitation may be replaced by some form of compensation system, to the extent that such copying cannot be controlled. In sum, there are obvious differences between the current EU rules and a right to reasonable exploitation when it comes to private copying.

5.4.4.2 Resale of Digital Content

The current EU rules entail considerable ambiguity as regards exploitation of secondary markets, including redistribution of purchased material. On the one hand, it is evident that the right to control secondary markets for tangible copies of copyright works is curtailed by the rule of exhaustion of the distribution right. On the other hand there are clear indications in the Infosoc Directive that no exhaustion shall apply to the online context. This distinction follows to a large extent a legal logic based on the fact that online exploitation is not to be considered as distribution, but rather affects the right to communication to the public and the reproduction right in combination, and that these rights are not subject to exhaustion by the first sale. In addition, it seems to be predicated on a misconception that exhaustion may only apply to goods, not services. In the UsedSoft case, however, the CJEU broke through that logic when it applied the rule of exhaustion of the distribution right in the Software Directive to the resale of software licences. The decision leaves on the one hand much legal uncertainty regarding the scope of the distribution right and the application of the exhaustion rule to other kinds of works. On the other hand, it follows the rationale behind the rule applying to tangible goods, highlighting the lack of justification for controlling secondary markets even with regard to online services. Looking through the lens of reasonable exploitation, the approach of the Court lacks the necessary sophistication to justify the extension of the ‘exhaustion rationale’ to the digital context. Yet it aligns well with the principle that the right holder’s absolute control over secondary markets is not necessary in order to secure current or future exploitation possibilities, even in such a context. The risk that buyers may extend the secondary market is counteracted by the premise that a buyer must make his own copy ‘unusable’ at the time of the resale. The ‘UsedSoft solution’ is thus in line with the first alternative outlined above, namely allowing the resale on this premise and regaining control through TPMs. Again, however, the legal ambiguity surrounding this problem, and the lack of sophistication approaching it, is due to the structuring of the rights blurring the fundamental problems at stake.

5.4.4.3 Linking and Embedding

The same could be said about linking and embedding. In the Svensson and BestWater decisions the CJEU equated the two different situations, treating

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70. Article 5(2)(b) of the Infosoc Directive.
71. CJEU, Joined cases C-457/11 to C-460/11 (VG Wort) para. 37 and case C-463/12 (Copydan) para. 65.
72. CJEU, Case C-435/12 (ACI Adam) para. 41.
74. Article 3(3) and Recital 29.
75. Recital 29.
77. Case C-128/11 (UsedSoft).
78. Case Rognstad (2014), 4-12.
79. This is reflected in particular in paras 45 and 61. See Rognstad (2014), 14-15.
80. See s. 5.4.2.2 above.
81. UsedSoft para. 78.
82. See UsedSoft para. 87.
them both under the so-called new public doctrine, and implying that both linking and embedding fall outside the scope of the communication to the public right as long as the linked or embedded work was freely and unrestrictedly made available on the Internet.\(^{83}\) Again, equating the two seems logical on the basis of the legal regulation and the fact that embedding is based on linking technique, but the rulings are ignorant to the fact that the effect of the two is quite different. Thus, although there are some similarities between the results of the new public approach and of the approach following conditional control under the proposed right to reasonable exploitation, we claim that the former are based on non-economic and legally inconsistent grounds.\(^{84}\) Comparing the results, conditional control implies that there should be an opening for banning links that, exceptionally, affect current or future exploitation possibilities, irrespective of the new public rationale. Furthermore, there is a difference in the approach to embedding, as we suggest an 'opt out procedure' for securing the right holder's right to control, instead of creating incentives to impose access restrictions, which would be the result of the new public approach.\(^{85}\)

Third, the right to reasonable exploitation opens the way for different solutions for links to unauthorized material. To be sure, even under the apparently objective concept of 'communication to the public', the CJEU has in the GS Media case attempted to distinguish between links to authorized and unauthorized content and in addition also by contrasting certain situations.\(^{86}\) Thus, according to the logic of the CJEU, posters of links who did not know, or have reason to know, about the lack of authorization, are not communicating the work to the public, while those who have such knowledge, or ought to have it, do and consequently also infringe copyright.\(^{87}\) In addition, the CJEU also introduced a rebuttable presumption of knowledge on the part of those posting hyperlinks 'for profit'.\(^{88}\) And in any case, the CJEU 'noted that ... rightholders, in all cases, have the possibility of informing [posters of hyperlinks] of the illegal nature of the publication of their work on the Internet and of taking action against them if they refuse to remove that link',\(^{89}\) prescribing a sort of notice and take down procedure. Contrasting the approach of the CJEU with our discussion in section 5.4.3.2 above, the approach coincides with the right to reasonable exploitation on two points: (1) that links to obviously unlawful sites should be deemed infringing, and (2) that the poster of the links should act upon received knowledge about the unauthorized content. On the contrary we believe that including the 'ought to know' standard and, not least, the presumption based on the highly ambiguous 'for profit' criterion, is likely to have undesirable chilling effects and cause net dead-weight losses, in addition to freedom of speech concerns.

In addition, we will point to the fact that solutions based on subjective criteria, like knowledge, fit well with the concept of a right to reasonable exploitation, but are conceptually incompatible with the notion of 'communication to the public' and overlook current distinctions between primary and secondary infringements. Thus, the approach of the CJEU in GS Media appears – like those of Svensson and BestWater – as a strained effort to reach prima facie reasonable results on the basis of legal criteria unfit for the purpose, and also without having a yardstick for reasonableness, like our operationalization of the efficiency principle in terms of conditional control.

5.4.4.4 Text and Data Mining

The treatment of TDM also highlights the difference between the current rules and the reasonable exploitation approach. Even though there are no precedents yet from the CJEU regarding this matter, the current legal regime implies that there is a copyright problem on the basis of the reproduction right.\(^{90}\) Against this background the European Commission has launched a proposal for an exception for TDM as part of its Single Digital Market Agenda, which is limited to TDM for the 'purposes of scientific research'.\(^{91}\) In other jurisdictions the problems concerning the scope of the reproduction rights may be remedied through more flexible justification rules, like the fair use doctrine in the US. Under the reasonable exploitation approach, however, the fact that TDM may involve acts of reproduction of the work is irrelevant, and there is consequently no need for any justification for placing TDMs outside the scope of copyright. As pointed out above, neither the efficiency principle nor any of the other guiding principles speak in favour of leaving TDM within the scope of the economic rights. Consequently, there is no reason for including TDM in the right to reasonable exploitation.

5.4.4.5 TPMs and Intermediary Liability

Under current copyright regimes, the legal protection of copy and access controls (TPMs), as well as the question of intermediaries' liability, are to a

\(^{83}\) See CJEU case C-466/12, (Svensson) paras 24–32 and case C-348/13 (BestWater) paras 14–19.
\(^{84}\) As to the former, see s. 5.4.2.3 above, as to the latter, see O-A. Rognstad, 'Linking – A Gordian Knot of Copyright Law', in Liber Amicorum Jan Rosén, ed. G. Karnell et al. (2016), 681–689.
\(^{85}\) See Svensson para. 31.
\(^{86}\) CJEU case C-160/15 (GS Media) paras 46–53.
\(^{87}\) Id. paras 47–49.
\(^{88}\) Id. para 51, and a contrario para. 47.
\(^{89}\) Id. para. 53.
large extent handled by way of special rules or doctrines outside the right holders’ exclusive rights. The concept of reasonable exploitation implies, on the contrary – due to its simplification of the structure of the economic rights – that legal protection of TPMs and intermediary liability may also be covered by the right holder’s exclusive right, but only on condition that the right holder’s control be reasonable. As far as TPMs are concerned, this means that, unlike current rules in the EU and the US, there will be no tension between the limits to the copyright protection and the legal protection of TPMs.\(^{92}\) Moreover, whereas the current rules on protection of TPMs may prohibit the circumvention of TPMs that aim to price discriminate between markets, it follows from the analysis above that such practices do not necessarily amount to a reasonable exploitation, discrimination between single and multi-user licences being an important exception. When it comes to the question of intermediary liability, the regulation within the framework of the economic rights is not intended to grant right holders a stronger position than under current doctrines of secondary liability. From an economic point of view, the liability should depend on whether the benefits outweigh the transaction costs and the dead-weight losses. Apart from such efficiency considerations, other guiding principles such as freedom of speech are also at stake here. This provides for a careful approach to intermediary liability under the concept of reasonable exploitation, but again the concept will provide for a simpler and more transparent structure for dealing with the problems than the current ‘patchwork’ of different (and partly divergent) doctrines of secondary liability.\(^{93}\)

5.5 IMPLEMENTATION OF THE RIGHT TO REASONABLE EXPLOITATION: CATALOGUE REGULATION

A general, and much debated, issue in law concerns the style of regulation, i.e., whether provisions should be formulated in broad and general terms or by use of more specific language and detailed regulation.\(^{94}\) Typically the discussion revolves around two prototypes, rules that safeguard the need for specificity ex ante and standards that leave much to ex post assessments and are therefore able to meet the need for flexibility but may provide less legal certainty ex ante. In the copyright field, it may be considered that on the one hand rule-style regulation is called for, in particular as regards actions that are carried out frequently and by a large number of people,\(^{95}\) such as private copying and hyperlinking. On the other hand, there is a need for flexibility due to the rapid changes in technology, which may call for the use of standards.\(^{96}\) In the current state of copyright law, the regulation may be held to be somewhat asymmetric as the exclusive rights are regulated by rules, which on the other hand are getting quite blurry and ‘standard-like’ in the digital environment, while the exceptions and limitations to a variable degree are based on standards, although more so in the US than in the EU due to the standard-like fair use doctrine (section 107 of the US Copyright Act). The alternative model based on the right to reasonable exploitation aims to do away with this asymmetry.\(^{97}\) By abandoning the ‘six stage structure’ the aim is to achieve a more coherent regulation. It is important to remember, however, that the complexity inherent in the countless ways of exploiting a work does not disappear as a result of simplifying the structure. Instead, the complexity must be handled within the one stage structure based on the right to reasonable exploitation. It is believed that a catalogue regulation is the most appropriate way of handling the complexity, as this ‘third category’ of regulation entails the benefits of both rules and standards, and thus is apt to balance the needs for predictability and flexibility.\(^{98}\) A typical catalogue comprises ‘two or more enumerated instances (or items) followed by a general provision that empowers courts to recognize other unenumerated instances (or items) that have the same key characteristics as the enumerated ones’.\(^{99}\) Although regulating the entire exclusive rights regime in copyright, including features that are currently regulated by adjacent rules or principles,\(^{100}\) involves much greater complexity than for example a provision under criminal law prohibiting dangerous weapons,\(^{101}\) the structure implicit in the right to reasonable exploitation is a catalogue structure. On the face of it the proposed model may look like a standard regulation, but the intention is to regulate a number of enumerated instances in order to concretize the

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92. See Rognstad (2015), 537, with reference to the fact that ‘[a]lthough there are limits to the legal protection both U.S. and EU law, these legislations put the right holder in the position to control and condition access beyond the express limits of copyright law’, whereas on the other hand it would be a logical impossibility under the concept of reasonable exploitation ‘to permit a certain kind of use in the first place only to prohibit circumvention of technological measures that prevent the permitted use in the second. That would be equal to saying that what is not reasonable, namely imposing restrictions on the use in question, is reasonable after all.’

93. See also Rognstad (2015), 542–543.

94. See also Stefan Bechtold, in this volume.


99. Ibid. 181–182.

100. Such as doctrines on secondary infringements and protection of technical protection measures.

101. See the example by Parchomowsky & Stein (2015), 191 on the provision in D.C. Code § 22-4502(a), On the other hand, the authors also consider parts of the fair use provision in US Copyright Act § 107 as a catalogue regulation, see pp. 189–190.
content of 'reasonable exploitation' against the background of the guiding principles, starting from the concept of conditional control. As demonstrated above, the latter may give considerable guidance as to how the line between reasonable and non-reasonable control is to be drawn with respect to concrete instances and this wisdom may in turn be implemented into the statutory provisions as enumerated catalogue examples. Thus, the catalogue will give further and more precise guidance as to how not only the enumerated but also unenumerated instances are to be solved, through assessments of 'family resemblance' with the enumerated examples.102

It goes without saying that when drafting the catalogue of examples the legislator cannot and shall not predict all conceivable or inconceivable situations that may occur. First, it is obvious that the catalogue will have to reflect the current, or at least the foreseeable, state of technological development, and that it is practically impossible, and undesirable from a cost perspective, to amend the legislation every time new problems occur. The very idea of the proposed regulation should be that existing examples, along with the guiding principles and the operationalization of efficiency in terms of conditional control, give sufficient guidance to predict the outcome of emerging problems, at least for a foreseeable period of time. From thereon, legal certainty will increase as the body of case law builds. To be sure, it will still be necessary to carry out periodic law revisions under this kind of legislation, but the claim is that the task of amending and adding to the catalogue should be easier and less costly than introducing new rights and exceptions under the current regulation.

Second, the legislator will in any case have to make a selection of examples that give guidance as to how similar cases are to be solved. There should be a number of possible criteria for selecting such examples, but it is obviously important how frequently an example is expected to occur. The cases discussed in this chapter clearly fulfil this criterion and, given the current technological state of the art, the solutions outlined in section 5.4 could be implemented in the catalogue.

To illustrate how the catalogue regulation could work in comparison with current law, consider the state of technology some years ago when illegal downloading - but not streaming - was a regular problem (e.g., around the turn of the century when the Infosoc Directive was adopted). In light of the model advocated in this chapter, private copying should be lawful insofar as it is indirectly appropriated in the pricing of the original copy or the online service. Therefore the catalogue might state that copying for personal purposes falls outside the scope of the right to reasonable exploitation. Copying from unauthorized sources could, on the same basis, be subject to a compensation system. When streaming became normal, the logic behind conditional control along with the solutions enumerated in the catalogue for private copying, should tell us that the same should apply to streaming. There is certainly no case for controlling streaming from lawful sources, while streaming from unlawful sources may affect current or future exploitation possibilities, at the same time as privacy concerns implicit in the principle of public domain would speak against a control right. Under the current EU copyright rules, the situation has been far more ambiguous as the downloading from unlawful sources is covered by the right holder’s exclusive right, while at least not until recently it was clear how streaming on the part of the end user is to be treated in the equivalent situation.103

We also claim that it would be much easier to solve the question of ‘digital resales’ by way of a catalogue regulation of redistribution of tangible copies of works, than to tackle this problem under the current rights regime that distinguishes between a distribution right subject to exhaustion and rights of communication to the public and reproduction that are not subject to exhaustion.

It is submitted that under this model, the question of who has the ‘burden of proof’104 as to whether there is a violation of the right to reasonable exploitation – the ‘right holder’ or the ‘user’ – is not intended to shift beyond what should follow from general procedural principles. In our model, whether or not an exploitation is ‘reasonable’, is a legal – not a factual – question, to be answered by interpreting the ‘catalogue rules’ on the basis of the guiding principles. The ‘burden of proof’ question simply misses this point. There, a more appropriate question would be to ask whether the ‘burden of argument’ as to whether a certain conduct falls within or outside the scope of the exclusive rights. The answer to this question seems to be ‘no one’, as the interpretation of the right to reasonable exploitation should depend on ordinary legal methods and not some construed principles. Nonetheless, both parties may provide factual evidence for the occurrence or absence of harmful effects, which courts may take into consideration. In addition, parties could be asked to provide evidence, for instance about prior notices or consent, but this also puts no specific burden of proof on any one party. It should be borne in mind that a core feature of the concept of ‘reasonable exploitation’ is that it is not biased. Thus, the starting point is neither that the right holder holds exclusive rights to ‘exploitation’ of the work, such that users will have to prove that it does not, nor the other way around. In our model, right holders hold exclusive rights to reasonable exploitation, and what has been suggested here is a method for delineate the scope of these rights.

103. As pointed out above, it follows from the ACI Adam decision (2013) that private copies from unlawful sources are not covered by the private copying provision in Art. 5(2)(b) of the Infosoc Directive, and do therefore conflict with the exclusive right to reproduction. Whether streaming from unlawful sources conflicts with the exclusive rights depends on whether temporary copies reproduced in the user’s browser are made with the purpose of enabling lawful use pursuant to Art. 5(1), see now case C-527/15 (Filmespeler) paras. 60-67.

104. See Bechtold in this volume.
5.6 CONCLUSION

In this chapter, we have elaborated on the model of copyright as a right to reasonable exploitation by filtering the content of 'reasonable exploitation' through the utilitarian goal of social welfare maximization (efficiency). Unlike hard-core economists who would hold that the welfare economic framework includes any norms other than equity (or fairness) through their welfare effects, we take a more pragmatic approach by opening up room for guiding principles other than efficiency, to give reason to amend the normative economic stance. Proportionality, public domain, dignity, freedom of expression and market integration are identified as norms that may give reason to adjust the outcome of a welfare economic analysis of copyright issues to the extent that it does not monetize these norms.

Towards the economic goal of efficiency, a key consideration is that it is the non-excludability or 'public good' market failure of the rents of creating a work of art, literature or science that justifies intervention on economic grounds. Through the decreased costs of copying in the digital realm, this market failure may well have increased over the last decades, but at the same time the costs of copyright protection in terms of transaction costs, dead-weight losses and chilling effects need to be taken into account.

Implementing the aforementioned efficiency approach to reasonable exploitation, it should be acknowledged that exploitation of works can take a wide variety of forms, the exchange of a copy of a work for a sum of money being just one of them. This implies that the concept of reasonable exploitation should be broad enough to allow for many of the current exploitation models. At the same time, it ought to be general enough to account for new models that are yet to be developed. Starting from that notion, we operationalize the efficiency principle by the concept of conditional control: acts can only be considered copyright relevant if, against the background of the public good character of works, they affect the ability of a creator to control access to a work and exchange it for something which has direct or indirect commercial value for him, and do so by negatively and significantly affecting the current or future exploitation opportunities for the right holder. But even with respect to copyright relevant acts, the positive effect of protection on the exploitation opportunities, and eventually the incentives to create for the right holder, need to be balanced against any transaction costs, dead-weight losses and chilling effects. Moreover, the primary aim of copyright should remain to resolve the public good market failure inherent in creative works, and not exceed this goal by protecting price discrimination or control of secondary markets beyond what is considered acceptable in other markets. This implies that many issues related to price discrimination and contractual arrangements should not be dealt with in the context of copyright but instead in the context of contract law, competition law and EU law on market integration.

This approach to reasonable exploitation has subsequently been applied to a number of prominent present-day copyright issues: private copying, redistribution of purchased material, downloading from illegal sources, data mining, access controls and protection of TPMs, intermediaries' liability, and linking and embedding. Across this diverse set of cases studies, it was shown to lead to consistent and converging outcomes. However, these outcomes were also shown to differ in a number of respects from the formalistic approach followed by the CJEU. In line with the alternative model for restructuring the economic rights in copyright we propose that a catalogue style of regulation is the optimal way of balancing predictability and flexibility under the right to reasonable exploitation.