Copyright in the age of online access

Alternative compensation systems in EU copyright law

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List of Abbreviations

ACS  Alternative Compensation System(s)
ACTA  Anti-Counterfeiting Trade Agreement
AG  Advocate General
ALAI  Association Littéraire et Artistique Internationale (International Literary and Artistic Association)
ACTA  Anti-Counterfeiting Trade Agreement
AG  Advocate General
ALAI  Association Littéraire et Artistique Internationale (International Literary and Artistic Association)
BC  Berne Convention for the Protection of Artistic and Literary Works
BGH  Bundesgerichtshof (the German Federal Court of Justice)
BIRPI  Bureaux Internationaux Reunis pour la Protection de la Propriété Intellectuelle (United International Bureaux for the Protection of Intellectual Property)
Charter  Charter of Fundamental Rights of the EU
CMO(s)  Collective Rights Management Organisation(s)
CISAC  Confédération Internationale des Sociétés d’Auteurs et Compositeurs (International Confederation of Authors and Composers Societies)
CJEU  Court of Justice of the European Union (former European Court of Justice (ECJ))
DRM  Digital Rights Management
ECHR  European Convention on Human Rights
ECtHR  European Court of Human Rights
ECL  Extended Collective Licence (or Licensing)
EU  European Union
EP  European Parliament
GEMA  Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte (German society for musical performing and mechanical reproduction rights)
HADOPI  Haute Autorité pour la Diffusion des œuvres et la Protection des droits d’auteur sur Internet. Also refers to the law that set up this authority, the Law No. 2009-669 of June 12, 2009, promoting the Dissemination and Protection of Creation on the Internet
ICESCR  International Covenant on Economic, Social and Cultural Rights
ISP  Internet Service Provider(s)
P2P  Peer-to-peer
RC  Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations
TEU  Treaty on European Union
TFEU  Treaty on the Functioning of the European Union
TPM(s)  Technological Protection Measure(s)
TRIPS  Agreement on Trade-Related Aspects of Intellectual Property Law
UGC  User Created/Generated Content
UDHR  Universal Declaration of Human Rights
VCLT  Vienna Convention on the Law of Treaties
WCT  WIPO Copyright Treaty
WIPO  World Intellectual Property Organization
WIPO Treaties  The WCT and WPPT
WPPT  WIPO Performances and Phonograms Treaty
WTO  World Trade Organization
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Amsterdam, 23 September 2016
Note: The research for this dissertation was completed on 31 March 2016. Subsequent developments in the relevant law are therefore not reflected in this study, with the exception of minor updates relating to judgments of the CJEU and AG Opinions cited in the text and published until 30 June 2016. This dissertation is written in UK English.
1 Introduction: Challenges for Copyright in the Online Environment

1.1 Background and problem definition

In the EU, more than 80% of households now have an Internet connection. Most individuals aged between 16 and 74 years use the Internet, a number that will only rise over time. As Internet penetration and the number of connected consumers increase, so does the importance of copyright law to the regulation of their everyday online lives. When individuals stream music, download a film, access an e-book, create a mash-up, share a video online, or (in some cases) post hyperlinks to protected content, they are usually carrying out copyright relevant acts.

Copyright is a type of intellectual property right and, in EU law, enjoys fundamental rights protection as property. This status derives from the statement in Article 17(2) of the Charter of Fundamental Rights (Charter) that “intellectual property shall be protected”, as well as from multiple references in other legislative acts.

In essence, copyright is a bundle of separate and distinct rights that apply to certain uses of protected works, such as literary works, sound recordings, films, and paintings. The principle of exclusivity is central to this form of protection. According to this principle, the use of works is subject to a default prohibition and authorisation rule that allows right holders to individually manage and enforce their rights. The owner of the copyright, or person to whom the owner grants the exclusive benefit of one or more rights comprising the copyright, has in general the exclusive right to reproduce, adapt, communicate or make the work available to the public, or to authorise others to do so. These rights apply in the digital environment.

For a good part of its early history, copyright was aimed at regulating the use of works in tangible media between professionals and for commercial purposes. In that realm, the legal mechanism of the exclusive right was adequate, and its place at the centre of the legal framework justified.

Technological development and evolving social norms slowly changed this landscape. A legislative trend surfaced whereby the emergence of new technologies enabling the exploitation and, later, the mere use or enjoyment of works, was met by a corresponding extension of the law.

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1 Eurostat, 2015, with “information society statistics” on households and individuals (Data extracted in June 2015).
2 Eurostat, 2015, referring to numbers as from the beginning of 2014 and noting that the proportion of non-users was down to 18 % in 2014 (Data extracted in June 2015).
3 Unless specified, “copyright” and its variations refer to copyright and related rights. Likewise, “work” and its variations refer to subject matter protected under copyright and related rights.
5 Kur & Schovsbo, 2011, p. 9., noting that, in continental Europe, exclusivity “is an essential feature firmly anchored in the ‘natural right’ character of an author’s claim to her work”.
6 Rahmatian, 2011, p. 371, qualifying copyright as both a negative and positive right, noting its internal dimension as “the right to use, especially in the form of the right to assign or license”.
to that use. As a rule, each such extension generally followed the legal template of exclusivity, placing increasing emphasis on strict enforcement of rights.8

And so it is that the remit of copyright grew to include the printing press, piano rolls, photography, cinematography, sound recordings, broadcast by satellite and cable, reprography, analogue tape recording, digital technology, and the Internet.9

It is possible to trace this evolution in international copyright law by following the different revisions of the Berne Convention for the Protection of Literary and Artistic Works (BC), the 1994 Agreement on Trade-Related Aspects of Intellectual Property Law (TRIPS) and, in relation to use over digital networks, the 1996 WIPO Copyright Treaty (WCT), and the 1996 WIPO Performances and Phonograms Treaty (WPPT).

When the latter treaties came along, the EU was already in the middle of a legislative programme to tackle the challenges of territoriality. This ongoing effort of upward harmonisation has so far resulted in ten directives on copyright and related rights.10 These instruments have often surpassed international minimum standards of protection, on the pretext of inter alia removing disparities amounting to barriers to the free movement of goods and services.11 The centrepiece of the copyright acquis is the InfoSoc Directive, which implements the WCT and WPPT into EU law and adapts it to the information society.

As technology evolved, it increasingly allowed individuals to use works in a low-cost and ubiquitous manner for private and non-commercial purposes. Internet users read, view, display, copy, rip, cut, paste, remix, mash-up, edit, link, and appropriate works. They do this through different devices and for varied purposes, including leisure, entertainment, communication, artistic expression, parody, and critique. Borrowing and recreating have always been a part of our cultural practices, but the Internet enables users to do so from a wider pool of works, with greater ease, while disseminating the results widely at low cost.12

By extending the scope of copyright protection and exclusivity to these uses, the law shifted from primarily applying to professional relationships, to also regulating acts of enjoyment and expression in the online environment.13 One consequence was the reduction of space for otherwise lawful non-market activities and the cultural production and expression that goes with them.14

The application of this legal regime to “mass” online use by individuals created a mismatch between the law and technology-influenced social norms. On the one hand, online sharing is low cost and ubiquitous; on the other, copyright relies on exclusivity and enforcement. The result is an increase in unauthorised production and dissemination of works, with a corresponding decrease in the public legitimacy of the law. This disconnect raises the need to rethink the law in light of its lack of social acceptance and technological adequacy.

The problem is amplified by the ineffectiveness and costs of copyright enforcement. Online enforcement against mass unauthorised use or file sharing is difficult due to the challenges posed by technology and high transaction costs associated with pursuing thousands (if not millions) of infringers. The persistence of this unauthorised use despite the ratcheting of enforcement measures and litigation in the past decade is illustrative of this.

Since the advent of the first peer-to-peer (P2P) networks, rights holders have sought to prevent large-scale infringement through litigation. The targets of lawsuits have included the demand-side of the unauthorised market (the individual file-sharers), and the supply-side, i.e. the platforms that accommodate and enable unauthorised use. The latter include P2P software providers and Internet Service Providers (ISPs) supplying the infrastructure for data flows.

Taking advantage of the available space in EU law, including the liability rules in the E-Commerce Directive, rights holders concentrated their efforts on obtaining injunctions for filtering, blocking, and disclosure of information in relation to allegedly infringing subscribers. There have also been notable efforts made towards the adoption of so-called “graduated response systems” These are systems where ISPs monitor subscribers’ potential illegal actions or act upon notification of the same by rights holders, serving notices and warnings to cease infringement. If users continue their practices after a number of warnings,
sanctions are applied, including “suspension and termination of service, capping of bandwidth, and blocking of sites, portals and protocols”.

The current trend is to increase the role and responsibility of Internet intermediaries in online enforcement. This entails targeting online gatekeepers like ISPs, advertisers, search engines, mobile operators, and payment providers. This trend fits into a broader tactic by rights holders to remedy a perceived “value gap” between intermediaries’ digital revenues, generated by the online dissemination of content, and the lack of fair remuneration for rights holders for that use.

Despite this multi-layered strategy, there is little causal evidence that enforcement is effective in significantly reducing online infringement. It is true that rights holders have had success in shutting down numerous unauthorised platforms. However, both file sharing and the number of available P2P applications have continued to rise. Empirical evidence suggests that litigation has at best a short-term deterrent effect before demand and supply relapse into infringing practices through alternative channels. Furthermore, complex enforcement approaches, like graduated-response systems, are costly and inefficient.

But strict enforcement is not only ineffective; it may also be undesirable. On the one hand, it is now apparent that these measures alienate consumers and erode the respect for and public legitimacy of copyright law. On the other hand, they risk disrespecting fundamental rights and freedoms of individuals and intermediaries.

In EU law, fundamental rights have emerged as an external constraint on copyright enforcement online. In several cases before the Court of Justice of the European Union (CJEU), measures such as filtering, blocking, and disclosing ISP subscribers’ information have been limited by the application of freedom of expression and information online, privacy in telecommunications, respect for personal data, and freedom to conduct a business. The Court’s jurisprudence requires that a “fair balance” is reached between the protection of the right of property in

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24 Geiger, 2014a; Giblin, 2012, pp. 58–59, 115; IFPI, 2013, 2015. See also infra note 17, with further references at the institutional level in the EU.
25 See e.g. IFPI, 2015, p. 22; International Confederation of Music Publishers, 2015.
26 See Giblin, 2014b; Handke, Bodó, & Vallbé, 2015; Lunney, 2014; Poort et al., 2014; Poort & Weda, 2015a.
27 See: Gervais, 2010, p. 16, arguing that mass-scale use has brought about a reshaping of the copyright landscape, making it apparent that, short of expelling users from the Internet there is no effective way to prevent these practices; Bridy, 2009, p. 604, noting that “[a]s an empirical matter, the mass lawsuits appear to have had only a transitory deterrent effect”. See also Cammaerts & Meng, 2011; Eijk, Poort, & Rutten, 2010, p. 53; Gervais, 2004; Giblin, 2012, pp. 58–59; Harris, 2012; Huygen et al., 2009.
28 See Poort et al., 2014, pp. 2–4, with further references.
30 See infra 4.4.1.4 and 5.3.3.6.
copyright and competing fundamental rights, sometimes giving primacy to the latter.\textsuperscript{31} At the legislative level, similar considerations have led to the rejection of graduated-response systems.\textsuperscript{32}

In contrast to enforcement, the market is more efficient at addressing infringement. Research shows that authorised services with an attractive price and catalogue can decrease demand for unauthorised websites and develop new markets.\textsuperscript{33} Thus, private ordering can address to some extent unmet demand as one of the causes of online infringement.\textsuperscript{34} The spectacular rise of authorised film and streaming services like Netflix and Spotify is a testament to this development.

Nevertheless, legal channels appear insufficient to cater in full to consumers’ demands and habits.\textsuperscript{35} Users aspire to a new pattern of cultural consumption characterised by multi-device and multi-screen availability, and the opportunity to reproduce, share and modify cultural works. The market cannot entirely solve this problem, due in no small part to the complexities inherent in the territorial and substantive fragmentation of exclusive rights. These factors suggest that the gap between consumer demands and market offerings will persist.\textsuperscript{36}

Finally, the current system fails to adequately remunerate individual authors and performers for their creative efforts. In a content market transitioning from ownership to access-based models, global digital rights revenues for the entertainment industry have steadily increased.\textsuperscript{37} Individual creators’ shares, however, have not risen accordingly in the digital environment. In fact, creators often transfer their rights for little consideration to other rights holders (e.g. phonogram or film producers) as a result of their weakened bargaining position.\textsuperscript{38}

A copyright policy that emphasises repression over monetisation of use fails to address the issue of fair remuneration for creators and pre-empts the exploration of alternatives for remunerated access. Of course, contractual imbalances can be tackled by EU-level regulation of contractual practices between creators and exploiters.\textsuperscript{39} Still, collective rights management schemes and

\textsuperscript{31} See infra 4.4.1.4 and 5.3.3. In Europe, the legal basis for the cited rights is found in Arts 8 and 10 ECHR, and Arts 7, 8, 11 and 16 Charter.
\textsuperscript{32} See Art. 1(3)(a) Framework Directive. On fundamental rights concerns with graduated response systems, see infra 5.3.3.6.
\textsuperscript{34} Vallbé et al., 2015, pp. 2–4, noting that the success of early P2P networks and growth of cultural black markets in the absence of lawful offers were indicative of consumers’ willingness to adopt online distribution of cultural works before rights holders.
\textsuperscript{35} Kantar Media, 2012; Poort & J. Leenheer, 2012; Vallbé et al., 2015.
\textsuperscript{36} See Ricolfi, 2007, p. 300, making a similar argument. See also Greece, Lange, Schneeberger, & Valais, 2015, pp. 132–133, and Communication on Modern European Copyright Framework 2015, p. 4 (noting the problems caused by territoriality).
\textsuperscript{37} IFPI, 2015, p. 6 (for number and trends in the recording industry; See, e.g., Grece et al., 2015, p. 14: “From 2009 to 2013, the audiovisual turnover from the audiovisual activities of the 50 major worldwide groups rose from USD 361.5 billion to USD 425 billion.”) Motion Picture Association of America, 2015, pp. 2, 4–7. See also the positive data reported in Giblin, 2014b, p. 210: “The movie industry has broken its record for worldwide box office receipts for the last seven years straight.”. Grece et al., 2015, pp. 75–77, 132–133 (growth of European consumer spending and of the number of customers for online subscription video-on-demand; this trend will continue in the future)
\textsuperscript{38} Flowers, 2015; Vallbé et al., 2015, pp. 1–4.
\textsuperscript{39} Communication on Modern European Copyright Framework 2015, p. 10.
legal licences, coupled with unwaivable remuneration rights, have historically been adequate solutions to challenges of enforcement and fair compensation. ⁴⁰ (As we shall see, these legal schemes play a central role in the present dissertation.)

Against this background, there is an urgent need to find a lawful way for online users to access, use and share digitised works in a manner that not only promotes the development of the information society but also fairly compensates creators and other right holders. From a policy perspective, copyright should harness and stimulate the democratic and social welfare benefits from developments in communications networks and social norms. ⁴¹ The challenge is to do so in compliance with EU copyright law and the related *acquis communautaire*.

This dissertation examines the issue and explores a possible solution for modernising the EU copyright framework, in the form of a model of access and remuneration. ⁴² The analysis is concerned with “legalisation” proposals for unauthorised non-commercial online use by individuals.

These proposals advance legal mechanisms that restrict the exercise or scope of exclusive rights applicable to online acts by Internet users. The acts in question are typically those of downloading, streaming, uploading, sharing or modifying copyright works. The scope of proposals frequently includes the online rights of reproduction and communication to the public (and only seldom adaptation), and traditional categories of works, like music and film (often excluding software and databases). The restriction to exclusive rights is accompanied by rules ensuring remuneration for rights holders (or solely creators) of works included in the scheme. As a result, a previously unauthorised use becomes “permitted-but-paid”. ⁴³

In short, legalisation proposals aim to regulate mass use of works through licensing schemes, subject to payment of compensation. Among the schemes studied throughout this dissertation are different models of collective rights management (voluntary, extended, and mandatory), statutory and compulsory licences, and state-funded systems.

Legalisation proposals come with different labels. Among the most influential discussed throughout this dissertation are proposals for a “tax-and-royalty system”, “license globale”, “content” or “culture flat-rate”, “creative contribution”, “file sharing” or “broadband levy”, “sharing licence”, or an “alternative reward system”. ⁴⁴ For convenience, these proposals are referred to under the umbrella term “alternative compensation systems” or “ACS”. The models are “alternative” insofar as they favour remunerated access over exclusivity and enforcement for large-scale online use by individuals.

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⁴⁰ See *infra* 2.3, 2.5, 3.3.5, and 5.3.3.3. See also Communication on Modern European Copyright Framework 2015, p. 10.

⁴¹ See Benkler, 2006, p. 276; Lessig, 2008. “Policy” is defined here as “a course of action adopted or proposed by an organisation or person, more specifically an action which implies a choice of one action among others”. Cf. Gerven, 2008, p. 14.

⁴² Mention efforts to modernise copyright through increased enforcement by the Commission.

⁴³ On the notion of “permitted-but-paid”, see Ginsburg, 2014b. There is significant research on schemes external to copyright but with similar effects, such as Aigrain, 2008, 2012; La Quadrature du Net & Aigrain, 2013. “ACS” is adopted here as an umbrella term to refer also to those proposals.

⁴⁴ See Chapter 3 for discussion and categorisation of these proposals.
Since the early 2000s, ACS have been proposed by legal and economics scholars, advocacy groups, and political parties. Legislative proposals were presented in the national parliaments of Portugal, France, Germany, Belgium, and Italy.\textsuperscript{45} Discussion on the topic also surfaced in debates on EU copyright reform, especially in the context of efforts by the Commission and Parliament to update the private copying system.\textsuperscript{46}

In 2011, the European Parliament commissioned a study on “content flat-rates”.\textsuperscript{47} In 2014, it adopted a resolution recommending the examination of the possibility of levying cloud services, a development that would approximate private copying to an ACS for certain digital reproductions.\textsuperscript{48} The draft version of the resolution went further. It mentioned the need to “examine the possibility of legalizing works sharing for non-commercial purposes so as to guarantee consumers access to a wide variety of content and real choice in terms of cultural diversity”.\textsuperscript{49}

In addition, empirical research encourages the study of legalisation models. First, because it suggests the existence of public support for ACS, despite the reputational damage caused to rights holders by strict enforcement strategies. Second, because it highlights the economic promise of these models.

There is evidence of public support for ACS. This is especially true among users already consuming culture online, including high-intensity file-sharers. A recent study in the Netherlands suggests that increased usage of legal channels indicates greater inclination to support ACS, as well as greater willingness to pay. The same study shows that support is strongest for legalisation schemes that provide holistic access to works, with few usage restrictions, and at a reasonable price (e.g. a surcharge on the monthly rate of Internet access, within the price range of existing premium streaming services like Netflix and Spotify).\textsuperscript{50} Furthermore, there is also research suggesting that ACS may be welfare increasing, despite the scepticism of some economists.

Unlike direct licensing, these systems rely on standardised terms of use, blanket licences, and are typically intermediated by a collective rights management organisation (CMO).\textsuperscript{51} The risk posed by an ACS is that it offsets the market mechanism for setting prices by limiting the possibilities afforded by individual management of copyright in terms of tailoring prices and conditions of transactions for works. By mandating rights holders to make available their works at set prices, legalisation systems restrict price discrimination and product differentiation. Hence, they are less flexible, and susceptible to misallocation of resources.\textsuperscript{52}

\textsuperscript{45} See Chapter 3 for further analysis of these proposals.
\textsuperscript{46} See Report Public Consultation on the Review of the EU Copyright Rules 2014, pp. 72–77, where ACS are mentioned as a regulation model favoured by certain end-user/consumer respondents. See also Vitorino, 2013.
\textsuperscript{47} Modot et al., 2011.
\textsuperscript{49} See Castex Report 2013, ¶27. The suggestion was dropped in the final version of the document.
\textsuperscript{50} Vallbé et al., 2015. For other studies with similar results, see Collopy & Bahanovich, 2012; Karaganis & Renkema, 2013; SPEDIDAM, 2006; Swedish Performing Rights Society (STIM), 2009; Wiggin & Entertainment Media Research, 2011.
\textsuperscript{51} Handke et al., 2015.
\textsuperscript{52} See Stan J. Liebowitz, 2003, 2005; Stan J. Liebowitz & Watt, 2006; Merges, 2004a.
Moreover, some critics raise objections to the reliance of legalisation proposals on collective rights management. Concerns have been voiced regarding CMOs’ failure to provide sorting functions, high costs of operation, extensive market power, the potential for “inertia and slow decision making”, and distribution of rights revenue based on mere proxies for actual use, which potentially distort the market.  

In economic terms, therefore, an ACS with standardised terms of use and a centralised intermediary is not the first-best option. Of course, neither is the inefficient and costly enforcement associated with direct transactions and individual copyright management. Whether an ACS represents an increase in social welfare compared to the status quo amounts to a complex empirical question.  

Empirical research on this matter has significant limitations. However, a recent study in the Netherlands assessed the economic viability of a statutory licence ACS for recorded music. It concluded that a well-designed system makes users and rights holders better off as a whole by increasing their total welfare compared to the status quo. If nothing else, this research highlights the likely cost of exclusivity over a model of remunerated access.

The potential benefits of a welfare-increasing ACS are significant. Rights holders would see increased revenues and savings in enforcement costs. Creators could benefit too if the system includes a mandatory requirement for fair compensation, thereby mitigating problems with fair remuneration in digital exploitation channels. End-users would face a lower risk of infringement, increased legal certainty for their online activities, and experience better online access to works. In the long term, an ACS could promote the circulation of culture, technological development, and fair competition between online service providers of works. These are all good arguments for a legal exploration of ACS under EU copyright law.

1.2 Research Questions

This dissertation aims to answer the following research questions:

Are Alternative Compensation Systems for non-commercial online use of works by individuals admissible under EU copyright law and consistent with its objectives and, if so, to what extent? How can and should EU copyright law incorporate an Alternative Compensation System?

Before addressing methodology, some remarks about the research questions and terminology are necessary. The concept of “Alternative Compensation Systems” (or ACS) was explained in the previous section. It is an umbrella term for different proposals promoting the legalisation of large-scale non-commercial online acts of sharing of works between individuals. These proposals seek to restrict the exercise or scope of the exclusive right, including the possibility of individual management and enforcement, promoting in its stead legal models that enable works to be accessed and used in return for remuneration.

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53 Handke et al., 2015. For discussion on the economics of CMOs, see Besen & Kirby, 1989; Besen, Kirby, & Salop, 1992; Handke, 2007, 2013.
54 Handke et al., 2015. See also Handke, Quintais, & Bodó, 2013.
55 Handke et al., 2015.
The “individuals” mentioned in the research questions are natural persons. They may be consumers of digital works or services acting outside their trade or business (benefiting from consumer law protection), users of works outside a consumer-trader relationship, or follow-on creators that build on pre-existing materials—and are thus potential authors of transformative works.  

This dissertation is concerned with Internet users that engage in “non-commercial” online use of works. The term “non-commercial” is challenging to define in the online environment. Historically, copyright regulated commercial use in the public sphere. In Europe, as Chapter 2 explains, this changed with the emergence of the German private copying model in the 1950s–1960s. Decisions by the German Federal Court of Justice (BGH) extended the scope of the reproduction right to the private sphere and imposed contributory liability on manufacturers, whilst balancing the need for technological innovation and respect for the constitutional right of privacy.

Fast-forward to the present-day information society and the role of end-users has changed drastically, as illustrated by the rich and diverse ways in which they use digital content. In this context, drawing distinctions between amateur/non-commercial and professional/commercial use for analytical purposes is difficult and, some argue, undesirable. Still, there are good reasons to rely on this distinction as an analytical tool, insofar as we perceive it to be closer to a standard than a rule. Here, a rule is a detailed statutory provision, akin to a list, spelling out the cases in which a use of a work qualifies as non-commercial. Uses outside that list would not be included in the ACS. A standard, in contrast, constitutes “a more flexible framework designed to give courts both guidance and significant leeway in determining the uses” susceptible of qualification as non-commercial, “while keeping in mind the interests of rights holders”.  

Many consumptive and creative acts by Internet users take place in the private sphere or are clearly not for direct commercial purpose or with a profit-making aim. Thus, the challenges of defining commerciality are circumscribed. Whether a use is non-commercial could be defined by case law pursuant to a reasonable standard.

Several acquis provisions use the “non-commercial” concept in connection with copyright limitations and collective rights management. On the one hand, limitations variously privilege

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56 Mazziotti, 2008, pp. 4–5, referring to the concept of “end-user”. See also Benkler, Roberts, Faris, Solow-Niederman, & Etling, 2013; R. Hilty & Nérisson, 2012, pp. 89–90, noting that these new users, because they are more socio-culturally and politically engaged through the use of technology, are increasingly perceived as “citizens” instead of mere customers, and even play a significant role in shaping copyright debates.

57 A “commercial user” can be defined as a person or entity involved in the provision of goods or services that for their business activities requires a licence from right holders of copyright and/or related rights. See SWD CRM Directive 2012, p. 195. N.B. some follow-on creators may likewise qualify as commercial users if they market their transformative works.


acts that are “neither directly nor indirectly commercial”, for a “direct or indirect commercial… advantage”, of non-commercial “nature”, “purpose” or for a non-commercial “advantage”. On the other hand, the CRM Directive states that CMOs must ensure rights holders have the right to grant licences for non-commercial use of any rights, categories of rights or types of works and other subject matter that they may choose.

The legislative recognition of the “non-commercial” notion in the acquis should lead to its qualification as an autonomous concept of EU law, subject to uniform interpretation by the CJEU.

This basic understanding of the concept as an EU copyright law standard that includes non-market and non-profit acts by individuals is an analytical starting point, to be given meaning and effect throughout this dissertation.

1.3 Methodology

This is a dissertation in copyright law, within the broader area of information law. Information law relates to “the production, marketing, distribution and use of information goods and services”, and comprises “a wide set of legal issues at the crossroads of intellectual property, media law, telecommunications law, freedom of expression and right to privacy”. As a normative concept, information law aims to “contribute to a legal framework that best serves the information society while respecting fundamental rights and freedoms”.

Here, these aims are applied to the field of digital copyright by answering questions of law through normative legal research, i.e. “normative assertions, views and concepts” with regard to a specific legal system. The dissertation asks what the law is in order to assess what the law ought to be, using doctrinal analysis to develop theoretical and prescriptive arguments for reform of EU copyright law.

The objective of the dissertation is not an “ideal” normative theory, but rather one that assumes a variety of constraints on the choice of legal rules, namely their legal and political feasibility. The analysis aspires to be pragmatic and relevant for EU copyright policy. Hence, it does not consider proposals that require a complete overhaul of existing law, the abrogation of international treaties, or the abolishment of copyright protection for non-commercial use. For instance, the dissertation looks at legalisation schemes external to copyright (e.g. based on taxation) to examine their characteristics, some of which are susceptible of transplant to copyright systems; however, it does not examine their legal feasibility.

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62 See Art. 5(2)(b) (for “ends that are neither directly or indirectly commercial”), 5(2)(e), 5(3)(a), 5(3)(b) InfoSoc Directive. See also Art. 6(5) Orphan Works Directive.
63 See Art. 5(3) and recital 19 CRM Directive.
64 Metzger & Heinemann, 2015.
65 See infra 3.3.1, 3.4.2, 4.4.3.2, 5.1, 5.3.2.3, and 6.2.3.
66 Institute for Information Law, 2012, pp. 1, 3.
67 Institute for Information Law, 2012, p. 3.
69 Van Gestel et al., 2012, p. 4, using this expression to define the essence of normative legal research.
70 On positive theory as constraint, see Vermeule, 2007, pp. 394–395.
71 See the analysis of “State Systems” infra at 3.3.6.
The investigation is carried out through the internal legal perspective of the copyright *acquis communautaire*. The *acquis* includes primary legislation, secondary legislation, and case law from the Court that form part of the EU legal order in the area of copyright.  

It is in relation to this legal framework and its objectives that the dissertation assesses the admissibility, normative consistency and desirability of ACS. The sources used in the analysis include legislation, case law and doctrine (predominantly legal literature in the field of copyright), gathered through desk research.

“Primary” law consists of the Treaties (TEU and TFEU) and the Charter—which has “the same legal value as the Treaties”—together with fundamental or general principles of EU law developed by the Court, “including the requirement to protect fundamental rights.” The EU fundamental rights framework includes principles derived from the European Convention on Human Rights (*ECHR*) and national constitutional traditions, some of which are codified in the Charter, thereby justifying the occasional reference to these sources. This includes decisions on the interpretation of these instruments by competent bodies, such as the European Court of Human Rights (*ECtHR*) and national constitutional courts.

“Secondary” law includes unilateral acts based directly on the Treaties, which must comply with primary law. The most relevant acts for this dissertation are the multiple directives on copyright and related rights. Because the research questions focus on non-commercial online use by individuals, the InfoSoc Directive and its interpretation by the CJEU will take centre stage in the analysis. Furthermore, as the dissertation is concerned with copyright, references to related or neighbouring rights are limited. Beyond the directives, the research considers other relevant “unilateral acts” in the field of copyright, such as decisions, opinions, recommendations, communications, white papers, and green papers.

Within EU copyright law, several topics are outside the scope of the research. They include rules on the protection of software, databases, videogames, orphan works, the non-harmonised right of adaptation, and moral rights. The study also excludes areas of EU law outside copyright that

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73 The vast majority of sources referred to are in English. Where a choice existed between an English language source and an alternative in another language, the English language was preferred.

74 Art. 6(1) first subpara TEU.

75 Bradley, 2014, p. 103.

76 Griffiths, 2013.

77 Bradley, 2014, pp. 103–104; Ramalho, 2014, pp. 21–22. Art. 288 TFEU contains a list of unilateral acts that are secondary sources of law, such as regulations, directives, decisions, opinions, and recommendations.


80 N.B. that Chapter 4 contains a brief reference to the right of adaption when discussing the issue of digital adaptations (4.2.7) and limitations applicable thereto (4.4.4).
may indirectly influence the legal study of ACS, such as competition law, conditional access, consumer law, and electronic commerce law.\textsuperscript{81}

EU law is an autonomous body of law largely independent from national law.\textsuperscript{82} It is the exclusive jurisdiction of the CJEU, which has the power to provide authoritative interpretation on its rules, largely dependent on the obligation by national courts to refer cases under Article 267 TFEU.\textsuperscript{83} Since 2009, there have been frequent references for a preliminary ruling on the interpretation of open concepts in the \textit{acquis}, namely in the InfoSoc Directive. Due to doubts as to its competence basis and normative admissibility, some authors label this practice as “harmonization by stealth” or “judicial activism”.\textsuperscript{84}

Regardless, the CJEU’s jurisprudence plays a vital role in shaping the law applicable to mass online use. It also contains key normative considerations regarding how far the law can and should be reformed to accommodate this use. As such, understanding the Court’s case law and method of interpretation is essential to examine ACS and answer the dissertation’s research questions.

Interpretation of EU copyright law follows the traditional literal (semantic or semiotic), systematic (or contextual) and purposive (or teleological) methods. These are frequently used together and combined with the “peculiar canons” of EU law, such as the principles of effectiveness, proportionality, and uniform application.\textsuperscript{85}

The teleological method is prevalent in the CJEU’s copyright jurisprudence. This prevalence is based on the application of the principles of effectiveness and autonomous interpretation, as well as a range of arguments linked to the objectives of EU copyright, found in the preambles of directives. A notable example is the interpretation of notions in directives as autonomous concepts of EU law, requiring uniform interpretation.\textsuperscript{86} The InfoSoc Directive, in particular, is used as a horizontal harmonisation instrument, with its recitals playing the role of veritable harmonisation guides.\textsuperscript{87}

\textsuperscript{81} The regulation of the topics mentioned is found for example in Arts 101 and 102 TFEU (on the constraints posed by competition law on CMOs), the Consumer Rights Directive, the Conditional Access Directive (containing rules that articulate with those on TPMs in the InfoSoc Directive), the AVMS Directive, and the E-Commerce Directive.

\textsuperscript{82} Rösler, 2012, p. 979.

\textsuperscript{83} Art. 19 TEU. See Rösler, 2012, pp. 979–980. Art. 267 TFEU gives the CJEU jurisdiction to give preliminary rulings concerning both the interpretation of primary law and the “the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union”.


\textsuperscript{85} See Geiger & Schönherr, 2014b, pp. 554–556.

\textsuperscript{86} In general, see Rösler, 2012, p. 979. The author argues that this method is consistent with the EU’s functional perspective, and highlights the difficulty in using it when the interpreter identifies conflicting purposes underlying the same provision. For the copyright \textit{acquis}, see Geiger & Schönherr, 2014b, pp. 449–500; Leistner, 2014, pp. 560, 599.
The objectives of the copyright acquis, as viewed by the Court, have been identified through empirical analysis by Favale, Kretschmer and Torremans. These objectives are: a “high level of protection for copyright holders”, “fair competition”, “circulation of culture”, “fair balance between the rights and interests of authors and the rights of users”, “harmonisation”, “adequate compensation”, “resolving legal uncertainty”, and “technological development”.88 It is in light of such objectives that proposals for EU copyright law reform ought to be evaluated. Therefore, they are used throughout the dissertation not only to understand the Court’s teleological arguments in adjudicating the law, but also in the normative assessment of ACS.89

In the process of analysing EU copyright law, it is important to recognise that this legal regime operates in a multi-level system. The directives are interpreted in respect of primary law and in light of international copyright agreements. The main agreements considered here are the BC, TRIPS and the WCT, to which all EU Member States are parties. The EU as an organisation is a member of TRIPS and the WIPO Treaties, making them binding on its institutions and Member States.90 In addition, TRIPS and the WCT incorporate by reference the most relevant substantive provisions of the BC.91 The InfoSoc Directive, furthermore, implements the WCT in the acquis.

This framework imposes two important obligations. The first is the obligation to comply with international treaties, including the incorporated provisions of the BC.92 The second, and related, obligation is to interpret EU law in light of international law, “in particular where its provisions are intended specifically to give effect to an international agreement concluded by the Community”.93

Finally, to determine the meaning of international law, the aforementioned treaties must be interpreted according to the principles of the Vienna Convention on the Law Treaties of 1969 (VCLT).94 In simple terms, the VCLT rules on treaty interpretation favour a literal approach to determine the ordinary meaning of a treaty provision in good faith, combined with systematic analysis (“context”) and teleological elements (“object and purpose”). In addition, these rules allow, at a subordinate level, recourse to extrinsic elements (e.g. preparatory works) that

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88 Marcella Favale et al., 2015, pp. 33, 66–67. The authors note also the Court’s preference for the teleological method and that these arguments, while possibly rhetorical, may provide an indication of whether the outcome of a case is favourable to rights holders or to users.
89 See infra 4.4.1 and 5.5.
90 Cf. Art. 216 TFEU. See Geiger & Schönerr, 2014a, p. 135 & n.102, 2014b, p. 443, citing CJEU jurisprudence in support of this principle regarding “mixed agreements”, such as TRIPS and the WCT. N.B. the WIPO Treaties were approved on behalf of the European Community by Council Decision 2000/278/EC.
91 Arts 9(1) TRIPS and 1(4) WCT incorporate by reference Arts 1–21 and the Appendix BC. N.B. Art. 1 WPPT states that the treaty shall not derogate from existing obligations that Contracting Parties have to each other under the RC.
92 CJEU, Laserdisken II, ¶39; CJEU, Luksan, ¶59; CJEU, DR and TV2 Danmark, ¶29.
93 CJEU, Peek & Cloppenburg, ¶¶29–33; CJEU, SGAE, ¶35; CJEU, Murphy, ¶189; CJEU, Infopaq I, ¶32; CJEU, Painer, ¶126; CJEU, UsedSoft, ¶42; CJEU, Donner, ¶23. An interpretation in light of international treaties can be understood as part of the Court’s systematic or contextual method of interpretation, as well as an express objective of the InfoSoc Directive. See Marcella Favale et al., 2015, pp. 37, 52, 72. The objective of consistency with international obligation is expressed in recitals 15 and 44 InfoSoc Directive.
94 See Section 3, Part III (“observance, application and interpretation of treaties”), Arts 31–33 VCLT. It is generally considered that Arts 31–33 VCLT “codify customary public international law on the matters covered” and that international treaties on copyright should be interpreted in its light. See Kur, 2008, p. 22; Ricketson, 2003, p. 5; Ricketson & Ginsburg, 2006, pp. 181–182, 189; Senffleben, 2004, p. 99.
demonstrate the intentions of the parties to the treaty. As we shall see, in this dissertation, these rules have most significance for the analysis of the three-step test in Chapter 5.

1.4 Scientific and Societal Relevance

This study aims to contribute to the body of knowledge in the area of EU copyright law. The problem of large-scale unauthorised online use and the preservation of a sphere of enjoyment and expression online has inspired some academic literature on ACS. But this literature has limitations.

First, most studies pay little attention to normative legal research. Second, many are restricted to specific modes of dissemination—commonly P2P—or subject matter, usually music. In a rapidly evolving technological landscape, such analyses risk obsolescence and are of limited value vis-à-vis other uses or protected subject matter. Third, many studies focus on the applicable international copyright treaties, US law or specific national laws. Hence, they are of less relevance to the copyright acquis, where rules on copyright limitations and collective rights management are different, especially relative to the US. Finally, many authors refrain from designing potentially viable legal models. When they do, some of the proposals are purely theoretical, or wholly unrealistic.

This dissertation addresses these lacunae by undertaking in-depth research on ACS under EU copyright law. The study aims to be pragmatic; the aim is reinforced by the development of the study in the context of an interdisciplinary research project on the legal, social and economic feasibility of ACS. The findings of that project provide empirical justifications for the legal inquiry into ACS, and are embedded into key parts of the analysis.

The societal relevance of this dissertation was illustrated in section 1.1. The large majority of the EU population uses the Internet. For a significant number of individuals, their online acts of enjoyment and expression are restricted by copyright, and the existing model of exclusivity with enforcement is problematic for all parties involved. This problem should be addressed by EU policy makers. Online enforcement is either impossible (de facto or due to high transaction costs) or undesirable, as it risks encroaching upon fundamental rights and freedoms of individuals and intermediaries. Criminalisation and strict enforcement alienate end-users—with file-sharers being among the best clients of the content industries—and diminish the respect for, and legitimacy of, copyright law. Furthermore, emerging online business models, like streaming

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95 Chapter 3 contains a systematic analysis of the literature and proposals on ACS.
98 Among these exceptions, see Fisher, 2004; Netanel, 2003.
102 See supra 1.1, and infra 5.3.2.3.3, and 5.3.3.3.
103 Eurostat, 2015.
platforms, despite generating significant rights revenue, fail to provide fair remuneration to creators or capture the market for mass-scale non-commercial use.

These challenges suggest an urgent need to study pragmatic legal solutions that enable end-users access to works in the digital environment, while assuring remuneration to creators or all rights holders, and promoting the development of the information society. The dissertation addresses that need by exploring flexibilities in EU copyright law in search of a consistent regulation of non-commercial online use. In doing so, the study offers policy makers a blueprint for reform of the *acquis* through ACS.

### 1.5 Outline

The main research questions are restated here:

Are Alternative Compensation Systems for non-commercial online use of works by individuals admissible under EU copyright law and consistent with its objectives and, if so, to what extent? How can and should EU copyright law incorporate an Alternative Compensation System?

The questions aim at studying the legal admissibility and normative consistency of an ACS with the EU copyright *acquis*. The different components of the questions are recast as sub-research questions, answered sequentially in each chapter.

History is a good teacher. This is especially true for copyright law, a field that has evolved in a dialectic relationship with technology. Chapter 2 seeks to understand whether ACS are a wholly new phenomenon or have instructive precedents in the history of copyright. To do so, it asks the following questions: What influential historical examples of copyright rules qualify as precedents to ACS? What is their legal design? What justifications underlie their adoption? The objective is to draw lessons from the past for the examination of similar models in the online environment. The chapter examines two influential copyright rules that qualify as precedents to ACS: private copying and broadcasting compulsory licences. The objective is to uncover their legal characteristics and justifications for implementation. The analysis is descriptive, explanatory and, from the normative perspective, justificatory.

Chapter 3 investigates how best to conceptualise legalisation proposals and their attributes in light of EU copyright law. In other words, how to understand these proposals in a legally coherent way that enables the study of their nature, characteristics and effects as compared to each other and EU law. The questions this chapter examines are: What legal models are most commonly used for legalisation proposals? How can these models be qualified in light of EU copyright law? What is their nature and effect on the exclusive right? What are their main attributes? The chapter designs a conceptual framework that systemises different types of ACS and their attributes, while connecting these to the *acquis*. The analysis focuses on different models of collective rights management—voluntary, extended, and mandatory—, on legal licences, and on state-funded systems. The chapter clarifies the scope and effects of legalisation proposals, as well as the central role of CMOs in their design. This research is primarily conceptual, setting the stage for the subsequent compliance and normative analysis of legalisation proposals in light of EU law.

Chapter 4 then maps the space available in the *acquis* for non-commercial online use by individuals, which is instrumental in evaluating the potential scope of an ACS. The main question addressed here is: how does the bundle of exclusive rights and corresponding
limitations in the acquis apply to non-commercial online use by individuals? The analysis provides a snapshot of what the law is in light of CJEU interpretation. It first proposes a typology of online use by individuals, including browsing, downloading, streaming, stream capture, uploading, hyperlinking, and digital adaptations. This typology is then examined against the exclusive rights of reproduction and communication to the public in the acquis. Where a use triggers the application of an exclusive right, the chapter assesses whether it may nonetheless be authorised by an exception or limitation, namely for temporary and transient use, private copying, quotation, incidental inclusion, and caricature, parody, or pastiche. Because the Court often follows a teleological method of interpretation, and sometimes relies on fundamental rights to define the scope of exclusive rights and limitations, the legal research in this chapter is both descriptive and normative. The chapter elucidates the legal status of mass online use and the extent to which the types of ACS identified in Chapter 3 would necessitate legislative reforms in the acquis.

Chapter 5 is the heart of the dissertation. It is divided in two main parts, which analyse the doctrinal and normative aspects of the dissertation’s main research questions.

The first part of the chapter builds on the previous analysis which determined that a statutory licence ACS offers the greatest promise for regulation of non-commercial use, while dealing with complex issues of substantive and territorial fragmentation of copyright in the EU. However, such a licence entails the adoption of one or more limitations to the exclusive rights of reproduction and communication to the public. Therefore, it must pass the three-step test. In this light, the chapter inquires: whether and to what extent is a statutory licence ACS for non-commercial online use by individuals admissible under EU copyright law, namely the three-step test? Answering this question helps to elucidate the space available in the acquis for the adoption of a limitation-based ACS. It also clarifies important normative issues, as the test is used to conduct a fair balancing exercise between the interests of creators, rights holders and the public, including the interest in the respect of users and intermediaries’ fundamental rights.

The second part of the chapter turns to the key normative question of this dissertation: whether and to what extent is a model of access and remuneration, such as an ACS, consistent with the general aims of copyright and the particular objectives of EU copyright law? This inquiry is made in light of the prevailing rationales of copyright and the objectives of the acquis, recasting the normative insights gained throughout the dissertation. In light of these elements, it is argued that EU copyright law can and should regulate non-commercial individual online use through a right of access and remuneration.

Chapter 6 offers conclusions and a proposal on how EU copyright law ought to incorporate an ACS. The first part of the chapter summarises the main findings of the study and teases out its descriptive and normative conclusions. The second part advances a reform proposal for the regulation of non-commercial online acts by end-users through a model of remunerated access. It advances a blueprint for a compensated limitation for non-commercial individual use that is consistent with EU copyright law. Following the pragmatic approach of the study, that blueprint is susceptible of adaptation to less stringent collective rights management models, supplemented by a soft law approach, which may be politically more feasible in the short to medium-term.
2 Copyright Rewind: Precedents for Compensation Systems

2.1 Introduction

This chapter examines precedents to ACS. Precedents are current or previous legal rules adopted to address similar problems to those associated with large-scale online infringement: market failure due to excessive transaction costs, difficult or undesirable enforcement of exclusive rights, and the regulation by copyright of disruptive technological developments.

The focus of the analysis is on the justifications, development and design of alternative legal models (to exclusive rights) for the regulation of mass use that ensure remuneration to creators or exploiters. The chapter explores copyright history to understand how certain precedents balance competing interests within copyright through regimes that share core attributes with ACS.

The chapter asks the following research questions:

- What historical examples of copyright rules qualify as influential precedents to ACS?
- What is their legal design?
- What justifications underlie their adoption?

Answers to these questions enable a better understanding of the ACS taxonomy in Chapter 3, and provide background and texture to the normative legal research of the dissertation. The analysis is descriptive in that it analyses and interprets legal rules and principles, and normative to the extent it looks at justifications for their introduction and design.104

To answer the research questions, two representative precedents are selected and their legal development traced through time. The focus is on primary legal sources, playing particular attention to their context, object and purpose.

A historical approach assists in understanding current rules, shedding light on legal developments, providing insights into dynamics of legal change, and explaining its underlying causes.105 It informs the opinions of authorities and, as a result, impacts legal interpretation.106

The discussion on online infringement recasts previous debates on adequate copyright responses to new technologies and changing market or consumer practices. Reactions to mass use often trigger re-assessment of the concepts of exclusivity and enforcement, weighed against efforts to balance the interests of rights holders and the public.107 The analysis intends to harness the lessons of copyright past with the expectation that these are useful for its future.

The chapter proceeds as follows. Section 2.2 explains the process of precedent selection. Section 2.3 examines the mechanics and justifications for the first precedent: statutory licensing for private copying. Section 2.4 does the same for the second precedent: the compulsory licence for

104  This internal/external distinction is a theoretical explanatory device; it mirrors the similar distinction made in legal history scholarship, on which see, e.g., Handler, 2013; Ibbetson, 2005.


106  See supra 1.3.

107  Taking an historical approach does not make this chapter an exercise in legal history research. On the latter, see Boorstin, 1941; Handler, 2013; Ibbetson, 2005; Rose, 2010.
broadcasting and communication to the public. Section 2.5 presents the conclusions of the analysis.

2.2 Precedent Selection

Many ACS proposals are extensions or adaptations of copyright schemes that emerged in response to disruptive technologies, market failure in the licensing and enforcement of copyright, or the undesirability of such enforcement in certain circumstances (e.g. against individuals in their private sphere). ACS precedents have been selected from that pool of schemes.

Precedents should assist in the subsequent examination of ACS against the EU copyright acquis. Hence, only rules that have a connection with this legal framework qualify. The aim is not to offer a detailed examination of acquis provisions that implement precedents, but instead to look at the legal history and the rules (some of which are still in force) that helped shape them.

In addition, precedents ought to have explanatory power vis-à-vis legalisation proposals, sharing core characteristics. Building on the preliminary characterisation of ACS in Chapter 1, it is possible to advance four attributes for precedents. They should:

- Constitute a copyright rule or scheme;
- Regulate large-scale or mass use of works;
- Provide a non-voluntary licence that aggregates works and types of use, as an alternative to exclusive rights;
- Ensure remuneration or compensation to creators or all rights holders.

These attributes—copyright rule, mass use regulation, non-voluntary licence and compensation—encapsulate the essential trade-off between remunerated access to works (for users) and control of use (by rights holders) that is the touchstone of ACS.

There are numerous candidates for precedents in international and European copyright law. They include statutory licences for private copying and reprography, “residual” remuneration rights\(^\textsuperscript{108}\), the compulsory licence for mechanical reproduction of phonograms,\(^\textsuperscript{109}\) the compulsory licences for broadcasting and cable retransmission, and the public lending right.

As several candidates possess the required attributes, it is necessary to filter the selection. This is done by introducing a criterion of diversity. An ACS regulates multiple exclusive rights, namely reproduction and communication to the public, including the right of making available. Thus, it is justifiable to select an influential precedent for each of those rights, as opposed to choosing regimes that apply to the same right. The remainder of this section looks at each attribute and the diversity criterion for selection of precedents.

\(^{108}\) These are typically unalienable non-exclusive remuneration rights granted mostly to authors and performers by operation of law after transfer or assignment of exclusive rights. See Ficsor, 2003b, p. 308. Examples are Arts 14\textsuperscript{ter} BC, 7(3) WCT, 9(2) WPPT, 14(4) TRIPS, 5 Rental Right Directive, and 1 Resale Right Directive.

\(^{109}\) Art. 13 BC. On the history of this provision, see Okpaluba, 2012, pp. 96–100.
2.2.1 Copyright Rule or Scheme

This attribute excludes rules outside the field of copyright, such as taxation or public grants. There are some ACS proposals of this type. According to them, non-commercial online use of works would not be subject to copyright protection, but creators would receive compensation through a tax paid out of the state budget, *ex ante/post* grants, or rewards. Chapter 3 explains these proposals, as some of their features are susceptible of transplant to copyright schemes.\(^{110}\)

Yet, most ACS are internal to copyright law and proposals to move regulation of non-commercial use completely outside the field are politically unrealistic, as they would require abrogation of international treaties and an overhaul of the *acquis*. Hence, a precedent that is external to copyright law has low explanatory power.

This view makes historical examination of public lending right systems less appealing due to their origins outside copyright regulation, despite later integration in national copyright laws and the Rental Right Directive.\(^{111}\)

2.2.2 Regulation of Large-Scale or Mass Use

The terms “large-scale” or “mass” refer to a large number of copyright-relevant acts in relation to a significant number of works. They are abstractions to describe the online activities of end-users giving rise to infringement on a wide-scale, enabled by technologies for reproduction and dissemination of near perfect copies of works. Although this dissertation focuses on the regulation of non-commercial use, this particular attribute does not intend to qualify the use in question as “commercial” or “non-commercial”.\(^{112}\)

P2P file sharing is a good example of a mass use. It involves up- and downloading of works by thousands or millions of Internet users. These activities are typically restricted under the exclusive rights of reproduction and communication to the public.

A clear case of a copyright rule regulating mass use is the private copying limitation and accompanying statutory licence. The limitation privileges reproductions made by end-users for non-commercial purposes in the private sphere, while guaranteeing fair compensation to rights holders. This model is often cited as inspiration for ACS and has the potential to apply to acts of downloading. It is therefore the most suitable precedent for the right of reproduction.

Following the diversity criterion, the choice of private copying would imply the exclusion of other rules applying to the reproduction right, such as the compulsory licence for mechanical reproduction of phonograms in the BC, and the reprography statutory license, which allows commercial and institutional users to make mass reproductions of works on paper or any similar medium through photographic techniques against the payment of fair compensation to rights holders.

\(^{110}\) See *infra* 3.3.6.

\(^{111}\) For analysis of the public lending right before the rental Right Directive, see ALAI, 1983, and Explanatory Memorandum Rental Right Directive, pp. 12–18.

\(^{112}\) See Geller, 1991, pp. 23–25, for a different definition of mass use as an antonym to “market use”. Some ACS proposals cover commercial and non-commercial use (see *infra* 3.4.2). However, the focus of this study is on the latter, ACS for non-commercial use. Cf. *supra* 1.2.
holders, but without their authorisation. 113 Because the origins and development of reprography and private copying are intertwined, examining reprography in addition to private copying would add little value to the analysis.

Conversely, the compulsory licence for broadcasting appears a good choice. Like reprography, the licence regulates large-scale use due to the high aggregate number of copyright acts and works involved, even if the number of commercial users (e.g. copy shops or broadcasters) included is low. In contrast to reprography, the compulsory licence for broadcasting applies to the right of communication to the public. It allows broadcasting organisations to transmit by wireless means for public reception (meaning an indefinite number of end-users) vast quantities of works, against payment of equitable remuneration but without a requirement for authorisation. Moreover, the licence has the potential to cover online use such as webcasting of musical works and phonograms. 114

Other schemes, like those applying to residual remuneration rights (rental and droit de suite) are inadequate for precedents. They primarily regulate the legal effects of the transfer or assignment of exclusive rights and cover a relatively small number of uses. 115

2.2.3 Non-voluntary Licences

“Non-voluntary licences” are legal mechanisms that enable mass use of works absent authorisation and subject to the payment of remuneration or compensation. In international copyright law, the meaning of the term is sometimes unclear and usually tied to the expressions “exercise” and “conditions on exercise” of rights. The expressions refer to the option for domestic laws to regulate certain copyright use through legal licences or mandatory collective management. 116 These mechanisms have different effects on the nature and exercise of the exclusive right. Figure 1 contains a simplified conceptual map of non-voluntary licences.

113 See Dreier, 2006, p. 57, on the potential conflict between Art. 13 BC and Art. 2(a) InfoSoc Directive. Dreier admits the possibility of compulsory licences and exemplifies with the existing German scheme under Art. 13 BC. On reprography, see Art. 5(2)(a) InfoSoc Directive.
114 See infra 2.4.
115 Geller, 1991, p. 23 & n.7, not qualifying the commercial rental of copies as a mass use but rather a market use. However, Geller recognises its “appearance of a mass use, at least when the chain of privity from the author to the renting end-users is broken by the first sale or exhaustion doctrine.”
116 See infra 3.2 and 3.3.4.2.
“Legal licences” include statutory and compulsory licences. Statutory licences restrict the nature of a pre-existing exclusive right through the application of a compensated limitation. The term “compulsory licence” is used both as a synonym for statutory licence and with different meanings. In the context of this chapter, it is sufficient to note that compulsory licences do not usually regulate a pre-existing exclusive right; rather, they are imposed *ab initio* to govern a new type of use through a “self-standing” remuneration right.\(^{117}\) (The possible meanings of the term “compulsory licence” are detailed in the ACS taxonomy in Chapter 3.)

Private copying and compulsory licensing for broadcasting provide examples of the different types of licence with a link to the *acquis*. The first is based on a statutory licence tied to a compensated limitation, and is recognised in Article 5(2)(b) InfoSoc Directive. The second relates to a remunerated non-exclusive right tied to a compulsory licence, traces of which are found in the SatCab and Rental Right Directives. Both licences are typically administered through obligatory collective management.\(^{118}\)

In this dissertation, a distinction is made between two schemes where collective rights management is imposed for administration of copyright. “Mandatory” collective management is the term used to refer to schemes imposed by legislators in order to regulate exclusive rights through the intervention of a CMO. In contrast, the term “obligatory” collective management is used for cases where collective administration accompanies legal licences as the model for administration of remuneration or compensation rights. As explained in Chapter 3, many ACS proposals rely on both schemes.\(^{119}\)

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\(^{118}\) See Art. 4 SatCab Directive and Arts 8 and 10 Rental Right Directive.

\(^{119}\) See *infra* 3.3.4. On the conceptual distinction between mandatory and obligatory collective management, see also *infra* 3.2.
Mandatory collective management is distinguishable from legal licences in that it does not impose restrictions on the nature of the exclusive right per se. It is not a copyright limitation but instead a restriction on the exercise of copyright (see Figure 1). Therefore, this model of collective management can theoretically apply to exclusive rights, as exemplified by the special regime for the cable retransmission right in the SatCab Directive. (Chapter 3 explores the rationale for this distinction and its implications. Importantly, not all authors categorise mandatory collective management as a non-voluntary licence.)

2.2.4 Equitable Remuneration or Fair Compensation

To qualify as precedent, the non-voluntary licence selected must ensure compensation for rights holders or at least creators. Outside remuneration through royalties for the use of exclusive rights, EU copyright law recognises two categories of compensation element—equitable remuneration and fair compensation—that reflect different non-voluntary licences.

The concept of equitable remuneration attaches to self-standing remuneration rights or rights of remuneration per se. These are rights designed from origin not as restrictions to exclusivity, but as non-exclusive rights vested in rights holders (typically creators) to obtain monetary consideration from the use of their works or related subject matter by third parties. Equitable remuneration rights are directly provided in “international copyright and related rights norms, and in national copyright laws, as a right to such remuneration”.

Equitable remuneration rights are commonly tied to compulsory licences for uses or forms of exploitation of works not previously covered by an exclusive right. Examples at the international level are the equitable remuneration rights for broadcasting of works and for “secondary uses” of phonograms. In the acquis, it is possible to find a right for an unwaivable and equitable remuneration for rental, an optional right of remuneration for public lending, and rights for a single equitable remuneration for broadcasting and communication to the public.

In international treaties, the concept of “equitable” remuneration is often undefined and domestic laws have leeway to shape it beyond the ordinary meaning of a fair and just remuneration. Most commentators understand the term to signify that use of the work under the compulsory licence entitles authors to receive compensation equal or similar to that which would be obtained following negotiations in the absence of the licence. The resulting remuneration could be similar to the market value of the use, but could also be lower, depending on the factors considered (e.g. frequency of use), the balance of negotiations between stakeholders, and the position of the national (executive, legislative or judicial) body competent to set the final rates, absent agreement.

See infra 3.3.4.2, for discussion on the legal nature and effects of mandatory collective management.

Arts 8–12 SatCab Directive. See infra 2.4.4 and 3.3.4.


Arts 11bis BC and 12 RC. See infra 2.4.2 and 2.4.3.

Respectively, Arts 5, 6 and 8(2) Rental Right Directive.

See, e.g., Arts 11bis(2) BC and 12 RC, analysed infra at 2.4.2 and 2.4.3, respectively.
In the *acquis*, although similar considerations are valid, the CJEU interprets the concept of equitable remuneration as based on the “value of the use in trade” and following a logic of balance between competing interests.\(^\text{128}\) Regarding calculation of the right of equitable remuneration for broadcasting (Article 8(2) Rental Right Directive), the Court allows the same to operate by reference to variable and fixed factors, such as the number of hours of phonograms broadcast, the viewing and listening densities achieved by the radio and television broadcasters represented by the broadcast organisation, the tariffs fixed by agreement in the field of performance rights and broadcast rights in respect of musical works protected by copyright, the tariffs set by the public broadcast organisations in the Member States bordering on the Member State concerned, and the amounts paid by commercial stations, provided that that model is such as to enable a proper balance to be achieved between the interests of performing artists and producers in obtaining remuneration for the broadcast of a particular phonogram, and the interests of third parties in being able to broadcast the phonogram on terms that are reasonable, and that it does not contravene any principle of Community law.\(^\text{129}\)

“Fair compensation” has different contours. This concept accompanies certain limitation-based statutory licences. Before the InfoSoc Directive, most European systems would subject compensated limitations to the payment of equitable remuneration, following the blueprint of other non-exclusive rights in the *acquis*. After the directive, that concept was replaced by “fair compensation”. Rights of fair compensation are now recognised for reprographic reproductions, private copying, reproductions of broadcasts by non-commercial social institutions, and for use of orphan works by specific organisations.\(^\text{130}\) Furthermore, recital 36 InfoSoc Directive suggests a preference of the EU legislator for the concept of fair compensation in connection with future compensated limitations on the directive’s exclusive rights of reproduction, communication to the public, and distribution.\(^\text{131}\)

Recital 35 InfoSoc Directive clarifies that the “form, detailed arrangements and possible level” of fair compensation should take into consideration the particular circumstances of the use, and that the potential harm caused by such use to rights holders provides a “valuable criterion” to evaluate those circumstances. Therefore, the notion of “harm” is the basis of fair compensation.\(^\text{132}\) If the harm is reduced or non-existent, it is possible that the payment of fair compensation is reduced or eliminated accordingly. This reduction or elimination is possible where other payments for the same use have been made (e.g. as part of a licence fee) or the use

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\(^\text{129}\) CJEU, *Sena*, ¶46. See also CJEU, *Kanal 5 and TV4*, ¶¶37, 41.

\(^\text{130}\) See, respectively, Arts 5(2)(a), (b) and (e) InfoSoc Directive, and 6(5) Orphan Works Directive.

\(^\text{131}\) Recital 36 reads: “The Member States may provide for fair compensation for rightholders also when applying the optional provisions on exceptions or limitations which do not require such compensation.” Following the objective of harmonious interpretation of limitations in recital 31, it would make sense to adopt the concept of fair compensation to new compensated limitations on the exclusive rights in the InfoSoc Directive.

\(^\text{132}\) See Art. 5(2) and recital 35 InfoSoc Directive. See infra 2.3.3 and 4.4.3.3. Beyond the legal bases referenced, the concept of “fair compensation” in the *acquis* is developed in the following CJEU judgments: *Padawan*, *Stichting de Thuiskopie*, *VG Wort*, *Amazon.com*, *Luksan*, *ACI Adam*; *Copydan*, and *Reprobel*. For analysis, see Poort & Quintais, 2013; Quintais, 2015b.
in question causes minimal harm (de minimis). Finally, the level of fair compensation should take into consideration the degree of use of TPMs.133

Although the directive is silent on the topic, the CJEU has interpreted fair compensation as an autonomous concept of EU law 134 and, after weighing different objectives of the InfoSoc Directive—establishing a high level of protection, safeguarding internal market competition and striking a “fair balance”—qualified the right as unwaivable.135

2.2.5 Selection of Precedents

In conclusion, precedents are copyright rules that regulate mass use of works through non-voluntary licences and subject to compensation. They address challenges resulting from technological disruption, market failure related to difficulties in licensing or enforcement of copyright, and undesirable enforceability of copyright. Under the criteria adopted here, the legal regimes most suited to serve as precedents are statutory licences for private copying and compulsory licences for broadcasting and communication to the public. Both schemes are frequently exercised through collective management, and have influenced multiple ACS proposals.136

2.3 Statutory Licensing for Private Copying

The origin of the private copying levy system can be traced back to landmark decisions of the German Federal Court of Justice (Bundesgerichtshof or BGH) between 1955 and 1964, namely in the Grundig Reporter and Personalausweise cases, which influenced the draft of the 1965 German Copyright Act.137

The invention, in the 1930s, and market introduction in Germany, in the 1950s, of magnetic tape recording, followed by massive consumer uptake, allowed end-users for the first time to mechanically copy or “home tape” works, especially sound recordings. The litigation that ensued led to the introduction of a non-voluntary licensing scheme for private copying in the 1965 Act.138

The initial scope of the German levy system covered tape recording equipment, but was extended to tape media in 1985. Technological developments, a drop in equipment prices, and the high degree of penetration of consumer recording devices in Germany all contributed to the

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133 Recital 35 and Art. 5(2)(b) InfoSoc Directive.
134 See CJEU, Padawan, ¶32, 37, applying by analogy to the concept of “equitable remuneration” in Art. 8(2) Rental Right Directive. See also CJEU, Sena, ¶24.
135 See Art. 5(2)(b) and recitals 31 and 32 InfoSoc Directive. On the unwaivable character of fair compensation see CJEU, Luksan, ¶100, 102, 104-106. See also: CJEU, Padawan, ¶34–35; CJEU, Stichting de Thuiskopie, ¶34; CJEU, Murphy, ¶186, identifying as the principal objective of the InfoSoc Directive the establishment of a “high level of protection of authors, allowing them to obtain an appropriate reward for the use of their works”; CJEU, DR and TV2 Danmark, ¶35. For the use of the fair balance criteria in recital 31 within the context of the Court’s systematic interpretation of provisions in the directive, see infra 4.4.1.4 and 5.3.3.
136 See infra 3.3.4 and 3.3.5.
steady expansion of levy targets to encompass multiple reproduction technologies and related supports.\textsuperscript{139}

German levy schemes were influential in other European countries’ laws and throughout the world.\textsuperscript{140} They likewise impacted international copyright law, with private copying featuring in UNESCO and WIPO agendas, as well as in the preparatory works of the 1967 Stockholm act of the BC—playing a role in shaping the three-step test—and the 1996 WIPO Treaties. Finally, the German scheme provided the blueprint for the private copying limitation in the InfoSoc Directive.

Because it involves acts of reproduction, private copying calls into play Article 2 InfoSoc Directive. That provision contemplates a broad exclusive right, covering all digital acts of reproduction over the Internet, except transient copies.\textsuperscript{141} Article 5(2)(b) InfoSoc Directive allows Member States to provide limitations to the Article 2 reproduction right:

\begin{quote}
in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned.
\end{quote}

This constitutes the so-called private copying limitation. Its implementation is conditional upon the grant of fair compensation, calculated with reference to the criteria mentioned above in 2.2.4. The directive does not mention levies, but the recognition of a fair compensation right is a tacit endorsement of levy systems existing in national legislatures.\textsuperscript{142} This section examines the development of the private copying limitation from its inception to its inclusion in the InfoSoc Directive.

2.3.1 A German Legal Creation

The years of 1927 (in the USA) and 1928 (in Germany) saw the issue of the first patents for inventions of sound carrying magnetic tapes.\textsuperscript{143} Following the early development of tape recording technology and its adoption by commercial users in Germany in the 1930s, notably the widespread use of the “Magnetophon” by the German public radio service, the 1950s saw the gradual transition of tape recorders into the consumer market.\textsuperscript{144}

Interoperability was a design feature of such devices, including a function for recording radio broadcasts and phonograms—for which they were duly advertised—allowing home taping of

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{139} Reporting figures for the German market and that of other Member States see Green Paper on Copyright and the Challenge of Technology 1988, pp. 110–113.
\item \textsuperscript{140} On the general significance of the German Act as a model of international copyright law, see Cornish, 1995, p. 804.
\item \textsuperscript{141} Arts 2 and 5(1) InfoSoc Directive. Note also that Recitals 9 and 11 seem to favour an “in dubio pro autore” interpretation of this right. See Ohly, 2009, p. 217.
\item \textsuperscript{142} P. Bernt Hugenholtz, 2012b, pp. 192–193.
\item \textsuperscript{143} Boytha, 1993, pp. 295–296.
\item \textsuperscript{144} P. Bernt Hugenholtz, 2012b, p. 181. See also Green Paper on Copyright and the Challenge of Technology 1988, p. 101.
\end{itemize}
\end{footnotesize}
works. Consumer adoption of the technology was exponential, and the same was used to record both protected content and that not protected by copyright (e.g. dictation).

The German author’s CMO for musical performing and mechanical reproduction rights—the Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte (GEMA)—was quick to recognise and label the phenomenon a “large-scale infringement of the musical works it represented”. Its reaction was to propose that every device owner pay a monthly amount as consideration for the authorisation for home taping. This proposal for a “personal possession” licence was met with widespread criticism.

The objections to the proposal were many and varied: the reproduction devices were similar to other licence-free objects (like musical instruments) allowing infringing use; the licensing requirement conflicted with the constitutional right of privacy; and unauthorised use resulted more from the industry’s inability to meet consumer demand than from home taping activities. (It is remarkable that near identical arguments are central to today’s online infringement debate.)

The GEMA proposal never made it to law. Instead, some manufacturers and producers entered into a voluntary licensing scheme with the organisation, agreeing to pay a one-off amount of “1% of the production value of each manufactured tape recorder”, as consideration for an authorisation to sell consumers “GEMA free machines”. As Hugenholtz points out, this scheme is at the inception of the 1965 statutory levy system.

Nevertheless, other manufacturers refused the “voluntary levy” on the grounds of non-liability for private acts of end-users and relying on the express authorisation for personal use copies in the 1901 German Copyright Act. In response, GEMA sued.

2.3.1.1 Pre-1965: The GEMA Litigation that Shaped the Act

In 1952, GEMA and multiple record companies sued several tape recorder manufacturers. Besides asking for damages, the plaintiffs sought two injunctions against manufacturers, aimed at preventing both the sale of tape recorders without their authorisation and related advertising that did not include a notice on the GEMA licence requirement.

To some surprise, the Berlin Court of First Instance awarded the injunctions in 1953, stating that not only were end-users infringing authors’ exclusive rights, but that “dealers” of recording devices and tapes were likewise infringing because they participated in “the illicit utilization for putting the devices at the public's disposal without informing the purchasers of their liability”.

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147 P. Bernt Hugenholtz, 2012b, p. 182 citing the reaction in 1950 from Dr. Eric Schulze, General Director of GEMA
149 P. Bernt Hugenholtz, 2012b, p. 182.
150 P. Bernt Hugenholtz, 2012b, pp. 182, 189.
151 P. Bernt Hugenholtz, 2012b, p. 189.
155 Collová, 1966, p. 106.
As a result, two identical cases—*Grundig Reporter I* and *II*—made it to the BGH. The first focused on copyright managed by GEMA, whilst the second addressed related rights in sound recordings held by plaintiff record companies.\(^{156}\) The cases were decided in 1955.

The legal bases for the lawsuit were Articles 11(1) and 15 of the 1901 German Copyright Act. The first provision gave copyright owners an exclusive right of reproduction, while Article 15(2) exempted copying for non-commercial private purposes.\(^{157}\) In essence, the *Grundig Reporter* cases examined, first, whether private non-commercial home taping triggered the exclusive reproduction right and, second, whether the private use exception exempted home taping.\(^{158}\)

The issue “sharply divided” German legal doctrine. One school of thought relied on literal statutory interpretation and the principle that copyright did not extend to the private sphere. That line of thinking echoed Kohler’s proposition to exclude consumptive uses from copyright protection. Another school of thought, including the likes of Ulmer, understood home recording technology as fundamentally transforming the role of users within the copyright ecosystem, justifying their analogy to commercial users for liability purposes.\(^{159}\)

In its *Grundig Reporter* decisions, the BGH sided with the latter, in what can be viewed as a watershed moment for copyright regulation—a shift from focusing primarily on market use to regulating large-scale non-profit individual use as well.\(^{160}\) For the Court, private use was an exception to the general exclusive right, and thus subject to strict interpretation. The legislative history of the 1901 Act made clear that this exception was not meant to cover home taping of musical works, a possibility “beyond the imagination of the legislator”.\(^{161}\)

Home recording technology thus posed a conflict unforeseen by the legislator, leaving the BGH with a margin of discretion to develop the law through interpretation. In doing so, the Court favoured teleological and purposive interpretation of the law over its literal element.\(^{162}\) Established case law on conflicts of interest of this nature was to the effect that the “creative sphere of the authors” prevailed over the “private sphere of the user”.\(^{163}\)

In light of this, the BGH was of the opinion that authors enjoyed a right to a “just pecuniary reward” for all use of works, irrespective of technical means. Although reflected in Article 27(2) of the Universal Declaration of Human Rights (*UDHR*), the right did not require statutory recognition, as it derived from natural law and found its justification in the fact that individuals “enjoyed” the work.\(^{164}\) The nature of the right was such that it applied even for use that “did not


\(^{159}\) See P. Bernt Hugenholtz, 2012b, p. 184, providing a summary of the debate. See also Ulmer, 1986, pp. 711–712, expounding similar arguments vis-a-vis reprography.


\(^{164}\) See P. Bernt Hugenholtz, 2012b, p. 185, citing BGH, 18.05.1955, I ZR 8/54 (“Grundig Reporter I”), 496.
show any direct economic profit”. Thus framed, the scope of the exclusive reproduction right included home taping acts and left no freedom to make private copies under German law. The BGH further justified the strict reading of the exception on its limited rationale under the 1901 Act, which was “to allow financially weak musicians to make hand-written copies of copyright protected sheet music”. From that perspective, it made little sense to extend the exception to all consumers.

That was especially true, the BGH added, because the quality of home taped copies posed a risk of subsequent commercial piracy, and would negatively influence record sales, likely harming authors’ economic interests. Pursuant to these justifications, the enforceability of the right was immaterial to the recognition of its existence.

However, because consumers made the copies, application of the exclusive right to home taping did not imply direct liability for manufacturers. The BGH cleared this liability hurdle through the application by analogy of the indirect liability concept developed under German patent case law. The court justified the analogy on the basis of recording devices’ susceptibility to use for copyright infringement, and manufacturers’ express advertisement of such use. As a result, manufacturers and producers in both Grundig Reporter cases were subject to injunctions and ordered to only sell their devices with “GEMA-notices”. Despite this, no damages were awarded.

Predictably, the reaction of device manufacturers was to cease advertising infringing uses, in an effort to escape liability and the GEMA-notice requirement. True to form, GEMA filed new lawsuits against Grundig and retailers, which caused the BGH to extend the obligation to include GEMA-notices in all advertisements for reproduction devices, irrespective of the reference to infringing uses.

GEMA continued to pursue the litigation route against manufacturers/producers, retailers and, on occasion, private owners of devices. However, despite legal successes, the litigation did not yield the desired results. This was for two main reasons. First, the monitoring and enforceability of the exclusivity claim on the ground was difficult. Second, the legal barriers erected by the right of privacy under Article 13 of the German Constitution hampered enforcement attempts.
make things worse, consumer uptake of GEMA user licences was negligible when compared to the number of devices sold.176

In the midst of this climate, the German Government submitted a new draft copyright law to Parliament in 1962. The draft included a remuneration right for private use but failed to impose liability for payment of the remuneration on manufacturers/producers, considering they “did not undertake an exploitation of works in the sense of copyright”; instead, liability for payment resided with equipment owners, i.e. consumers.177

In a parallel track, GEMA stepped up efforts to force producers into its licensing programme. It asked a Berlin court to order device manufacturers to request information from wholesalers and retailers on the identity of consumers purchasing equipment. The objective was to subsequently approach consumers and either monitor the lawfulness of their use or propose a licence.178 That litigation led to the BGH’s landmark 1964 Personalausweise decision.

In Personalausweise, the BGH restated its earlier case law and ruled that the mere placement of “equipment on the market could of itself be held as aiding and abetting innumerable violations of copyright”. However, the court refused to impose a general prohibition on the sale of recording devices, essentially on two grounds. The first was the susceptibility of the devices to use for non-infringing purposes. The second was the lack of proportionality of such a ban vis-à-vis the constitutional right of privacy (or inviolability of a citizen’s home).179 In addition, the judgment nudged the parties towards a licensing scheme where intermediaries could pass on the royalty or fee to end-users in the retail price, which the court considered the best way for GEMA to collect equitable remuneration for authors.180

2.3.1.2 The 1965 German Copyright Act and its 1985 Amendment

Personalausweise had a decisive influence on the legislative process of the 1965 German Copyright Act.181 The Judiciary Committee of the German Parliament cited the judgment to emphasise that producers “took express advantage of the popularity of private home taping”, and justify a proposal for a levy whereby the liability for payment resided with manufacturers/producers, under what became Article 53(5) of the new Act.182

On the rationale and design for the system, the committee opined that the exclusive reproduction right did extend to home taping acts, but enforcing the same was not feasible.183 It did not view the use of devices for non-infringing purposes as an obstacle to levies, due to the likely use of those devices for recording works.184 Furthermore, the committee expected producers to pass on

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180 P. Bernt Hugenholtz, 2012b, p. 188 noting that the Court suggests a “one-time lump sum payment”. See also Mac, 1973, p. 109.
184 J. Reinbothe, 1981, p. 40; Mac, 1973, p. 113. According to J. Reinbothe, 1981, p. 40, the Committee had doubts on a similar probability regarding blank tapes, which led to their exclusion as levy targets. For a different opinion, see W.
the levy to consumers in the retail price of tape recorders, a well-known practice in the analogous case of “publishing licenses or the production of records”. 185

In advancing its arguments, the committee was concerned with finding a balanced solution—one which respected the fact that limitations in the 1965 Act were “imposed in the public interest”—but was mindful of not leading “to unjustified advancement of private commercial interests of users”. 186

Article 53 (and in particular its paragraph 5) of the Act granted authors a remuneration right for acts of private use by means of sound or video recording; the right was further extended to performers, producers of phonograms and films. 187 The provision imposed liability on producers and importers of recording devices to pay remuneration to rights holders for the possibility of making copies of works that their devices offered. 188

Because only producers/importers of tape recorders “suitable” for private recordings were liable for payment, liability was excluded in relation to “professional purpose” or “dictation” recording apparatus. 189 The law brought importers of devices into the scheme to make effective payment claims otherwise directed at foreign producers of devices, which risked being unenforceable; devices intended for export were not subject to levies. 190

The aim was to circumscribe levy targets to devices used within the German territory, mirroring the jurisdiction of the German Copyright Act. Reinbothe argues that such a feature made the levy a “copyright remuneration” instead of a tax, precisely because it provided “for the opportunity… to make such reproductions” within the Act's jurisdiction. 191

Calculation of remuneration was based on a percentage (5%) of the devices’ manufacture or factory price. 192 Due to transaction costs related to the enforcement of the remuneration claim, Article 53(5) imposed a system of obligatory collective management. The model, known at the time for management of other equitable remuneration rights 193, was to be carried out by a sole CMO. 194

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186 W. Nordemann, 1980, p. 54.
187 See J. Reinbothe, 1981, p. 41; Mac, 1973, p. 107; W. Nordemann, 1980, p. 50. Related rights owners were beneficiaries by virtue of Arts 84, 85(3) and 94(4) of the Act. See Collová, 1991, p. 44. However, broadcasting organisations were excluded, an exclusion that was kept in subsequent amendments of the law. See: Art. 87(3) 1985 German Copyright Act; Green Paper on Copyright and the Challenge of Technology 1988, p. 105.
192 Collová, 1991, p. 44; J. Reinbothe, 1981, p. 42. In practice and until 1980, German CMOs only managed to negotiate percentages between 2.2% and “slightly over” 4%, and had difficulties monitoring the accuracy of the data disclosed by debtors. See W. Nordemann, 1980, p. 52, arguing that the remuneration right left authors' CMOs in a weaker bargaining position as compared to the exclusive right.
193 See Jorg Reinbothe, 2010, p. 220, identifying the artists' resale right (sec. 26), rental and lending rights (sec. 27), and mechanical licensing (sec. 61).
Different organisations—including GEMA (for musical authors), VG Wort (for literary authors), and GVL (for performing artists and producers of phonograms)—set up the *Zentralstelle für private Überspielungsrechte* to function as a central agency for collection of the levy and its distribution to member CMOs, as well as negotiation broker between rights holders and levy debtors.\(^{195}\)

The levy system’s final judicial hurdle was cleared following enactment of the 1965 Act. In 1971, in an action brought by the recording equipment producer Uhe, the German Federal Constitutional Court assessed the compatibility of Article 53(5) with multiple constitutional rights and duties: freedom of action, equal protection, freedom of profession, and protection of property.\(^{196}\) The court considered the levy scheme to be in line with the German Constitution. The judgment relied on the likelihood that devices would be used for infringing purposes, and the possibility that levies would be passed on to purchasers, thus preventing unequal treatment of certain levied manufacturers.\(^{197}\)

Twenty years after its implementation, in 1985, the private copying levy system was amended. The German legislator extended the levy to blank tapes, and implemented a model for the fixation of amounts through periodically revised tariffs, instead of on a percentage basis.\(^{198}\) The change was an attempt to curtail problems in enforcing the limitation, and aimed primarily at popular lower fidelity cassette recorders and millions of blank tapes sold annually in Germany.\(^{199}\)

Due to the technology-neutral legal formula of the provision—“equipment suitable for making such reproductions”—and the rapid development of consumer-ready copying technology, the scope of the levy gradually expanded and developed to encompass a plethora of analogue, and later digital, devices and media, ranging from cassette recorders and VCRs, to CDs, USB sticks, external discs and so forth.\(^{200}\)

In 1986, the 56th Congress of the International Literary and Artistic Association (ALAI) in Berne discussed copyright levies and the 1985 German Copyright Act. Professor Françon broached the topic in the general report on “the future of copyright”, as did Dr. Adolf Dietz in a complementary report on private copying and reprography.\(^{201}\) The reports and ensuing discussions reflected two main criticisms of levies. The first was that levies represented a “dangerous” trend towards non-voluntary copyright licensing, which challenged the principle of


\(^{196}\) Respectively, Arts 2, 3, 12, and 14 of the then German Constitution. J. Reinbothe, 1981, p. 40. BVerfG (German Federal Constitutional Court), 07.07.1971 - 1 BvR 775/66 (“Private Tonbandvervielfältigungen”).


\(^{199}\) See W. Nordemann, 1980, p. 51 describing the types of devices and tapes massively used in Germany and excluded from the 1965 Act. See also Collová, 1991, p. 48.

\(^{200}\) P. Bernt Hugenholtz, 2012b, pp. 190–191

exclusivity and left authors in a weaker bargaining position. The second was that the workings of levy systems through CMOs were not efficient or transparent.\textsuperscript{202}

For the participants, including leading scholars of the time, statutory licensing for private copying was justified on a pragmatic basis, as the best available solution for the exercise of rights, the exploitation of which involves unenforceable mass use.\textsuperscript{203}

Despite criticism on certain aspects of the system, the amounts collected under it increased gradually since its inception and the model became widely accepted in Germany.\textsuperscript{204} It was only a matter of time until improvements in consumer reproduction technology made other countries feel the need to implement levy systems based on the German model.

\subsection*{2.3.2 A Legal Chronology of International Developments}

\subsubsection*{2.3.2.1 Berne Convention: The 1967 Stockholm Revision Conference}

Prior to 1965, private copying was present but not prominent in international copyright debates. From the rights holders’ standpoint, the push for a statutory licensing solution was advocated in various resolutions and recommendations of the International Confederation of Authors and Composers Societies (CISAC).

As early as 1949, the issue of reproduction for private use and the possibility of a “statutory grant of remuneration calculated on equipment and/or blank tapes” were discussed in a CISAC assembly meeting. There, the need was expressed to reach a “new solution capable of protecting the legitimate interests of authors without impairing the dissemination of science and culture that is made possible by such new inventions”.\textsuperscript{205} Following that initial pronouncement, it is possible to find other mentions of the topic up until the confederation’s Rome congress in 1962. These, however, had little to no follow-up.

Such apathy can be partially justified by the fact that, although popular, the technologies of tape recorders, reel-to-reel tapes, and audio cassettes were in their infancy, with the respective industries “experiencing production and marketing difficulties”.\textsuperscript{206} Private copying and the legal developments in Germany, however, would end up having significant influence on the design of the three-step test at the 1967 Stockholm revision conference of the BC.\textsuperscript{207} (The test, currently set forth in Article 9(2) BC, states: “It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author”)


\textsuperscript{205} Collová, 1991, pp. 36–38.


\textsuperscript{207} Senffleben, 2004, p. 53. For an overview of the conference, see C. Masouyé, 1967.
The conference was preceded in 1965 by a report from a committee of governmental experts from the *Bureaux Internationaux Reunis pour la Protection de la Propiete Intellectuelle* (BIRPI). The report advanced two main proposals on this topic. First, introducing a “general provision establishing the right of reproduction jure conventionis”, i.e. as a minimum of protection. Second, recognising a formula allowing national legislation to “provide for exceptions” in favour of cultural and public interests, thus limiting the “recognition and exercise” of the reproduction right. The latter point, in particular, gave rise to much debate in the committee of experts.

The main argument for introducing the right was the “obvious” principle that “all the forms of exploiting a work which have, or are likely to acquire, considerable economic or practical importance must in principle be reserved to the authors”. Exceptions to this principle, the report stated, were “unacceptable”.

Nevertheless, national laws contained an array of exceptions “in various public and cultural interests”, including for private use. In that light, the report proposed that Article 9 BC include a three-part formula for introducing “exceptions of lesser importance”: (1) respect for other Berne provisions; (2) definition of “clearly specified purposes”, e.g. private use; and (3) that exceptions “not enter into economic competition with the work”. The BIRPI report considered a provision of this type a superior option to an exhaustive list of exceptions. The report further admits that exceptions are valid absent a “right to claim remuneration”. Still, it goes on, if a remuneration right is granted, “the scope of the power to make exceptions widens to some extent”.

At the Stockholm conference, the Main Committee I discussed the right of reproduction in Articles 9, 10 and 10bis BC. The conference introduced for the first time a general reproduction right applying to all literary and artistic works “in any manner or form” in Article 9(1). Concerns with private copying shaped the right.

For instance, Germany proposed that the provision include a reference to recording of protected works “by instruments capable of reproducing them mechanically”. Other proposals were broader in scope, but the consensus was that a general reproduction right would encompass such recordings, including for private use.

The programme’s draft paragraph (2) set out the general exceptions to the reproduction right, enabling national legislation to permit them in three cases, divided into items (a), (b) and (c). Item (a) referred to “private use”, item (b) to “judicial or administrative purposes”, and item (c)
included the future second and third conditions of the three-step test.\(^{218}\) Item (a) and its influence on item (c) are of interest here.

A reading of the committee’s debates clarifies the relevant opposing interests. On one level, there were proposals to prevent exceptions to a general reproduction right.\(^{219}\) Countries like France, the Netherlands and Italy wished to replace “private use” with the narrower “individual or family use”, while including a more general formula in item (c). Germany, for its part, wished to make the private use exception subject to a third condition in item (c): that reproduction should not conflict with the “author’s right to obtain equitable remuneration”, to be fixed by a competent authority, absent agreement between the interested parties.\(^{220}\)

In Germany’s view, it was not possible in Stockholm to reach international consensus on a private copying exception. Regardless, further study on the rapid phenomenon of home taping was needed, as it threatened the “substance” of the reproduction right itself.\(^{221}\)

An opposing scheme to extend exceptions was advocated by developing countries. They argued for applying general or territorially limited compulsory licensing for reproduction—by regulating the “conditions of exercise” of the right—coupled with a remuneration right for authors.\(^{222}\)

A third proposition, embodied in a proposal by the UK delegate, was to eliminate items (a) and (b) and introduce a single formula, to be merged with item (c): “in certain special cases where the reproduction does not unreasonably prejudice the legitimate interests of the authors.”\(^{223}\)

After re-ordering the conditions and adjusting the text, the committee adopted that proposal. In this drafting exercise, it appears that the conditions (steps) of the test are intended as cumulative and subject to sequential analysis. To that effect, only if reproduction acts (1) do not conflict with the normal exploitation of the work, and (2) do not unreasonably prejudice the legitimate interests of the author, then (3) “would it be possible in certain special cases to introduce a compulsory license, or to provide for use without payment”.\(^{224}\)

The three-step test, as a rule directed at national legislators, was born. Equitable remuneration was a constituent part of its conditions, concretely its third step, essential for the validity of certain exceptions.\(^{225}\) The Committee went so far as to illustrate its application:

A practical example might be photocopying for various purposes. If it consists of producing a very large number of copies, it may not be permitted, as it conflicts with a normal exploitation of the work. If it implies a rather large number of copies for use in industrial undertakings, it may not unreasonably prejudice the legitimate interests of the author, provided that, according to national legislation, an equitable remuneration is paid. If a small

\(^{218}\) Ibid., p. 1144.

\(^{219}\) Ibid., p. 1144.


\(^{222}\) Ibid., pp. 621, 705-706, 820-821 (docs. S/13, S/75 and S/86).


number of copies is made, photocopying may be permitted without payment, particularly for individual or scientific use.  

For the purpose of clarification and following the above-mentioned German proposal, Article 9(3) of the Stockholm Act stated that “any sound or visual recording” was to qualify as a reproduction. Hence, private use exceptions for recordings of those materials were subject to the three-step test.

In the end, the discussion on private copying and the national (German) legislative private copying experience were instrumental in shaping the three-step test, especially in relation to the element of remuneration. Private use linked to a remuneration right was apparently within the confines of the test, as would be certain reprography levy systems. For some authors, like Collová, private copying without remuneration was in general not acceptable under the test, as it could lead to “the massive use of protected material without payment”. That view was to some extent echoed by Ulmer. The influential author argued “the aim should be, insofar as exceptions are made in certain cases to the prohibition of reproduction, that a royalty should be paid to the author”. To be sure, that was the understanding of Germany, which in 1974 adhered to 1971 Paris Act of the BC, maintaining Articles 53 and 54 of the German Copyright Act. Therefore, it is possible to view those provisions as examples of permissible limitations under the three-step test.

In fact, it seems uncontroversial that the compromise wording of the three-step test left room for diverse national designs for remunerated private use limitations. These, together with other limitations to the exclusive reproduction right considered admissible by Union countries in the Stockholm debates, find their justification in different manifestations of the public interest. (Chapter 5 returns to this point in detail in when examining whether an ACS is consistent with the three-step test.)

2.3.2.2 Post-Stockholm: From 1967 to the 1990s


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232  Green Paper on Copyright and the Challenge of Technology 1988, pp. 102-103.
233  See, e.g., Records BC Stockholm 1967, pp. 627 (Belgium, S/18), 629 (Denmark, S/13). See also Collová, 1991, p. 86.
234  See Collová, 1966, for a comparative analysis of the application of copyright to acts of home-taping before Stockholm.
Netherlands (1989/1991), Switzerland (1992), Denmark (1992), Italy (1992), Belgium (1994),
and Greece (1994).  

As noted by the EU Commission, “the compact cassette marked a revolution in the popular
music field”, replacing vinyl discs and affording consumers with a portable and durable
recording media, which proved increasingly popular. VCRs and (later) compact discs followed.

During the same period, European common law countries, such as the UK and Ireland, devoted
“much discussion” to copyright levies but ultimately rejected their implementation, in part due to
“effective lobbying by blank tape manufacturers”.  

In the majority of cases after 1985 (the date of the amended German Copyright Act), European
levy systems had a dual basis, targeting recording devices and media. At the same time,
several countries outside Europe were seriously considering the implementation of similar
systems. In some cases and with varying scopes of implementation—like in the US, Japan and
Russia—those intentions materialised in the 1990s.

Similarly to the German model, the vast majority of emerging levy systems defined the
remuneration right for private copying as internal to copyright, instead of a tax. This
qualification, Collovà argues, results from the rationale, functions and beneficiaries of the
levy. The consequence of accepting the remuneration right as internal to copyright is that both
the right and the levy system are subject to international copyright law, namely the national
treatment and three-step test provisions of the BC. The presence of copyright levies in the
WIPO agenda, notably in the preparatory works for the 1996 WIPO treaties, illustrates the
universal acceptance of this legal qualification.

2.3.2.3 Preparatory Works for the 1996 WIPO Treaties

In 1989, the Berne Union assembly and conference of representatives adopted the WIPO
programme. The programme included a provision for convening a committee of experts on a
possible protocol to the BC. WIPO’s programme for the 1990-1991 biennium stated that the
“protocol would be mainly destined to clarify the existing, or establish new, international norms

52, 106–107, stressing that Austria was the first country to target reproduction media; P. Bernt Hugenholtz, 2012a,
See Astier, 1986.

236 Green Paper on Copyright and the Challenge of Technology 1988, p. 101, noting that re-usable optical discs were not
yet marketed for consumers, but were on their way.


238 The conclusion reflects the data reported in Collová, 1991, pp. 46–52.


1010 US Copyright Act); Australian Copyright Council, 2001, pp. 7–17; P. Bernt Hugenholtz, 2012a, p. 192. For a
comparative analysis of the legal challenges and treatment of home taping in US and German laws, see Mac, 1973.

241 Collová, 1991, p. 52–ff. Finland, Norway, and Spain are exceptions, funding their levy through the General State
Budget. On this topic, see CJEU, EGEDA II, and infra 3.3.6.

242 See: Burger, 1988a, 1988b; Collová, 1991, p. 52ff., 104; Goldstein & Hugenholtz, 2013, pp. 110–111. See also
Geller, 1991, p. 53–ff, explaining the challenges arising from the application of the national treatment principle.
where, under the present text of the Berne Convention, doubts may exist as to the extent to which that Convention applies”. 243

After convening in 1991 and 1992, the Committee divided into two groups: one focusing on a possible protocol to Berne (the “Berne Protocol Committee”) and another on the preparation of a new instrument on the protection of related rights holders (the “New Instrument Committee”). 244

The work of both committees led to the so-called “basic proposals” for the 1996 Geneva diplomatic conference. Private copying was on the agenda of both committees.

The Berne Protocol Committee was of the opinion that, before the introduction of digital recording, home taping only infringed the third condition of the three-step test, as it unreasonably prejudiced the interests of authors. To overcome or reduce such prejudice to reasonable levels, some form of payment was warranted, e.g. via levies on recording equipment or media. 245

Nevertheless, the advent of optical and digital recording meant that serial reproduction—“reproduction of more than one generation” of perfect copies—was now possible, even for private purposes. If unrestricted, digital private copying would also pose a conflict with the normal exploitation of works, and with step two of the test. Therefore, such acts should be restricted unless it was possible to eliminate the conflict and reduce the prejudice to reasonable levels. 246

In that light, the committee proposed that a future Berne Protocol include a broad exclusive reproduction right, covering copying for personal purposes. Limitations to that right were possible if they did not exempt serial digital reproductions, only acts of copying for personal purposes of sound recordings and audiovisual works and certain reprographic uses. Permitted limitations were subject to remuneration through levies on equipment (used for personal purposes) or blank supports, paid by the respective manufacturers or importers. 247

The proposal was favourably received but raised doubts on the “nature and extent of possible provisions”. 248 Different views were expressed on the feasibility of a private copying prohibition, its applicability to software, the impact of copy-protection mechanisms, and the implementation of a remuneration right. In view of these challenges and the need to streamline the agenda, the committee’s mandate was reduced in September 1992, and private copying was dropped from the agenda as a result. 249

The New Instrument Committee, for its part, suggested that private copying of performances and phonograms be subject to the three-step test, by aligning Article 15(1)(a) RC with the requirements of Article 9(2) BC. 250 Echoing the debates of the Berne Protocol Committee, the proposal was justified by developments in reproduction technology and the conflicts it posed to rights holders' normal exploitation of works, as well as their legitimate interests. In a similar

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244 Ibid., pp. 161–162.
248 Ficsor, 2002c, p. 392.
249 Ficsor, 2002c, p. 392.
250 Ficsor, 2002c, p. 392.
fashion, the New Instrument Committee endorsed the implementation of a levy system based on
a right to remuneration for performers and phonogram producers to compensate them for private
copying of sound recordings, underscoring that such remuneration would comply with the third
prong of the three-step test.251

This proposal was subject to “extensive and animated debate”, including discussions on the
necessity of remuneration, its nature—with consensus on its qualification as a non-exclusive
right, instead of a tax—its copyright relevancy, and its possible extension to audio-visual
records.252 However, as with the Berne Protocol Committee, and probably “due to the perceived
absence of agreement” on the issue, the topic did not make it to the fourth session of the agenda
and, consequently, to the basic proposals discussed at the 1996 Geneva diplomatic conference.253

Most of the themes animating the international levies debate, already present at the inception of
copyright levies in Germany, featured prominently in EU level discussions in the lead up to the

2.3.3 Manifestations in the Acquis

Copyright levies have historically been controversial in EU copyright law and policy, sparking
stakeholder and institutional debate. Following a Recommendation of the Council of Europe
favouring the introduction of a remuneration right for private copying of sound and audio-visual
recordings, levies made it to the harmonisation agenda in 1988.254

Chapter 3 of the 1998 Green Paper on Copyright and the Challenge of Technology addressed
home taping of sound and visual recordings, which it defines as unauthorised reproductions by
consumers for personal needs.255 The Green Paper reported on claims from rights holders on the
economic harm caused by home taping, the technological developments increasing its ease and
attractiveness, together with divergent national responses in the form of “taxes or levies”. The
latter, it stated, could have negative effects on incentives to creation of works and the functioning
of the internal market.256

The Commission recognised that “a clear picture is difficult to draw” as to the effect of home
copying on the market for audio-visual recordings or even its impact on the exploitation of
works.257 Nonetheless, private copying was already a “common practice”, which digital
technological developments would further facilitate. Therefore, it was important to allow “these
dynamic technologies to evolve in a way that is most beneficial to the producer and
consumer”258

On one side of the spectrum, rights holders demanded greater protection through levies or
technical measures, because mass use conflicted with the normal exploitation of copied works

251 See WIPO Document BCP/CE/II/1, pp. 11–12, and Ficsor, 2002c, p. 392,
252 Ficsor, 2002c, p. 393 (citing Document INR/CE/II/1).
253 Ficsor, 2002c, p. 394.
254 Council of Europe Recommendation No. R (88) 2. See also Collová, 1991, p. 56, and Green Paper on Copyright and
256 Ibid., pp. 100–117.
257 Ibid., pp. 113–117.
258 Ibid., pp. 110–113, 118–119.
and unreasonably prejudiced their interests. The technical measures approach in particular gained favour vis-à-vis digital use as rights holders considered levy schemes “inadequate to deal with the allegedly greater economic harm which DAT [digital audio tape recording] could imply.”259

Opposing this view were the hardware industry and (some) consumer representatives, who challenged claims of economic harm to rights holders. They argued that such harm was either insubstantial, not caused by private copying, or was actually priced into the purchase of content items. They further claimed home copying had the benefits of stimulating content demand and creating additional markets (e.g. for sale or rental of pre-recorded items).260

These interest groups also objected to levy systems on different grounds: that they did not reflect actual usage, were difficult to apply to multipurpose devices/media, and misallocated revenues. However, they showed openness to a “compromise technical solution” for the technical measures approach.261

In its assessment, the Commission stated that home copying had “negative but unquantifiable effects on the legitimate exploitation of recorded works”, however these would tend to increase significantly for digital use. In relation to private copying, it considered there to be no negative effect from the first copy made from lawful sources, only from subsequent reproductions. Rights holders risked losses where home copying was a substitute for sales of pre-recorded material.262

Therefore, the Commission suggested the adoption of measures to curb these acts and indirectly stimulate lawful content sales. Such measures did not include Community-wide legislation for home copying, but rather the fostering of device-level “technical solutions” to prevent private copying, if feasible and adequately balancing opposing interests. Levies should be retained only where Member States felt they were the “best way to remunerate rights holders”; digital private copying in particular was considered a challenge better addressed by technological—rather than levy-based—solutions.263

Not satisfied with this policy orientation, CMOs pursued the matter in 1989 and 1990 through joint declarations requesting specific legislation for a remuneration right coupled with a levy targeting equipment/media; for digital audio tape recording, they pushed for an approach combining levies with “compulsory” copy control mechanisms.264

In its 1990 Follow-up to the Green Paper, the Commission set up its working programme for copyright up until the date of establishment of the internal market (31 December 1992).265 A “large majority” of stakeholders manifested themselves to be against the prohibition on home copying, with most rights holders supporting levy systems, while hardware companies and consumer representatives opposed them. All parties supported the adoption of a “Serial Copy Management System”, a copy restriction system for devices that only permitted copies from the

259 Ibid., 120–122.
260 Ibid., pp. 122–124.
261 Ibid., pp. 122–124.
263 Ibid., pp. 129–143.
“original work”. Rights holders, however, demanded a remuneration right for copies authorised in this manner as well. 266

Given these developments, the Commission endorsed the general use of the Serial Copy Management System and stated its intention to propose a draft “directive on home copying of sound and audiovisual recordings” to the Council in 1991. 267 That proposal never officially materialised and rules on private copying only made it to the acquis in a limited form much later in the 2001 InfoSoc Directive. 268

Following the adoption of TRIPS and the 1994 Bangemman Report’s recommendation for the creation of a community framework for intellectual property in the digital environment, the year 1995 saw the arrival of a new Green Paper on Copyright and Related Rights in the Information Society, setting out the Commission’s harmonisation agenda. 269

The Green Paper described the challenges technological developments pose to the criterion of private use and the risk they turn “home copying into a fully-fledged form of exploitation”. It argued that the possibility of perfect copies raises the risks of piracy and non-remunerated use, simultaneously creating a need for community-wide remuneration arrangements and copy restriction “techniques”. 270

Private copying levies were at this stage a reality in most Member States. While the Green Paper recognised that analogue private copying is “impossible to control”, it considered that digitisation opens up the possibility of strict control of reproductions and, as such, the need to re-examine exceptions. 271

In that context, the “permissible” nature of private copying depended on whether the control of reproductions is possible. Where technical means can limit or prevent such use, “there is no further justification for what amounts to a system of statutory licensing and equitable remuneration”. 272 The Commission further criticised the BC three-step test for its uncertainty, illustrated by the different approaches taken by Member States to the regulation of private copying. Where the limitation existed, it was noted that technical restriction measures could not be made compulsory; however, the legality of digital private copying should be reassessed in light of technological possibilities for monitoring, preventing or limiting it. 273

In 1996, one month before the Geneva diplomatic conference preceding the WIPO Treaties, the Commission published its Follow-Up to the Green Paper. 274 It emerged from the intervening consultations that rights holders now opposed any limitations, believing these would conflict with the normal exploitation of work. They contended that technology would soon enable

266 Ibid., p. 12.
267 Ibid., pp. 13, 39.
268 Eechoud et al., 2009, p. 7; Poort & Quintais, 2013.
270 Ibid., pp. 26, 28.
271 Ibid., p. 49.
272 Ibid., p. 50.
273 Ibid., pp. 52, 75, 79-83, exemplifying with a technology called Serial Copy Management System.
274 Follow-up Green Paper 1996.
“effective control of private copying”. User groups, contrariwise, contested an unfettered exclusive right.\(^\text{275}\)

The Commission prioritised the adoption of a broad reproduction right and limitations thereto, stressing the need to harmonise different national regimes regulating private copying, especially in the “new electronic environment”. It further proposed harmonisation of “legal protection of the integrity of technical identification and protection schemes”.\(^\text{276}\)

For the Commission, a statutory licence with a remuneration right to regulate private copying was admissible only where the use does not conflict with the normal exploitation of works and the “exclusive right is not enforceable for whatever reason”. Outside those boundaries, it was only possible to exempt activities from the exclusive right through future EU legislation setting out defined limitations in the “interests of users or the public at large”, subject to the three-step test.\(^\text{277}\)

Under the test’s tutelage, even with absolute control of digital use, it was still possible for the private copying limitation to apply. That was because, the Commission claimed, “situations will continue to exist in which an unlimited exclusive right would not appear appropriate or enforceable, notably due to privacy reasons.” If the limitation was allowed, the expected economic impact of private use requires certain acts to “be subject to a legal license and equitable remuneration.”\(^\text{278}\)

It is worth noting that this is one of the few instances where the Commission expressly recognised—following the example of the German model—an overriding fundamental rights-based justification for the private copying limitation, beyond market failure.

In 1997, the Commission presented its proposal for the InfoSoc Directive, accompanied by an explanatory memorandum. The memorandum essentially restated the main points of the communications preceding it.\(^\text{279}\) It stated that most Member States’ laws contain a private copying limitation, motivated by two main factors: the non-enforceability of exclusive rights for such use, and the non-desirability of enforcement for privacy reasons. The document added that in eleven of fifteen cases the limitation was compensated through a levy system. The scope and functioning of levy systems is diverse; however, most systems do not distinguish between analogue and digital devices or media. Furthermore, the economic significance of private copying revenues was considerable, with the expectation that analogue and digital private copying would remain relevant for the next fifteen years.\(^\text{280}\)

In this light, the Commission proposed a rule allowing Member States to implement private copying limitations for reproductions “on audio, visual or audio-visual recording media”, without the requirement of fair compensation.\(^\text{281}\) The concept of “private copying” included

\(^{275}\) Ibid., p. 11.
\(^{276}\) Ibid., pp. 11-12, 15-17, 22.
\(^{277}\) Ibid., pp. 11-12.
\(^{278}\) Ibid., p. 12.
\(^{280}\) Ibid., p. 13.
\(^{281}\) Ibid., pp. 29-30, 45.
analogue and digital reproductions made for private use (understood in a “narrow sense”) and non-commercial aims, meaning it had to be “confined to a private context”.  

The Commission’s expectation was that developments in digital reproduction, allowing users to make unlimited perfect copies, would be counteracted by improvements enabling “effective control” thereof, potentially leading to the phasing-out of levies and their replacement by “individual licensing solutions... at least in the on-line environment.” Consequently, the expectation was for Member States to eventually abolish or limit the exception’s scope in the digital realm.

For the time being, however, due to uncertainties with enforcement and consumer behaviour, it was preferable to allow Member States the flexibility of maintaining or introducing exceptions for analogue and digital private copying, subject to the three-step test and the Commission’s watchful eye.

The proposal was subject to numerous amendments by the European Parliament on first reading, some of which were accepted by the Commission in its amended proposal, namely the condition of fair compensation, and the recognition of a link between private copying and “the existence of operational, reliable and effective” TPMs.

When, in September 2000, the Council adopted its Common Position, Article 5(2)(b) was adjusted so that the limitation now covered “any medium” (not just audio-visual), did not distinguish between analogue and digital copying, and took into account the application or non-application of TPMs.

The European Parliament adopted the provision on second reading and, in March 2001, the Commission joined it in a Common Position. The latter clarified that the limitation allowed copies to be made “for and on behalf of a natural person for private use”, and would cover acts for “ends that are neither directly or indirectly commercial”. The final version of the InfoSoc Directive, which contains the private copying limitation in Article 5(2)(b), was adopted on 9 April 2001 by the Council of Ministers, and published on 22 June 2001.

Most EU Member States have implemented this optional limitation and the accompanying levy system, with the exception of Cyprus, Ireland, Luxembourg and Malta. The UK introduced the limitation in 2014, but the same was overturned during the course of 2015 due to issues with the lack of a fair compensation requirement in the national implementing regulations.

The limitation has generated abundant and on-going case law from the CJEU; these judgments and their implications, insofar as they are relevant for the study of an ACS in the acquis, are

282 Ibid., p. 30.
283 Ibid., p. 30.
284 Ibid., pp. 30-31, noting that analogue private copying was less significant. See also recital 26 InfoSoc Directive.
286 Amended Proposal InfoSoc Directive 1999, ¶¶(1), 2(2) and III.(Comment to Art. 5(2)(ba)).
examined in the subsequent chapters. Nevertheless, a few additional words are warranted on
the institutional developments in this field, as the uncertainty surrounding the limitation has also
given rise to multiple institutional responses.

Among these were stakeholder consultations in 2006 and 2008, as well as a 2011 communication
from the Commission referring to comprehensive action in the field. In 2013, Commission-
appointed mediator António Vitorino presented his recommendations on private copying and
reprography levies. Between January and March 2014 the Commission launched a public
consultation to review and modernise EU copyright rules, including a section on private copying
and reprography, reflecting insights from the Vitorino recommendations and recent CJEU
judgments. The subsequent Commission report summarising the results of the consultation
identifies this as a topic of concern to end-users/consumers, intermediaries, distributors and other
service providers.

Furthermore, in February 2014, the European Parliament passed a resolution on private copying
levies where it considers it a “virtuous system in need of modernization and harmonization” and
identifies a set of challenges that need to be addressed, including the possibility of levying cloud
services. The following year, a European Parliament Resolution returned to the topic, albeit
without adding much in the way of detail. Private copying levies remain on the Commission’s
agenda to this very day as an “on-going initiative”.

2.3.4 Conclusions on Statutory Licensing for Private Copying

The private copying limitation and levy aim at solving the problem of mass home copying of
works by consumers for personal non-commercial purposes. The model emerged in Germany in
the 1950s–1960s in the wake of the commercial success of recording devices and the ensuing
litigation by GEMA against manufacturers.

From a policy standpoint, private copying touches upon different legitimate interests: fair
remuneration of authors for potentially harmful home taping activities, the public interest in
dissemination of knowledge and information, technological development (of recording
technology), consumer protection, and privacy. The German model uses the limitation and the

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290 See infra 4.4.3, 5.3.2.1, 5.3.2.3 and 5.3.3.2.
291 The documents relating to stakeholder consultations available at EUROPEAN COMMISSION, The EU Single Market,
296 Eechoud et al., 2009, p. 7; Poort & Quintais, 2013. See also EUROPEAN COMMISSION, The EU Single Market,
levy system as means to solve the conflict between the creative sphere of authors and the private sphere of users.

In a sequence of landmark decisions, the BGH first extended the scope of the reproduction right to the private sphere, and imposed liability on manufacturers indirectly contributing to the infringing use. Authors initially prevailed due to the recognition of a natural right to a “just pecuniary reward” for mass home taping of works. This inaugurated the intrusion of copyright regulation in the private sphere.

However, the BGH refused to impose a general ban on the sale of recording devices due to their susceptibility to use for non-infringing purposes, and the lack of proportionality of the ban in light of the fundamental right of privacy. Furthermore, the court steered the German legislator towards a statutory licensing system, based on an equitable remuneration right and managed by CMOs.

The German model was built on a remunerated limitation and statutory licensing, allowing users to reproduce sound and visual recordings. Remuneration was collected through levies, targeting first devices and later media “suitable” for private (not professional) copying purposes, within the law’s jurisdiction.

The expansion of levy targets was a result of developments in recording technology and the neutral statutory formula, which extended to equipment or media “susceptible of” use for private copying. That combination enabled application by analogy of pre-existing rationales to new technologies, a process that remains to this day. It also enabled technological development by preventing intermediaries from being subject to liability for copyright infringement.

Manufacturers and importers paid the levy in respect of the opportunity to make private copies offered by their devices or media. Yet, they could pass on the levy to consumers within the retail price, as these were the only directed beneficiaries of the legal “permission”. This design is privacy respecting, as it ensures a link to the actual user is maintained, and is equitable, insofar as it causes intermediary debtors to share the burden of activities from which they benefit.297

Calculation of the levy was on a percentage basis or via statutory tariffs, with the remuneration intended to reflect the use of works authorised by the limitation. In this way, the remuneration right is internal to copyright—rather than a tax—and subject to rules in international copyright treaties, like national treatment and the three-step test.

The high transaction costs associated with enforcement of the remuneration claim justify the coupling of the statutory licence with obligatory collective management. CMOs thus intermediate between rights holders and debtors for the definition, collection and distribution of the levy.

Ultimately, the German private copying model was the result of balancing the principle of exclusivity against economic and non-economic motivations: market failure in the regulation of mass home taping activities, and inadequacy of enforcement in the private sphere linked to users’ fundamental right of privacy.

The German model was disseminated throughout Europe and is currently a staple of most Member States’ national copyright laws. At international level, the topic was discussed in the 1967 Stockholm revision of Berne and in the preparatory works for the 1996 WIPO Treaties.

In Stockholm, the German model shaped the debate on the three-step test. It influenced the consideration of equitable remuneration as a tool to reduce rights holder’s prejudice to reasonable levels (step three of the test) and, thus, as a condition for the admissibility—and broadening—of copyright limitations. Remuneration may act as a public interest component for restrictions on exclusivity, leading to a normative equilibrium between authors and users.

In Geneva, the possibility of perfect copies offered by digital technology led to arguments that private copying would also conflict with the normal exploitation of works (step two of the test). A feature of this debate, which would be present at EU level, was the promise of control of digital use through technological measures and the subsequent possibility of phasing out levies.

In the EU, debate on harmonisation of private copying started in 1988 and included promises of a specific directive. Emerging from the discussions was the growing belief by the Commission and rights holders in the possibility of technological control of use, strengthening arguments that digital limitations would run counter to the three-step test and even facilitate commercial piracy.

Still, the elimination of the levy on this basis was never consensual, leaving as an intermediate solution its coexistence with TPMs. The Commission first suggested this combined approach in 1990, and built upon it in subsequent communications, emphasising that compensated limitations should respect the three-step test and apply where enforcement would not be possible or desirable due to privacy concerns.

The result was the modest framework of the optional limitation in Article 5(2)(b) InfoSoc Directive (and related recitals), aimed at providing Member States with the flexibility to implement “TPM-compliant” statutory licences, subject to the test. This provision follows the blueprint of the German model and expands upon it, by allowing digital reproductions and additional subject matter, and regulating the legal interface with TPMs.298

A significant departure from the German tradition seems to be that the remuneration claim is not rooted in a natural right of the author to a just pecuniary reward. Instead, it is based on a fair compensation right linked to a notion of harm, said link reflecting the market failure rationale.

However, it is arguable that the “harm” in question relates to the impossibility of monetising private use, which in turn is caused either by the impossibility of licencing and enforcement (market failure) or the inadequacy of mechanisms to do so (privacy rationale). From that standpoint, it is possible to retain a fundamental rights justification for this model of restrictions to exclusivity, which subsists even where market failures are curable (which is still not the case, as full digital control of copyright use and the phasing-out of levies have not come to fruition). To be sure, privacy concerns are at the root of the InfoSoc Directive’s provision, as explicitly stated in its 1997 explanatory memorandum.299

298 See infra 4.4.1.2 and 4.4.3.5.
2.4 Compulsory Licensing for Broadcasting and Communication to the Public

The regulation of broadcasting in international and EU copyright law is an entangled web of provisions crafted in response to a technology that revolutionised the communication of works to the public and its economic exploitation across national borders.

From the early days of amateur experimentalism with the transmission of radio waves at the beginning of the twentieth century, to the development of radio, television, and satellite broadcasting, the law has struggled to incorporate the technology. The profound impact of broadcasting on the dissemination of knowledge and culture, as well as on the democratic process, was also visible in the copyright field.

This section first examines the early days of broadcasting as a means to provide background to the technology, its impact on society and the copyright issues it raises. The analysis then proceeds to study how and why international copyright law, after subsuming broadcasting within the concept of communication to the public, allows for compulsory licensing of the right. As we shall see, international rules play a greater role in shaping this precedent then they do with private copying.

The focus is on the compulsory licence of Article 11bis(2) BC. However, other provisions on related rights in the RC, TRIPS, and WPPT allow for the implementation of such licences for acts of broadcasting and communication to the public against the payment of equitable remuneration. Although the BC licence was not implemented in the acquis, it helped shape compulsory licensing of several related rights that influence broadcasting and the communication to the public rights in the Rental Right and SatCab Directives. As explained below, due to the lack of harmonisation of the right of communication to the public for related rights holders in Article 3(2) InfoSoc Directive, the Rental Right and SatCab Directives allow certain compulsory licences where these are admissible under the RC.

2.4.1 The Early Days of Broadcasting

Broadcasting is the transmission of sounds and/or images for reception by a dispersed audience using electromagnetic radiation or waves, without the assistance of “artificial means of guidance or support”, like wire or cable. Most broadcasting occurs over the electromagnetic spectrum, a natural and common resource the regulation and allocation of which is subject to national and international communications policy.

Discussion on the technology dates as far back as the 1880s, and the first experiences with radio-communications systems, by Marconi and Tesla, from 1896 and 1897. In the early 1890s, the German scientist Heinrich Hertz discovered electromagnetic or “Hertzian” waves, initially used...
to “communicate the telegraphs dots and dashes”; around that period, the first reports surface of use of radio signals by the US navy.\textsuperscript{305}

As early as 1905–1906 it is possible to identify the amateur pioneers of broadcasting in the US, who operated rudimentary radio stations, talked with each other, and listened to “radio signals from ships at sea”.\textsuperscript{306} These experimental amateur activities significantly preceded the first commercial radio transmissions in 1919–1920, distributed through radio waves from transmitters to receiving devices with antennas.\textsuperscript{307}

The early days of radio broadcasting in the US were characterised by the coexistence of different models, from amateur radio clubs, to radio stations of universities, churches, hotels, newspapers, the US military, and a few commercial stations. Radio was mostly local, partly due to limitations in the range of transmissions, and the content transmitted was irregular.\textsuperscript{308} Between 1912 and 1922, the combination of “massive amateur and commercial exploitation” with war production led to a boom in radio innovation in the US.\textsuperscript{309} By 1924, more than a thousand broadcast stations existed and over two million broadcast-ready radio sets had been sold.\textsuperscript{310}

Across the Atlantic, the development of broadcasting suffered an interruption during World War I (1914–1918).\textsuperscript{311} There is evidence that the first broadcast programmes on a fixed schedule were made in the Netherlands in late 1919, by an early Dutch radio pioneer, Mr. Hanso Schotanus à Steringa Idzerda.\textsuperscript{312} It was only in 1922 that a UK consortium of radio manufacturers formed the BBC, which came into existence as a public “crown” corporation in 1927, one year before the Rome Act of the BC.\textsuperscript{313} In Germany, the first radio stations went on air in Berlin in 1932.\textsuperscript{314} By the 1930s, however, radio challenged the influence of film and had become the “dominant form of entertainment”.\textsuperscript{315}

The major technology shift produced by broadcasting, when compared with the previous telegraph technology, was an evolution from one-to-one to one-to-many communication of messages to multiple devices. Broadcasting, as a medium of mass communication, allowed all within reach of the broadcast to “see or hear the same program at the same time” without requiring “that the public is assembled in one location”.\textsuperscript{316} Radio, in these early days, became “the technological vehicle that allowed synchronized communication to a new audience”.\textsuperscript{317}

\textsuperscript{305} G. Austin, 2012; Wu, 2011a, p. 34.
\textsuperscript{306} Wu, 2011b noting that, in their contemporary dictionaries, “broadcast” was a seeding technique meaning “[c]ast or dispersed in all directions, as seed from the hand in sowing, widely diffused”.
\textsuperscript{307} See, generally, G. Austin, 2012; Pool, 2009b; Wu, 2011b.
\textsuperscript{308} Wu, 2011b.
\textsuperscript{309} Benkler, 2012b.
\textsuperscript{310} Pool, 2009b; Wu, 2011b. On the development of the US radio industry and its regulation in this period, see G. Austin, 2012; Benkler, 2012b; Wu, 2011b.
\textsuperscript{312} van de Donk et al., 2005, p. 29.
\textsuperscript{313} Lord Windlesham, 1980, pp. 18–23; Wu, 2011b.
\textsuperscript{315} G. Austin, 2012; Wu, 2011b.
\textsuperscript{316} Depreeuw, 2014, pp. 268–269.
\textsuperscript{317} G. Austin, 2012.
The rise of radio broadcasting saw three general regulatory and funding models emerge. Whereas the US favoured a commercial model,\textsuperscript{318} the UK followed a public service model, largely justified on the assertion that “a politically independent system of broadcasting is an essential element in a free society”.\textsuperscript{319} A similar model was in place in pre-Nazi Germany.\textsuperscript{320} Conversely, some countries, during specific periods of their history—Nazi Germany (post-1933) and New Zealand (1930-1960)—favoured a model of government control.\textsuperscript{321}

For Ithiel de Sola Pool, the propensity for national control of radio broadcast in Europe was motivated by the rise of social democratic parties and a socialist ideology favouring nationalisation of a new and invaluable resource. In the US, these factors were viewed sceptically because of censorship and free speech concerns, leading the country’s regulators to follow a market-based approach.\textsuperscript{322} It is fair to say that the public information and propaganda potential of broadcasting meant that radio played an important role during the 1930s, both in democratic and totalitarian governments.\textsuperscript{323}

Broadcasting also had a profound effect on copyright, mainly because protected works constituted a significant portion of the content transmitted.\textsuperscript{324} The programming of radio broadcasting, for example, primarily consisted of phonograph musical recordings.\textsuperscript{325} Broadcast music became part of social interactions and firms’ business practices, a tool to promote musical works and artists, the technology itself, and other types of content (e.g. newspapers, films).\textsuperscript{326} Advertising grew into the standard business model for radio, proving in time “almost a license to print money” and, together with sponsorship, “gave radio stations a sustainable financial basis”.\textsuperscript{327}

The question facing copyright policy makers in the early days of broadcasting was how to balance “the traditional view of authors’ rights with these new modes of communication: are new formulations of rights required, or do old formulations still hold good, necessitating only a flexible interpretation to apply to these changed conditions?”\textsuperscript{328} (This question could easily apply to the Internet as a means of disseminating works, and to the regulation of non-commercial online use.)

\textsuperscript{318} On the development of US federal regulation of radio, see G. Austin, 2012; Benkler, 2012b; Pool, 2009b.
\textsuperscript{319} Lord Windlesham, 1980 noting that the BBC was accountable to parliament and its net revenue depended on the issue of broadcast receiving licences and, initially, on “a royalty fee added to the price of radio sets”. See also Wu, 2011b.
\textsuperscript{321} G. Austin, 2012. On the German model, see Wu, 2011b.
\textsuperscript{322} Pool, 2009b.
\textsuperscript{323} Ricketson, 1987, p. 435.
\textsuperscript{324} Ricketson, 1987, pp. 436–437.
\textsuperscript{325} G. Austin, 2012, p. 121.
\textsuperscript{326} G. Austin, 2012, pp. 122–123.
\textsuperscript{327} Wu, 2011b.
\textsuperscript{328} Ricketson, 1987, pp. 436–437.
In the US, court battles in the 1920s “established that radio broadcasting implicated public performance rights of copyright owners”.\(^{329}\) Ginsburg speculates that this was due to economic reasons and fears that unlicensed and free broadcasting would undercut rights holders’ revenues.\(^{330}\) The move allowed US performing rights organisations to access the operation of radio broadcasters, setting the stage for a blanket voluntary collective licensing system under which the organisation provides access to its repertoire against a percentage of the radio station’s revenues. The system survives to this day\(^{331}\) and, in the context of the ACS debate, was proposed as the legal framework for a P2P blanket licence.\(^{332}\)

In Europe, the potential for exploitation of works through broadcasting became apparent only after World War I, namely through the transmission of musical compositions and plays to individual receivers in people’s homes, a “far wider audience than possible at one specific location”.\(^{333}\) For the most part, domestic legislators grappled with the new reality by interpreting existing law to protect authors against unauthorised exploitation of works through the new technology.\(^{334}\)

In a 1925 resolution, the ALAI urged that “radio electric transmission” of literary and artistic works be treated as a public performance.\(^{335}\) This was in the middle of the period of consolidation of broadcasting, but almost a decade before the advent of FM radio transmission.\(^{336}\)

The ALAI resolution eventually led to the discussion of a broadcasting right in the 1928 Rome revision conference of the BC.\(^{337}\) The programme proposal initially referred to a right of communication to the public by “telegraphy”, “telephony” or “other analogous means serving to transmit the sounds or images”.\(^{338}\) The reference to “artistic works” and “images” seems to indicate the “possibilities posed by the imminent advent of television”.\(^{339}\) However, television was still in its infancy, explaining why specific discussions regarding television broadcasting are found only in the preparatory works of the 1948 Brussels Act of the BC.\(^{340}\)

In fact, it was necessary to wait until 1928 for the first experimental demonstrations of electronic televisions (by Farnsworth and Baird), the introduction of the first mechanical televisions on the market (by General Electric), and for the beginning of television broadcasts in the US. In Europe, following the first experimental broadcasts in 1929, the BBC only started its regular television


\(^{332}\) See e.g. Lohmann, 2004, 2008; Quintais, 2012. See infra 3.3.2.2.


\(^{335}\) Records Rome 1928, p. 59, referring to the ALAI conference of 1925.

\(^{336}\) On the development of FM radio transmission as from 1934, see Wu, 2011b.

\(^{337}\) N.B. that the term “broadcasting” was only adopted in the 1971 Stockholm revision as the English translation of the French “radiodiffusion”. Until then, both English and French texts used “radiodiffusion”. This terminology choice, however, does not imply the exclusion of broadcasting of visual content from the scope of the provision. See Depreeuw, 2014, pp. 268–270; Ricketson, 1987, pp. 438–439. See also Records BC Rome 1928, p. 76.

\(^{338}\) Records BC Rome 1928, p. 76.


\(^{340}\) See infra 2.4.2.
broadcasting in 1936; one year earlier, in 1935, television broadcasts started in Nazi Germany. \(^{341}\) However, this development was put on hold due to World War II.

After the War, in 1948, the Brussels Act amended the BC regulation of broadcasting in an attempt to capture the developments of radio broadcasting and the relatively new invention of television. The convention did not yield a definition of broadcasting. According to Ricketson, the likely reason was the existence of a general international understanding of the term as an act of communication to the public. This understanding was embodied in the radio regulations of the International Telecommunications Union, which in that same year of 1948 defined broadcasting as a “radiocommunications service of transmissions to be received directly by the general public”. \(^{342}\) The consensus as to the meaning of the term is also apparent from the preparatory documents of the Brussels Act. \(^{343}\)

The impact of broadcasting was magnified by the advent of satellites (and later cable), which expanded its scope “enormously”, making possible “the diffusion of programmes from one continent to another, and even to most of the world at one time”. The result was an erosion of the relevance of national boundaries in the realm of communications technology, and “profound effects” on fields like “popular education and entertainment, the conduct of international trade and business, diplomacy and defense”. \(^{344}\)

This more versatile use of wireless technologies, as well as technical solutions for rebroadcasting and communication by wire, complicated the task of copyright. In particular, the introduction of separate technical steps in the process of disseminating the signals to the public (e.g. intermediary transmissions between providers before reaching the public), meant that copyright law struggled to qualify these technical acts. \(^{345}\)

As shown below, the BC does not deal expressly with satellite broadcasting, although its Article 11bis(1) applies to territorial broadcasting and most acts of satellite broadcasting, as well as to acts of retransmission via wire or cable. \(^{346}\) In the EU, the issue was only settled in the 1993 SatCab Directive. The directive draws a legal distinction between acts of cable retransmission and satellite broadcasting, applying to all types of satellite transmissions, whether the signal is received directly, or after decoding by an intermediary. \(^{347}\)

Against this background, the remainder of this section explains the mechanics and justifications for the legal regulation of broadcasting of works (in the BC) and related subject matter (in the RC, TRIPS and WPPT) under a compulsory licensing system, as well as their manifestations in the acquis.

\(^{341}\) Wu, 2011b.


\(^{343}\) Records BC Brussels 1948, p. 265.


\(^{346}\) Explanatory Memorandum SatCab Directive, pp. 9–13, describing the application of Art. 11bis BC to different acts of satellite broadcasting.

\(^{347}\) Art. 1(2)(c) and Recital 6 SatCab Directive.
2.4.2 Compulsory Licensing for Broadcasting and Communication to the Public in the Berne Convention

2.4.2.1 Analysis

The BC does not provide for a general right of communication to the public. Instead, it includes different rights spanning different subject matter for separate types of communication to the public: Articles 11, 11bis, 11ter and 14(1)(ii).

Article 11bis(1) BC regulates a set of these rights that apply to all subject matter in the BC and includes broadcasting, rebroadcasting, communication by wire of broadcast works, and communication by loudspeaker.

The provision includes both so-called “primary uses”—to authorise broadcasting and other wireless communications of works—and “secondary uses” of broadcast works, namely their rebroadcast or public communication by wire. With the exception of communication by loudspeaker, Article 11bis(1) only covers acts of communication to a public at a distance.348

The BC does not define “broadcasting” but the term applies solely to acts of wireless diffusion. The provision is technology neutral and can thus apply to new means of wireless transmission. Originally, the right applied to transmissions through Hertzian waves, known as “terrestrial broadcasting”. As the technology developed, the right extended to certain types of satellite broadcasting, covering a far wider public, potentially across different countries.349 The limitation to wireless acts means that broadcasting does not include original cable transmissions, which are covered by separate provisions of the BC.350

Secondary uses of the original broadcast also require authorisation if the user is different from the original broadcaster. These uses include cable retransmission, wired digital retransmission—including streaming of radio or television broadcasts, and webcasting—or wireless rebroadcasts of the original broadcast.351

This piecemeal approach created gaps in the legal protection for acts of communication to the public, such as primary wire transmissions of non-broadcast works, including Internet transmissions of “literary and photographic works and other visual creations”.352 These gaps

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348 The exception is Art. 11bis(1)(iii) BC: “public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work”. See Dreier, 2006, pp. 51–52; Ficsor, 2003b, p. 77; von Lewinski, 2008, p. 151. A violation of the exclusive right provided in paragraph (iii) by US law originated the WTO dispute in US–Copyright, discussed in Chapter 5.

349 Depreeuw, 2014, pp. 273–274. For issues with the application of the BC provision to intermediate satellite transmissions, see Depreeuw, 2014, pp. 284, 318–321.


351 Ricketson & Ginsburg, 2006, pp. 732, 734–738. N.B. that the original broadcaster’s authorisation covers rebroadcasting.

were later filled at international and EU levels by the general rights of communication to the public in Article 8 WCT and Article 3(1) InfoSoc Directive.\(^{353}\)

Article 11bis(2) BC addresses “compulsory licenses”, although it only mentions the term in its heading:

> It shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the preceding paragraph may be exercised, but these conditions shall apply only in the countries where they have been prescribed. They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.

There is debate on the meaning of the term “conditions”, as it relates to the exercise of the right. The term is typically understood as \textit{allowing}, but not requiring, domestic legislators to subject the exclusive acts listed in Article 11bis(1) to non-voluntary licences. Hence, national laws may subject broadcasting to either mandatory exercise via collective rights management (maintaining unchanged the exclusive nature of the right) or to compulsory licensing, which causes the right to become non-exclusive.\(^{354}\)

Ricketson and Ginsburg list four kinds of admissible compulsory licences under this provision, some of which apply in the online environment:

1. broadcasting of sounds and images, including by satellite;
2. rebroadcasting of broadcasts of works where this is done by an organization other than the original one, including by satellite;
3. wired rediffusion of broadcasts of works, where this is done by an organization other than the original one, including by cable and digital dissemination (for example, by the ‘streaming’ of radio or television broadcasts);
4. public communication by loudspeaker or any other similar instrument of the broadcast of the work.\(^{355}\)

The licence is limited to the territory of the state for which it is granted, and thus cannot legitimise the broadcast of works elsewhere. The territorial limitation can have an impact due to diverse interpretations of the meaning of broadcasting, for example in the case of certain types of satellite transmissions.\(^{356}\)

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\(^{353}\) See Arts 11, 11bis, 11ter, 14(1)(ii) and 14bis BC. See Ricketson & Ginsburg, 2006, pp. 741–743 discussing whether the BC rights of communication to the public include not only “push” but also “pull” (on-demand) technologies, as well as hybrid cases like pay-per-view broadcast and cable services.


\(^{355}\) Ricketson & Ginsburg, 2006, pp. 822–823, noting that the article does not cover original wired transmissions (e.g. via the Internet) and retransmissions of the same.

Beyond the respect of moral rights, the main condition for the admissibility of compulsory licences is that authors receive “equitable remuneration”. The remuneration is fixed by agreement between authors and commercial users (typically broadcasting organisations) or, where that fails, by the competent national authority. All remaining aspects of the system are subject to domestic law, including the definition of the remuneration and the role of CMOs.

The ordinary meaning of “equitable” suggests that the remuneration should be fair and just. Some scholars submit that authors are entitled to an amount similar to what they would potentially receive in the market absent the compulsory licence. However, that quantum is difficult to calculate in light of the impact of the licence on the authors’ bargaining position. Hence, equitable remuneration is not necessarily “the market value of the use in question”, a realisation that gives importance to the role of the executive, legislative or judicial authority competent to fix the amount.

Furthermore, equitable remuneration does not include amounts for “ephemeral recordings” made by a broadcasting organisation “by means of its own facilities and used for its own broadcasts” pursuant to Article 11bis(3) BC. Broadcasting acts are distinct from those of recording; the first are acts of communication to the public, and the second are acts of reproduction.

Article 11bis(3) BC recognises this by requiring express authorisation for ephemeral recording, but allowing countries to exempt from authorisation acts of archival preservation of those recordings, if they have exceptional documentary character. This exemption may be subject to equitable remuneration.

Finally, Article 8 WCT mandates a gap-filling right of communication to the public. The right is granted “without prejudice” to BC provisions on broadcasting and communication to the public or its limitations, such as Article 11bis(2) BC. Consequently, as a matter of international law, it is arguable that compulsory licences granted under Article 11bis(2) BC are admissible even

357 Ricketson, 2003, p. 31 & n.75 suggests, based on the Records of the 1948 Brussels revision conference, that it is possible the word “conditions” also extends to free use, subject to payment of equitable remuneration.
359 See Dreier, 2006, p. 53; Ficsor, 2002c, p. 275; Ricketson, 1987, pp. 521, 527. See also Françon, 1986, pp. 213–215, with an early criticism of non-voluntary licences, arguing that they result in a weaker bargaining position and lower remuneration for authors.
360 Ricketson & Ginsburg, 2006, pp. 816, 824, further mentioning and seemingly endorsing a German proposal (modelled on the German patent law of that time) presented (and rejected) during the Berlin revision conference. In said proposal, the licence would be set in the interval between a “reasonable compensation” and an amount sufficient to “enable the licensee to sustain the operation of his business”.
361 For an analysis of this provision, see Ficsor, 2002c, pp. 275–278. Art. 5(2)(d) InfoSoc Directive allows ephemeral recording exceptions under similar wording to Art. 11bis(3) BC. In the field of neighbouring rights, Art. 15(1)(c) RC allows exceptions for ephemeral fixations by a broadcasting organisation “by means of its own facilities and for its own broadcasts”.
363 Ficsor, 2002c, p. 277, 2003b, p. 80; Ricketson, 1987, p. 537; Ricketson & Ginsburg, 2006, p. 829, arguing that the same may be warranted for compliance with the three-step test. See also: Goldstein & Hugenholtz, 2013, pp. 372–373; Ricketson, 2003 (calling this an “uncompensated exception”); and International Bureau of WIPO, 2000, pp. 4–5, (referring to it as “free uses of protected works”).
364 See Agreed Statement to Art. 8 WCT, which reads: “…nothing in Art. 8 precludes a Contracting Party from applying Art. 11bis(2)”. 
where a country has joined the WCT and recognised its general exclusive right of communication to the public.\textsuperscript{365}

Following Ricketson and Ginsburg, if a BC member has “previously treated wireless on-demand communications as coming within the local equivalent of the broadcasting and diffusion rights”, it is possible to apply compulsory licensing to those transmissions.\textsuperscript{366} Similarly, Ricolfi argues that international law leaves space for compulsory licensing of interactive on-demand (point-to-point) communication to the public, such as uploads in P2P networks. This derives from the joint reading of Article 8 WCT and its Agreed Statement, which would permit application of the BC compulsory licensing regime online, and its extension to interactive uses of making available.\textsuperscript{367}

Regardless of their appeal and consistency with international law, these interpretations are difficult to apply to the \textit{acquis}, as Article 3(1) InfoSoc Directive implemented Article 8 WCT through an exclusive right that includes broadcasting by any means, as well as a broad right of making available.\textsuperscript{368} Therefore, it seems that no compulsory licence of these rights is admissible under EU law, unless compliant with the three-step test. (Chapter 5 examines whether and how a legal licence ACS fares under the test.)

\textbf{2.4.2.2 Justifications}

Article 11\textit{bis}(2) BC was introduced by the 1928 Rome Act and slightly amended in the 1948 Brussels Act to the version that is currently in force. At its inception, Article 11\textit{bis} was a reaction to the “new discovery of broadcasting”, an innovative medium for dissemination of works that introduced “a dramatically different vehicle of thought”.\textsuperscript{369}

Its regulation, through the “application of the principle of the exclusive privilege to radio broadcasting… whatever may be the conditions governing the exercise of the privilege that national legislation adopts”, was classified by Mr. Caselli (Rapporteur-General to the 1928 Rome revision conference) as a “victory for copyright of considerable importance”.\textsuperscript{370}

The introduction of compulsory licensing was justified by a combination of public interest associated with the educational and informative role of broadcasting—as “in many countries this function was carried out by, or under the close supervision of, governmental or public authorities”—with the specific group interest of broadcasters.\textsuperscript{371}

In particular, broadcasting organisations were concerned that CMOs representing the broadcasting rights of authors—usually monopolies on national markets—would abuse their dominant positions in negotiations with commercial users.\textsuperscript{372} The records of the 1928 Rome

\begin{footnotesize}
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\item See von Lewinski & Walter, 2010, p. 979.
\item Ricketson & Ginsburg, 2006, pp. 748–749 (emphasis added).
\item Ricolfi, 2007, pp. 303–304. See also Mazziotti, 2008, pp. 266–267. In the relevant part, the statement reads: “It is further understood that nothing in Art. 8 precludes a Contracting Party from applying Art. 11bis(2).”
\item On the unequivocal inclusion of broadcasting in the scope of the right, see Recital 23 InfoSoc Directive. See also infra 4.3.2.1.
\item Records BC Rome 1928, p. 255 (General Report).
\item \textit{Ibid.}
\item Ricketson & Ginsburg, 2006, p. 819.
\item Ricketson & Ginsburg, 2006, p. 819 & n.283, citing the comments of the national delegations (of Australia, New Zealand, Scandinavia, and Netherlands) in the records of the 1928 Rome revision conference.
\end{enumerate}
\end{footnotesize}
conference reflect the compromise nature of the text, with discussions on the article lasting the entire proceedings. When all was said and done, this article was considered one of the most important achievements of the conference.\textsuperscript{373}

The general report denotes a tension between two opposing approaches to regulating a radio broadcasting right. On the one hand, the British and French delegations supported its assimilation by an exclusive right. On the other hand, the Australian and New Zealand delegations recognised the cultural and social interests of this new and popular form of dissemination, particularly of musical works.\textsuperscript{374} The debate echoed the characteristic tension between exclusivity and access when copyright faces a new technology, also central to ACS discussion.

The records of the Sub-committee on Broadcasting provide additional detail. From their reading it is clear that national laws had “given broadcasting services a markedly social character”, with delegations proving “ill-inclined to make undertakings that might hamper the development of broadcasting as a social service.”\textsuperscript{375} Therefore, it was “essential to adopt principles that both safeguard the rights of authors and also reconcile than [sic] harmoniously with the social purposes of broadcasting”\textsuperscript{376}.

Compulsory licensing is further justified on the basis that, “in light of the general interest of the State, limitations may be imposed on copyright” where “the need for them has been shown by that country’s own experience”.\textsuperscript{377} Thus, “while reconciling the general public interest of the State with the interests of authors, [these rules] give useful guidance for the international protection of the author’s rights regarding broadcasting”.\textsuperscript{378}

In other words, compulsory licensing provides a model for regulating copyright use that strikes a fair balance between the interests of authors in exclusivity and remuneration, and the public interest in the access to works and development of a socially valuable technology.

Depreeuw notes accurately that broadcasting “enabled a previously unimaginable access to (cultural) creations”, and “could be used to spread ‘spiritual food’ to a public on a massive scale, at high speed, which made it more efficient than the reproduction and publication or the public performance of works.”\textsuperscript{379} In her view, this aspect, together with the concern that exclusivity “could hamper the development of this economic and technical model of exploitation”, justifies “the desire of state authorities to regulate ‘in the public interest’”.\textsuperscript{380} In sum, the purpose of the provision “was to enable the contracting states to balance the author’s exclusive rights with other policy considerations in other domains (e.g. education and culture).”\textsuperscript{381}

\begin{footnotesize}
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\item 373 Records BC Rome 1928, p. 248 (General Report). The other main achievement was the recognition of the protection of moral rights in Art. \textit{6bis} BC.
\item 374 \textit{Ibid.}, p. 248 (General Report).
\item 375 \textit{Ibid.}, p. 230 (Sub-committee on Broadcasting).
\item 376 \textit{Ibid.}.
\item 377 \textit{Ibid.}, p. 231.
\item 378 \textit{Ibid.}.
\item 379 Depreeuw, 2014, p. 296.\textsuperscript{379}
\item 380 Depreeuw, 2014, p. 296.\textsuperscript{380}
\item 381 Depreeuw, 2014, p. 297.\textsuperscript{381}
\end{enumerate}
\end{footnotesize}
The 1948 Brussels Act extended the scope of the exclusive right in Article 11bis(1) BC by introducing new items (ii) on communication to the public by wire or by rebroadcasting by a different organisation, and (iii) on communication by loudspeaker. From this moment onwards, the provision also covered acts of rebroadcasting, such as cable retransmission. Retransmission acts were necessary to respond to certain technical limitations of territorial broadcasting at that time, largely concerning the reach and quality of the signal. These new means of exploitation were therefore included in the scope of the author’s exclusive right.

The Brussels conference also incorporated a corresponding scope extension in paragraph (2) through some minor drafting changes and, more substantially, replacing “right” with “rights”, thus covering all the new entitlements in paragraph (1), including cable retransmission. This simple solution hides the “impassionate debate” behind the adoption of paragraphs (2) and (3), which saw the opposing tendencies manifested in 1928 resurface with vigour.

In the general report, Marcel Plaisant notes that the programme proposed took due account of the “prodigious development of radio” since the time of the Rome conference, where that invention was in its early days. He called this the “[c]onference of broadcasting, discs, cinema and artificial or natural screens”, which “reconciled copyright, a spiritual concept, to these at once so powerful and so changeable material realities”. The expansion of Article 11bis(1) was an attempt to trace technological developments by covering new forms of exploitation, including television and its potential future improvements. That provision was considered “inseparable from paragraph (2)”, which places possible conditions for exercise “within a fairly broad framework” and, as per the Rapporteur-General, would allow, “in general terms, that each country may take whatever action it considers appropriate for the avoidance of all possible abuses”. He concludes with the ideas of balance and fairness, stating that “the relations of authors and composers with the broadcasting… industries are laid down in equitable terms”.

The heated nature of the debate emerges clearly from the Report by the Subcommittee on Broadcasting and Mechanical Instruments, where the French delegation proposed replacing the right of remuneration with an exclusive right. The proposal was rejected and a decision to extend the compulsory licence to all uses covered by paragraph (1) carried the day. It was stated that “Governments wish to retain some freedom of action” regarding the then-new field of television broadcasting. The discussions suggest that the allowance of compulsory licensing was viewed as a flexible middle ground to regulate an evolving technology.

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382 Depreeuw, 2014, pp. 278, 280
383 See Explanatory Memorandum SatCab Directive, p. 16.
385 Ibid., p. 263.
386 Ibid., p. 270.
387 Ibid., p. 263.
388 Ibid., pp. 263–264.
389 Ibid., p. 269.
390 Ibid., p. 274 (Report by the Subcommittee on Broadcasting and Mechanical Instruments).
391 Ibid. See also Ficsor, 2002c, pp. 273–274 at 273-274.
In 1967, during the Stockholm revision conference, there was an unsuccessful proposal to exclude from the scope of the compulsory licence certain uses of cinematographic works.\(^{392}\) However, the licence remained unchanged as it “provided an acceptable compromise between opposing interests”.\(^{393}\)

Outside the BC, the compulsory licence in Article 11\(bis\)(2) was a topic of debate during the preparation of the WIPO Treaties in the Geneva Diplomatic Conference, and is mentioned in the Agreed Statement to Article 8 WCT. The statement originates in a basic proposal for the substantive provisions of the WCT prepared during the 1996 Geneva diplomatic conference.

That proposal included an Article 6—suggested by a group of countries that included the EU and its Member States—on “abolition of certain non-voluntary licenses”, designed to obligate parties to “no longer provide for” or “apply” the BC licence within three years of ratification.\(^{394}\) That draft provision did not contain a note on its rationale, but only a generic encouragement of collective rights management.\(^{395}\)

The relevant records state solely that Article 6 “related to a bedrock principle… that copyright is a bunch of exclusive rights”.\(^{396}\) Most countries opposed the provision with concerns that abolishing non-voluntary licences would require them to have in place a developed system of collective rights management, with no further explanation on the matter.\(^{397}\) After multiple amendments, the article was rejected.\(^{398}\)

During the debates, some countries noted that existing BC provisions on non-voluntary licences “were preferable and fair”.\(^{399}\) The main driving force behind the deletion of the provision was strong opposition from China and other delegations, summarised as follows:\(^{400}\)

> broadcasting was, in many developing countries, a popular and important form of dissemination of information and means of enjoyment of literature and art, and that non voluntary licenses for broadcasting, as established in his country [China], were helpful in that respect and even beneficial to the fair remuneration of authors and other concerned parties. He stated that strong policy reasons in the respective countries commanded that they be free to maintain such non-voluntary licenses, and that, therefore his Delegation requested the deletion of Article 6.

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\(^{395}\) Ibid., p. 186.

\(^{396}\) Ibid., p. 650.

\(^{397}\) Ibid., p. 647–650.

\(^{398}\) Ibid., p. 506 (CRNR/DC/82, December 20, 1996). After the deletion of Art. 6, the Main Committee I submitted its “Draft Agreed Statements Concerning Treaty No. 1” to the plenary meeting of the conference, including an agreed statement on Art. 8 WCT identical to its eventually adopted version. Ibid., pp. 546 (CRNR/DC/92 Corr., December 20, 1996), 548 (CRNR/DC/96, December 23, 1996).

\(^{399}\) Ibid., p. 647 (Israel).

\(^{400}\) Ibid., p. 756.
It is worth noting the link between the social value of the technology and the possibility it affords for the promotion of access to and enjoyment of works—and therefore knowledge and culture—and fair remuneration for authors (and rights holders). These are the core justifications for compulsory licensing when contrasted with a model relying on exclusive rights. The same arguments are used to justify the adoption of ACS for non-commercial online use.401

In Geneva, other delegations emphasised the importance of compulsory licences to regulate competition. For example, the Portuguese delegate stated that abolishing these licences would “cause prejudice to the just balance between authors and broadcasters” reached in 1948. “Now that situations of monopoly occurred frequently”, he added, these licences were “needed more than ever”, as they permitted “dissemination of works and consequently culture as well as the use of archives of broadcasters which were mankind patrimony”.402

Concerns with competition were also pivotal to the inclusion of the final sentence of the statement, to the effect that nothing in Article 8 WCT precludes a Contracting Party from applying Article 11bis(2) BC. The sentence was added following an intervention from the Australian delegate, who initially sought a declaration “that the right of communication would have no application to the possibility of making statutory licenses with regard to retransmission”.403 The declaration was a trade-off for waiving a proposed statement to the previous Article 6, aimed at allowing Contracting Parties to introduce legislation “in the public interest in order to prevent or remedy any abuse of rights that may restrict or prevent competition”.404

2.4.3 Compulsory Licensing for Related Rights: Brief Reference

Compulsory licensing rules in the field of related rights follow the blueprint of Article 11bis BC and are found in the RC, WPPT and TRIPS.405 Article 12 RC provides a compulsory licence for secondary uses of commercially published phonograms.406 Its main justifications were fairness and the regulation of competition. It was felt that, “as a matter of common justice”, performers deserved to share profits from such use, thus correcting a form of “unfair competition” by broadcasters.407

In addition, the licence aimed at striking a balance between rights holders and users (especially broadcasting organisations) due to concerns with refusals to license.408 This aim is reflected in the imposition of a “single” remuneration mechanism to streamline negotiations.409

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401 See supra 1.1 and infra 5.3.3 (on the three-step test’s balancing exercise).
403 Ibid., p. 779.
404 Ibid.
405 See Arts 7(2), (13(d) and 15(2) RC; Art. 14(6) TRIPS. See also Ricketson & Ginsburg, 2006, p. 1215.
409 By defining the remuneration as “single”, debtors (broadcasting organisations) need only satisfy one claim. Records RC 1961, pp. 49, 163 See: C. Masouyé, 1981, p. 48; von Lewinski, 2008, p. 214. As a counterpoint, the RC accommodates divergent national traditions and economic situations by allowing broad reservations. See Records
Article 15(2) RC permits compulsory licences analogous to copyright, if compatible with the RC. Compatibility is limited to the cases covered by Articles 7(2) and 13(d) RC. The first relates to instances where performers have consented to broadcasting of their performances, and the second grants broadcasting organisations an optional right to authorise or prohibit the public communication of their television broadcasts.\(^{410}\)

In relation to these provisions, it is clear from the records of the RC that “determining the conditions” for the exercise of a right “is a euphemism for compulsory licenses”.\(^{411}\) Article 15 RC was justified by the desire for legal consistency in allowing limitations analogous to copyright, and to avoid preferential treatment for related rights holders vis-à-vis copyright owners.\(^{412}\)

Article 15 WPPT grants performers and phonogram producers a remuneration right for broadcasting and communication to the public of phonograms. It extends the scope of Article 12 RC by including indirect broadcasting, a broader concept of communication to the public—extending to webcasting and possibly near-on-demand transmissions—and additional subject matter in digital form.\(^{413}\)

With the exception of live performances, the WPPT provision should allow a compulsory licence for non-interactive digital broadcasting under Articles 4 SatCab Directive, 8 Rental Right Directive and 3(2) InfoSoc Directive.\(^{414}\) The last-mentioned provision includes a far-reaching exclusive right of making available, which causes any compulsory licence touching upon interactive uses, possibly including near-on-demand transmissions, to qualify as a copyright limitation.

On the table during treaty negotiations was not only the adoption of an exclusive right for online commercial subscription services\(^{415}\)—broadly rejected, including by the EU delegation\(^{416}\)—but also an ACS-type proposal. The latter consisted of a mandatory remuneration right for types of

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\(^{413}\) Arts 2(f) and (g) WPPT contain definitions of “broadcasting” and “communication to the public”. See Brison, 2006, p. 171, noting that under the WPPT broadcasting follows a special regime vis-à-vis communication to the public. N.B. the RC did not define “communication to the public”, a right construed with a broader meaning in the WPPT. See Ficsor, 2003b, p. 252.

\(^{414}\) N.B. Art. 8(1) Rental Rights Directive provides an exclusive right regarding the broadcasting of live performances (for the first fixation); where that use refers to a former broadcast or fixation, Art. 8 provides only a remuneration right. See Nérisson, 2014, pp. 186–187.

\(^{415}\) See Records WIPO Treaties 1996, pp. 290–291, 312–315 (referring to then draft Art. 19 on the remuneration right of phonogram producers; draft Arts 12 and 19 were later merged into an Art. 20a and originated the current Art. 15 WPPT), 428–429, 459, 684-691, 769.

\(^{416}\) Ibid., p. 685.
use where the communication could only be received “on the basis of subscription and against payment of a fee”, i.e. to certain types of near-on-demand transmission.417

In the end, however, the parties did not reach a consensus and drafted an Agreed Statement on subscription-based transmissions, which addresses the lack of certainty regarding online acts such as “digital broadcasting, webcasting and near-on-demand-services”, especially in light of the exclusive right of making available, leaving the matter for “future resolution”.418

Finally, Article 14(6) TRIPS incorporates in the treaty (vis-à-vis the related rights it grants) the exceptions and reservations permitted in the RC.419 This arguably opens the door for RC-compatible compulsory licences regarding TRIPS-related rights420, which would not be subject to the three-step test.421 Therefore, it is “an effort to align exceptions to copyright and related rights”422, and consolidate the level of compromise achieved in the RC, with nothing in its drafting or negotiating history providing additional normative content to the rule.423

2.4.4 Manifestations in the Acquis

The final version of Article 11bis BC covers different acts of communication to the public of works, including broadcasting and cable retransmission. These acts are subject to different regimes in the acquis, which does not contain a rule equivalent to the BC compulsory licence.

The 1993 SatCab Directive—rooted in the 1984 Green Paper “Television Without Frontiers”—regulates two rights of communication to the public relating to two forms of transmission of works: satellite broadcasting, viewed as a form of primary exploitation, and cable retransmission of broadcasts, seen as a form of secondary exploitation.424

First, the directive states that Member States shall provide an exclusive right for the author to authorise the communication to the public by satellite of copyright works.425 By combining the exclusive right with a localisation criterion—a “country-of-origin” rule—the directive sought to solve the issues of legal uncertainty on the treatment of satellite broadcasts in the EU. This solution was justified by the cross-border nature of satellite broadcasting, the inadequate national copyright protection afforded to this new technology, and pragmatic commercial reasons.426 In particular, this design addressed the fear that refusals to license in one territory would obstruct

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418 See first Agreed Statement to Art. 15 WPPT. See also: Brison, 2006, p. 187; Ficsor, 2003b, pp. 253–254. On the exclusive right of making available, see Arts 10 and 14 WPPT.
419 Contrary to the BC, the RC is not integrated in TRIPS and only specific provisions are mentioned therein, in connection to the related rights covered by the Agreement. See Carlos Maria Correa, 2007, p. 166 & n.242; Morgan, 2010, p. 390.
420 See: Dreier & Hugenholtz, 2006, p. 208; Kamina, 2015, pp. 52–53. Contra: Ficsor, 2002c, p. 634–ff, who seems to disagree by stating that Art. 15 TRIPS does not contain the same type of rights as Arts 12 RC and 15 WPPT.
425 Art. 2 SatCab Directive.
satellite transmission, harming both the public interest and the interests of authors in the exploitation of their works.427

In the explanatory memorandum, the Commission states the rationale for the exclusive nature of the right, while allowing the possibility of extended collective licensing:

If the law of the broadcasting country does confer protection in principle, but makes a primary broadcast via direct satellite subject to a statutory license, rights owners in the entire footprint are prevented from deciding how their works will be exploited and simply receive remuneration that has been fixed by the competent authority in the broadcasting country…

For this reason the proposal for a Directive rules out the introduction of statutory licenses for satellite broadcasts. If on the date of the proposal the legislation of a Member State allows agreements between an entitled organization of rights owners and a broadcaster to be declared generally binding, this possibility may be maintained subject to certain conditions.428

The directive’s rejection of compulsory licensing is understandable in light of the choice of an exclusive right combined with a localisation criterion to regulate satellite broadcasting. If the country of origin allowed a legal licensing system, the work would be available throughout the EU without the possibility of the author exploiting it in other Member States. Hence, the prohibition was necessary to prevent differences in the level of protection within the common market from causing distortions to competition.429

Second, the possibility of applying the BC compulsory licence to cable retransmission acts included in Article 11bis(1)(ii) BC is restricted by the SatCab Directive. In strict terms, the directive does not mandate an exclusive right for these acts, merely requiring that the same are restricted under copyright.430 However, as Depreeuw notes, several elements in the directive confirm the exclusive nature of the retransmission right, and exclude the possibility of subjecting it to statutory licensing.431

The right applies only to simultaneous, unaltered and unabridged retransmissions by cable of television or radio programmes originating in another Member State—thus excluding purely national retransmissions—following an initial broadcast over the air or (unlike the BC) by wire.432 The definition of the right thus requires a primary transmission and the use of the specific technology of cable as the means for the secondary transmission.433

It is noteworthy that the exercise of the right is subject to a special regime of mandatory collective management in Articles 9–12 SatCab Directive, from which only broadcasting

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427 Ibid., pp. 30-31. This issue had already been addressed in the proposal for the Rental Rights Directive, and was the topic of a Common Statement by the Council and the Commission. See J. Reinbothe & von Lewinski, 1993, p. 93 & n.72.
428 Explanatory Memorandum SatCab Directive, pp. 22–23 (¶¶35, 36). On ECL, see infra 3.3.3.
429 See Recital 21 SatCab Directive. See also Depreeuw, 2014, p. 387.
431 Depreeuw, 2014, p. 402, referring to recital 27 and the wording of Art. 8 SatCab Directive, which mentions individual or collective contractual agreements.
432 Arts 1(3) and 8 SatCab Directive.
433 On the requirements of initial transmission and retransmission by cable, see Depreeuw, 2014, pp. 393–400.
organisations are exempted. Still, despite this special regime, the exclusive nature of the right is left intact.434

In essence, the directive opted for a less stringent non-voluntary licence to determine the conditions of exercise of the right, rather than affecting its exclusive nature. This solution, consistent with Article 11bis(2) BC, enhances the bargaining position of authors, who retain the (collective) right to prohibit the exploitation of their works.435

The main rationale for this option was not so much the protection of authors’ interests but the facilitation of “the practicable exploitation of programmes”.436 The objective was to put in place a system (already used in some Member States) that ensured cable operators could acquire cable retransmission rights in a timely manner and in their entirety.437 Mandatory collective management would shield cable operators from refusals to license by individual rights holders not represented by CMOs in relation to their rights in retransmitted programmes (the so-called “outsider” problem).438 The system would likewise provide that rights holders interested in cable retransmission “would not be prevented from exploiting their rights”.439 In the Commission’s view, this solution was superior to the compulsory licensing of cable retransmission rights.440

Chapter 3 discusses mandatory collective management, which provides inspiration for some ACS proposals that consider it a viable model to regulate online use in EU copyright law.441 On this point, it is unclear whether the right of cable retransmission in the SatCab Directive includes Internet retransmission. The definition of the right is specific to the technology of “cable or microwave system”, and the Commission does not appear to have considered cable as including Internet retransmission, making it difficult to argue that these acts are subject to mandatory collective management.442

In its 2002 report on the directive, the Commission rejected the extension of the mandatory collective management regime to online retransmission. It considered this extension premature in light of the early stage of development of the Internet, as well as the recent InfoSoc and E-Commerce Directives, which applied to some of these acts and had not yet been transposed into national laws.443

Finally, regarding copyright, the 2001 InfoSoc Directive supplements the area-specific directives discussed above, by granting authors a broad exclusive right of communication to the public in Article 3(1). This right includes satellite broadcasting and cable retransmission.444

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437 Explanatory Memorandum SatCab Directive, p. 32.
439 Explanatory Memorandum SatCab Directive, p. 32.
440 Ibid., p. 43. See also P. Bernt Hugenholtz, 2006, pp. 278–279; Rösen, 2014, p. 231.
441 See infra 3.3.4.
444 Recital 23 InfoSoc Directive. See infra 4.3.2.
Despite the non-implementation in EU copyright law of the compulsory licensing model of Article 11bis(2) BC, this provision contains the blueprint for such a model in the field of related rights at international level, making it part of the acquis in a limited fashion.

Article 8 Rental Right Directive is based on Articles 7(1), 12 and 13(1)(a) and (d) RC. It aims at harmonising certain rights in relation to wireless (including satellite) broadcasting and communication to the public of performers, phonogram producers and broadcasting organisations.\textsuperscript{445} Its paragraph (2), similar to Article 12 RC, states

Member States shall provide a right in order to ensure that a single equitable remuneration is paid by the user, if a phonogram published for commercial purposes, or a reproduction of such phonogram, is used for broadcasting by wireless means or for any communication to the public, and to ensure that this remuneration is shared between the relevant performers and phonogram producers. Member States may, in the absence of agreement between the performers and phonogram producers, lay down the conditions as to the sharing of this remuneration between them.\textsuperscript{446}

With the exception of live performances, the right of broadcasting granted to performers and phonogram producers is not exclusive and gives rise to equitable remuneration under Article 8(2) Rental Right Directive. (In addition and as noted before, the exercise of the separate right of cable retransmission of broadcasts is subject to mandatory collective management in Articles 9–12 SatCab Directive.)

This provision was not contained in the original Commission proposal of 1990, but only in the amended proposal of 1992, following an Opinion of the Economic and Social Committee and discussion in the European Parliament.\textsuperscript{447} Its introduction corresponded with the protection provided to related rights holders in the RC and, together with other rights granted to these rights holders and harmonised in the directive, intended to solve the problems caused by “piracy connected with non-material exploitation”.\textsuperscript{448} Regarding the right of remuneration in Article 8(2), the amended proposal merely states that this was a minimum rights provision already part of most Member States’ laws.\textsuperscript{449}

Article 10 Rental Right Directive follows Article 15 RC. It allows Member States to impose the same limitations for related rights as exist for author’s rights (e.g. in Article 5 InfoSoc Directive), and permits compulsory licences if the same are compatible with the RC and the three-step

\textsuperscript{445} The definition of “communication to the public by satellite” is included in Art. 1(2)(a) SatCab Directive. See Common Statement by the Council and Commission at the internal market Council meeting of June 18, 1992. Art. 4 SatCab Directive clarifies that the concept of “broadcasting by wireless means” under Arts 8 and 10 Rental Right Directive encompasses also “communication to the public by satellite”.

\textsuperscript{446} The provision is distinct from Art. 12 RC insofar as it does not allow reservations, applies to performers and producers, and covers indirect means of broadcasting.

\textsuperscript{447} On the legislative process, see J. Reinbothe & von Lewinski, 1993, pp. 19–29, 92–93, noting that the Economic and Social Committee suggested the harmonisation of broadcasting rights, and the Parliament proposed the introduction of a new Art. 6 on this topic.

\textsuperscript{448} Amended proposal Rental Right Directive 1992, pp. 3, 12, discussing the insertion of a new Art. 6bis, which would become Art. 8 of the directive. See J. Reinbothe & von Lewinski, 1993, pp. 17–18, noting the disappointment of performers and broadcasters with the proposal’s silence on the rights broadcasting communication to the public.

test.\textsuperscript{450} In the explanatory memorandum, the Commission expressed the need to provide compensation for limitations allowed under this provision, especially for private use, due to the “high intensity of this kind of use”.\textsuperscript{451} (Naturally, the private use limitation would not apply to acts of broadcasting, understood as \textit{communication to the public}.\textsuperscript{452})

The aforementioned chain of provisions means that compulsory licences for broadcasting of subject matter protected by related rights admissible under Article 15(2) RC are allowed by the Rental Right and SatCab Directives.\textsuperscript{453} This is possible due to the lack of harmonisation of the right of communication to the public of related rights holders in Article 3(2) InfoSoc Directive, which only deals with the making available right. Therefore, the RC rules on limitations to the exercise of rights of broadcasting and communication to the public remain in force in the \textit{acquis}.\textsuperscript{454}

This set-up insulates a portion of non-interactive acts of communication to the public in EU law from the umbrella of full exclusivity. These alternatives to exclusivity, as applied to large-scale acts of communication to the public in the context of new technologies, are explored in the ACS debate.

\textbf{2.4.5 Conclusions on Compulsory Licensing for Broadcasting and Communication to the Public}

Broadcasting introduced a communications medium allowing one-to-many simultaneous transmission of signals to a dispersed public. During the early days of the technology and well into the twentieth century, broadcasting through radio, television, and satellite influenced the dissemination of information, education, culture, and the development of the democratic process.

Broadcasting also had a profound effect on copyright and its exploitation, as the content transmitted consisted largely of protected works. The essential policy question that emerged was how to balance this new model of mass communication and exploitation with the protection of authors’ rights.

Internationally, the BC answered this question in its 1928 Rome revision by balancing opposing views. One view, echoing existing national laws, supported the regulation of radio broadcasting by an exclusive right of communication to the public. Another view cautioned against extending exclusivity to these uses in light of the cultural and social interests of this new and popular form of dissemination of works. Furthermore, there were concerns that authors’ CMOs, typically natural monopolies, would leverage the exclusive right and refuse to license broadcasting organisations.

In essence, it was feared that an exclusive right would hinder the development of a new economic and technical model of exploitation, and prevent public interest considerations. The

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\item \textsuperscript{450} See Art. 10(2) RC. The three-step test in Art. 10(3) Rental Rights Directive was included by virtue of an amendment introduced by Art. 11(1)(b) InfoSoc Directive.
\item \textsuperscript{451} Explanatory Memorandum Rental Right Directive, pp. 58–59, discussing Art. 8 of the proposal. Private use is mentioned in Art. 10(1)(a) Rental Rights Directive.
\item \textsuperscript{452} CJEU, \textit{PPI}, ¶¶70–77.
\item \textsuperscript{453} Dreier, 2010, p. 434.
\item \textsuperscript{454} Art. 1(2) InfoSoc Directive. N.B. Art. 3(2) InfoSoc Directive implements Arts 10 and 14 WPPT.
\end{itemize}
\end{footnotesize}
interests of rights holders had to be contrasted with the public and users’ interests in the promotion and development of a new and important technology—including related concerns with access to information and knowledge—and the interests of commercial users, linked to the regulation of competition and industry practice. Many of the same tensions and considerations are central to the debate on how to regulate the mass communication of works to the public over the Internet.

The result of the BC debate was a flexible model of remunerated access through compulsory licensing in Article 11bis(2). The licence strikes a fair balance between the interests of authors in exclusivity and remuneration, and the public interest in the access to works and development of a socially valuable technology.

Through a technology-neutral formula and a legislative update in 1948 (Brussels Act), the scope of the provision and the licence extended to different types of broadcasting (including through television and satellite), rebroadcasting, communication by wire of broadcast works (applicable to Internet retransmissions), and communication by loudspeaker.

Article 11bis(2) BC allows national laws to regulate the “conditions of exercise” of the exclusive right. This formula, also used in the RC, enables adoption of non-voluntary licensing—compulsory licensing or mandatory collective management—subject to the respect of moral rights and payment of “equitable remuneration”. The definition of this last concept is left to national legislators. Beyond the notion that the remuneration is fair and just, it seems that it should relate solely to the permitted use (and not to related uses governed by other rights), while bearing some connection to the market value of the use.

The BC compulsory licensing model has survived to this day in international law, despite multiple challenges in the context of BC revisions and the WIPO Treaties. The same policy arguments advanced in Rome (1928) and Brussels (1948), together with the importance of the model for the fair remuneration of creators, secured the preservation of the compulsory licence in the Agreed Statement to Article 8 WCT. This very statement, some argue, allows for the compulsory licensing of interactive acts of communication to the public, including uploads in P2P networks. (In the acquis, Article 3 InfoSoc Directive appears to restrict this possibility and subject such a licence to the three-step test.)

The BC provision further served as a blueprint for compulsory licensing of related rights in the RC, TRIPS and WPPT. Article 12 RC regulates secondary uses of commercially published phonograms, and Article 15 WPPT extends its scope to include certain types of non-interactive online use. Other compulsory licences applying to rebroadcasting and some forms of public communication of television broadcasts are permitted in the RC and TRIPS.

The licence in Article 12 RC is also a child of compromise, between performers and producers, as licensors, and broadcasting organisations, as licensees. Authors opposed the model out of concern it would undercut their revenues. Broadcasters opposed it out of fear of refusals to

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456 Arts 7(2), (13(d) and 15(2) RC, and Art. 14(6) TRIPS.
license, and because they rejected the notion that their “secondary uses” of phonograms would have adverse economic effects.457

In the end, the main justifications for the compulsory licence were justice and fairness—performers and producers were entitled to a share of the profits reaped from these acts of exploitation of their protected subject matter458—and the desire to avoid refusals to license. Furthermore, the model was designed to prevent double payments (by attributing a “single” remuneration) and streamline negotiations.459 Finally, the possibility of subjecting the licensed uses to collective management was justified by the high transaction costs of individually managing and enforcing these.

As with the BC licence, there is little guidance in the RC preparatory works on the concept of equitable remuneration. The issue is mostly left to contracting states. However, commentators argue that calculation of the remuneration should refer to criteria like frequency and market value of the licensed uses.460 Also similarly to the BC, the RC allows broad reservations as a counterpoint to the principle of equitable remuneration.

The remaining RC compulsory licences were adopted to avoid preferential treatment of related rights holders vis-à-vis authors; the same rationale holds true for the subsequent inclusion of these provisions in TRIPS.461 The rebroadcasting licence in Article 7(2) RC was a concession to broadcasters for purposes of rights clearance.462 Underlying this and the compulsory licence for public communications of television broadcasts in Article 13 (d) RC was also a desire to enable dissemination of content while ensuring remuneration for affected rights holders.463 Finally, Article 15 WPPT crystallises the RC balancing of interests, without meaningfully advancing it.464

In the acquis, broadcasting and communication to the public of copyright were subject to exclusive rights, but with restrictions on their exercise. The SatCab Directive first recognised distinct rights for communication to the public by satellite and cable retransmission of broadcasts. Importantly, the first right allows extended collective licensing, while the second is subject to a special regime of mandatory collective management; this regime also applies to

458 See Records RC, pp. 159 (“performers should not be excluded from sharing in the immense profits made be phonogram, producers and broadcasters through the exploitation of their performances. Such exclusion was completely unjust”), 162 (“equitable remuneration for performers, phonogram producers or both, should be adopted as a matter of common justice”), 265.
related rights holders, except broadcasting organisations. Due to the technology-specific nature of the cable retransmission right, the latter regime probably does not apply to Internet retransmission.

For satellite broadcasting, the combination of the right with a country-of-origin rule made compulsory licensing difficult, as it could lead to forum shopping and distortions in competition. For cable retransmission, mandatory collective management was motivated by the regulation of industry practice and competition (preventing refusals to license), the protection of rights holders that wished to use the means of exploitation, and the enhancement of the fair remuneration and bargaining position of authors, who retained a collectively exercised exclusive right.

A subsequent wave of legislative action saw the recognition of a general exclusive right in Article 3 InfoSoc Directive. As noted, this right seems to block the availability of the BC compulsory licence in the EU—including its application to online use—and subject it to the three-step test.

In the field of related rights, the RC rules on limitations to the exercise of rights of broadcasting and communication to the public remain in force in the EU legal order, in part due to the limited harmonisation effected by Article 3(2) InfoSoc Directive.

The international rules described, as implemented in the Rental Right and SatCab Directives, allow compulsory licensing of the right of broadcasting (except for live performances) granted to performers and phonogram producers, subject to equitable remuneration.\textsuperscript{465} In conformity with international law, this licence can extend to non-interactive digital broadcasting.\textsuperscript{466} Nothing in the preparatory works of the directives suggests a shift in the rationales for these provisions, as compared to their counterparts in international treaties.

**2.5 Conclusions**

This chapter set out to identify historical examples of legal schemes qualifying as precedents to ACS, and understand their legal mechanics and the justifications for their adoption. Precedents are copyright rules that regulate the mass use of works, by reproduction or communication to the public, through non-voluntary licences, subject to payment of compensation. They impose remunerated access over exclusivity in order to address challenges arising from technological disruption, market failure, and difficult or undesirable enforceability.

Two legal regimes are selected as precedents: statutory licences for private copying, and compulsory licences for broadcasting and communication to the public; these regimes usually rely on obligatory collective management of the underlying remuneration or compensation right. It is notable that these regimes, alone or in combination with mandatory collective management

\textsuperscript{465} On which, see supra 2.2.4.

\textsuperscript{466} Although Art. 3(2) InfoSoc Directive likely blocks licensing of interactive uses. The conclusion seems admissible in light of the Agreed Statement to Art. 15 WPPT. This statement leaves open the “complete resolution of the level of rights of broadcasting and communication to the public that should be enjoyed by performers and phonogram producers in the digital age.”
(with each model applying to different rights), serve as inspiration for multiple ACS proposals.467

The analysis of precedents illustrates how copyright evolves in response to technologies that enable the large-scale use and exploitation of works outside the control of rights holders. Both home taping by individuals and radio transmission to a dispersed audience were clear uses of protected works; however, it was contentious whether copyright protection applied or should apply to those uses.

The response of courts and lawmakers was to extend the exclusive right to both types of use. For private copying, the extension was justified by the right of the author to a just pecuniary reward; for broadcasting, it was rooted in reasons of fairness, as most content transmitted via the ether consisted of protected works. In the two examples, the move was influenced by concerns that failure to secure copyright protection would result in the loss of novel exploitation markets or economic harm to existing markets.

But extending exclusivity to these fields also clashed with the public interest. Regulating private copying through an exclusive right signified the first intrusion of copyright in the private sphere, and presented a conflict with consumer rights and the fundamental right of privacy. It also meant imposing secondary liability on technology providers, ultimately judged disproportionate due to the susceptibility of the technology to non-infringing use.

For broadcasting, the implication was control of a new technology with profound social value, which allowed the dissemination of culture and education, and played a key role in the democratic process. Simultaneously, there were fears that exclusivity would lead to refusal by CMOs to license broadcasting organisations, an issue of regulation of competition and industry practice.

The precedents share public interest justifications. Underlying both regimes are policy concerns related to curing market failures, securing the development of socially valuable technologies, dissemination of knowledge and culture—including access to and enjoyment of works—, fair remuneration of creators and, as regards the endorsement of obligatory collective management, a reduction of contractual imbalances for creators. The same issues are staple items of the ACS debate.

This constellation of public interest concerns forced lawmakers into balancing the interests of rights holders, the public interest, and specific group interests (of commercial users and technology providers). The result in both cases was to restrict the nature or exercise of the exclusive right in favour of non-voluntary licensing regimes. Remuneration replaced exclusivity at the centre of copyright law.

Furthermore, the technology-neutral formulation of the right and accompanying licence allowed both precedents to track technological disruption and accommodate forthcoming uses and modes of exploitation.

467 See infra 3.3.4 and 3.3.5.
Against this background, the private copying model emerged in Germany in the 1950s–1960s. Following a series of landmark judicial decisions extending the right of reproduction to private copying activities—and contributory liability to technology providers—, the German legislator imposed a statutory licence model based on a limitation with equitable remuneration. End-users had legal permission to make private reproductions in return for payment of a levy.

Initially, the statutory licence was aimed at forms of tangible exploitation of some categories of works, namely home taping of sound recordings and audio-visual works. However, due to the technology-neutral formula of the law, the licence extended to incorporate mass intangible use, such as digital private copying, and a growing array of devices and media as levy targets. Providers of these devices and media were debtors of the levy, but had the right to pass it on to consumers. This design was privacy-respecting, ensured a link to the actual use, freed providers from liability for infringement, and was deemed a fair way to burden intermediaries for activities from which they profited. Due to the transaction costs of managing the system, the licence was subject to collective management.

Prior to its acquis recognition, private copying was discussed in the preparatory works of the BC and the WIPO Treaties. In the Stockholm revision conference, the German model was pivotal in the introduction of equitable remuneration as a public interest component of the three-step test, making remuneration a flexible tool for the admissibility and broadening of copyright limitations.

The private copying statutory licensing model has since proliferated to most EU Member States, making its way to Article 5(2)(b) InfoSoc Directive as an optional limitation. This version of the limitation, however, is combined with a fair compensation right, based on harm, indicative of a market failure rational. The debate at EU level featured some of the topics discussed at the WIPO conferences, in conjunction with the possibility of curing that market failure through technological control of digital use. The result would be a phasing-out of levies. Although enmeshed with the legal protection of TPMs in the acquis, the private copying limitation survived, not only due to the lack of evidence on the effectiveness of technological controls, but also due to the privacy right that underpinned it. This seems to imply that the limitation retains a fundamental rights rationale.

The BC compulsory licence for broadcasting and communication to the public followed a different path from private copying. The licence exempts broadcasters from authorisation for acts of communication to the public of works, subject to remuneration.

Its introduction in the Rome Act of 1928 was a response to the growing importance of radio broadcasting, a then-new mode of immaterial transmission and exploitation of works. The amendments promoted in the Brussels Act of 1948, together with the technology neutral definition of the right (“wireless diffusion”), allowed its extension to television broadcasting, some forms of satellite broadcasting, rebroadcasting, and communication to the public “by wire” (a concept that includes Internet retransmission).

Admissibility of compulsory licensing hinged on the treaty formula “conditions of the exercise” of the right, a legal synonym for non-voluntary licensing, and on the payment of equitable remuneration. Determination of the remuneration was left to the discretion of national laws. Neither the convention nor commentators provide much guidance on its contents, other than it should be fair, just, reflect the use licensed, and present a link to its market value.
The balance of interests reflected by the licence allowed it to survive multiple proposals for abolishment. It is currently enshrined in the Agreed Statement to Article 8 WCT, a provision which some scholars view as allowing compulsory licensing of the right of communication to the public online; in the acquis, Article 3 InfoSoc Directive apparently blocks this avenue for ACS, subjecting it to the three-step test.

The BC provision is also a valuable study subject in that it has inspired similar compulsory licences in the field of related rights, in the RC, TRIPS, and WPPT. To a limited extent, remnants of these are present in the acquis, despite the general exclusive right of communication to the public in Article 3 InfoSoc Directive, which includes broadcasting and cable retransmission.

One example of non-voluntary licensing, motivated by the regulation of competition and industry practice, is the special regime of mandatory collective management of the cable retransmission right in the SatCab Directive, from which only broadcasters are exempt. Another example is specific to related rights. Consistent with international law and in light of the limited scope of Article 3(2) InfoSoc Directive, the SatCab and Rental Right Directives allow compulsory licensing of the right of broadcasting of performers and phonogram producers, including non-interactive digital broadcasting. The right is subject to equitable remuneration, on which the CJEU has provided some guidance.

A striking lesson from this chapter is how much remains unchanged in copyright debates. It is difficult not to come away from studying the historical debates on both precedents with the impression that we are repeating yesterday’s discussions, with slight updates, for the regulation of the use of copyright works over the Internet.

For instance, the private copying debate is riddled with alarming claims on the negative effects of home taping on rights holders’ revenues, promises of technological control of copyright use, and willingness to enforce copyright at intrusive levels. Some texts could be used today merely by replacing the reference to the recording technology of the past with “P2P” or “file sharing”. The private copying statutory licence provided an adequate counterpoint to the extension of the exclusive reproduction right to the personal sphere. However, as we will see in Chapter 4, whilst the right tends to expand in the digital age, the limitation is narrowing. Put differently, the current system is losing the balance achieved in the German model.

All in all, perhaps the most important lesson is that the principle of exclusivity is not totemic. Rather, it is a tool to ensure copyright protection, subject to the public interest. This fundamental aspect is as old as copyright itself, as attested by the famous statement by Numa Droz in the closing speech to the 1884 Berne Conference, to the effect that “limits to absolute protection are rightly set by the public interest.”

Where the exclusive right poses a conflict with the public interest or specific group interests, remuneration and access emerge as the central concepts of copyright protection. This chapter shows that remunerated access through a model of non-voluntary licensing allows policy makers to reconcile copyright protection with the public interest in the face of technological and market

468 See supra 2.2.4 and, in particular, CJEU, Sena, ¶46.
469 Records BC 1884, p. 67.
disruption. For both private copying and the broadcasting licence, this model secured a fair balance across a range of competing interests that exclusivity could not.
3 Alternative Compensation Systems: Taxonomy of Legalisation Proposals

3.1 Introduction

The study of the admissibility and consistency of ACS with EU copyright law requires a clear understanding of their legal characteristics. To do so, it is necessary to define their nature, scope, and effects. This can be achieved through the identification, systematisation, and conceptualisation of proposals for legalisation of large-scale individual online use. This chapter sets about that task by developing a taxonomy of ACS from the perspective of EU copyright law, which can subsequently be tested against the relevant provisions of the acquis.

The chapter asks the following research questions:

- What legal models are most commonly used for legalisation proposals?
- How can these models be qualified in light of EU copyright law?
- What is the nature and effect of these models on the exclusive right?
- What are the main attributes of these models?

The departure point for analysis is the preliminary definition of ACS in Chapter 1. As noted, ACS is a shorthand for legal schemes, often combined with elements of collective rights management, that allow individuals to make online use of works without the direct authorisation of rights holders, subject to the payment of remuneration.\(^{470}\)

The kinds of use in question are technology neutral. They can be of different types and carried out in different contexts over the Internet, such as through P2P networks, user groups, social media, streaming sites, or other web 2.0 platforms. (Chapter 4 develops a typology of online uses which it then links to exclusive rights and limitations in the acquis.)

The “alternative” refers to a deviation from the application of an exclusive right and individual management to large-scale online use for personal enjoyment and expression. The former restricted use becomes permitted-but-paid through a system of “compensation without control”.\(^{471}\) Hence, an ACS implies a shift from exclusivity to remunerated access and use.

It was also noted in Chapter 1 that legalisation proposals bear different labels, beyond the overarching term “alternative compensation systems”. These include, to name a few representative examples, Fisher’s “tax-and-royalty system”, Netanel’s “non-commercial use levy”, the French L’ALLIANCE Public Artistes’ “license globale”, the German Green Party’s proposals for a “content” or “culture flat-rate”, Aigrain’s “creative contribution” model, etc.

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\(^{470}\) There is a vast literature in this field, covering contributions beyond legal scholarship. Among the most influential sources see: Bernault & Lebois, 2005; Séverine Dusollier & Colin, 2011; Grassmuck, 2009; Litman, 2004; Lohmann, 2004, 2008; Lunney, 2001; Netanel, 2003; Peukert, 2005. N.B. probably the first high level ACS proposal is Stallman, 1993, proposing a system for taxing digital copying through a levy on devices and media.

\(^{471}\) See supra 1.1. See Ginsburg, 2014b (on the notion of “permitted-but-paid”) and Wizards of OS, 2004 (with the “Berlin Declaration on Collectively Managed Online Rights: Compensation without Control”, a jointly issued declaration urging the European Commission to consider content flat-rate proposals).
Blázquez’s “file sharing levy”, Grassmuck’s “sharing license”, and COMMUNIA’s “alternative reward systems”. 472

Most proposals share the core characteristics of the precedents identified in Chapter 2. They are copyright rules that regulate mass use of works through non-voluntary licences, subject to compensation. 473 However, in order to offer a complete systematisation, this chapter also examines proposals external to copyright or that rely on voluntary licensing through collective rights management.

The analysis focuses on a list of texts, along with commentary and critique that can be understood as a “canon” of the theory of ACS. 474 These materials include a selection of legalisation proposals ranging from the purely theoretical to concrete implementation legislation. From the perspective of comparative legal analysis, the selection of sources is a combination of “typical”, “most similar”, and “influential”. 475 The selected literature is authored by academics, stakeholders, and political parties. With few exceptions (mainly in Brazil and Canada 476), most proposals originate from the US and EU, 477 and are post-2000. 478 Due to the high level of international harmonisation in copyright and the fact that many proposals are anchored in models of collective rights management (on which the EU has a longstanding tradition in law and practice), even ACS designed for non-EU jurisdictions are considered here. 479 To provide an overview of the field, Annex 1 contains a list and brief description of selected ACS proposals.


473 See supra 2.2.

474 To this effect, see Duncan Kennedy’s parallel comments when describing the several facets of critical legal studies. See D. Kennedy, 1997, p. 10.

475 Seawright & Gerring, 2008, discussing several cross-case selection methods in scholarly research.

476 For Brazil, see: Grassmuck, 2010a; Machado & Ortellado, 2013; Souza, Machado, Mendonça, Ortellado, & Schmidt, 2013. For Canada, see Songwriters Association of Canada, 2011.

477 In Europe, several minority political parties in different countries (Italy, Belgium, and Portugal) have advanced legislative proposals for ACS. See: Beltrandi et al., 2008; Beltrandi, D’Elia, Turco, Mellano, & Poretti, 2007 (Italy); Hellings & Piryns, 2010; Mora & Piryns, 2010 (Belgium); and Partido Comunista Português (Grupo Parlamentar), 2012 (Portugal). In France, during the adoption process of Law No. 2006-961 of 1 August 2006 concerning Copyright and Neighbouring Rights in the Information Society (Loi relative aux droit d’auteur et aux droits voisins dans la société de l’information, also known as “DADVSI”), the Parliament adopted an amendment on 21 December 2005 that regulated the act of downloading a file. This amendment was said by some to legalise P2P file sharing. This decision was subsequently reversed. See Geiger, 2008b, pp. 1–2.

478 N.B. some authors advance general recommendations in the sense of adopting ACS but offer little detail, preventing their qualification as fully-fledged ACS proposals. See, e.g., Patry, 2011, pp. 177–189, advocating the need to implement “a right to be paid through statutory licensing, collective management of rights, and levies”. For criticism, see Samuelson, 2012. See also Slater, Smith, Bambauer, Gasser, & Palfrey, 2005, with a comparative analysis of different proposals.

479 Momirov & Naude Fourie, 2009, discussing the application of comparative law methods and advancing a typology of modes of vertical and horizontal legal comparison.
The ACS definition requires access to works through blanket licensing subject to payment of compensation. These features exclude as viable legalisation options pure private ordering schemes, like those based solely on open access. Also excluded are systems built on uncompensated limitations for online use, sometimes labelled as “digital abandon” or “information anarchy”\(^\text{480}\). Proposals of this type are therefore not examined here.

The design of the taxonomy is predicated on existing law. Despite their different origins, the selected proposals are qualified and systematised with reference to the copyright acquis. This predominantly conceptual analysis provides a building block for the subsequent study of the admissibility of an ACS in EU copyright law. However, the definition of the scope and effects of legalisation models in light of this legal framework necessarily entails some compliance analysis. For example, the examination of schemes based on collective rights management models (voluntary, extended, mandatory) requires an assessment of their scope in the acquis, together with consideration of the legal hurdles they may face. Nevertheless, beyond what is necessary to develop this taxonomy, the analysis of whether an ACS is admissible in EU copyright law takes place in the following chapters.

The inquiry proceeds as follows. Section 3.2 sets out a conceptual design for ACS. It identifies classification criteria for legalisation models and proposes a method to understand them through a gradual approach to exclusivity. Section 3.3 then defines the scope of ACS. The analysis delves into the legal schemes fitting the ACS definition and examines them as “vertical” regimes susceptible of application to large-scale online use. It relates the schemes to the acquis and takes a position on their legal nature\(^\text{481}\). Section 3.4 furthers the taxonomy of legalisation proposals by looking at the characteristics of ACS, conceptualised as “horizontal” attributes. Section 3.5 concludes.

### 3.2 Conceptual Design

Legalisation proposals vary widely and tend to be depicted as radical departures from current law. However, a systematic and careful study of the literature tells a different story. It reveals a body of work that explores copyright law’s flexibility. This section develops a conceptual design for the selection and characterisation of ACS. If first advances classification criteria to distinguish a set of legalisation models that impose restrictions to exclusivity. It then explores these models by explaining their relationship to exclusivity, leading to the selection of five types of ACS theoretically applicable to all types of works.

To design a conceptual framework, we need to identify an organising principle reflecting the aim of the subject of systematisation. The aim of ACS is the establishment of a model of remunerated access for the copyright regulation of online use of works, as an alternative to the status quo of exclusivity, individual management, and the possibility of strict enforcement against individuals.

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\(^{480}\) Netanel, 2003, pp. 74–77, labelling the positions of Ku, Litman, Lunney and Nadel as “digital abandon”. However, the label may not adequately reflect all cited authors’ proposals, namely in the cases of Lunney, Ku and Litman, which all advance alternatives in the form of atypical legal licences. See also Eckersley, 2012, p. 85, defining “information anarchy” as a regulatory regime where non-commercial copying is freely permitted or copyright is abolished altogether.

\(^{481}\) A similar approach in the literature in this field is used in Slater et al., 2005, p. 5.
In economic terms, ACS aim to substitute a “property rule”—imposing a default prohibition on use—with a “liability rule” for online use by individuals.\textsuperscript{482}

Therefore, we should classify legalisation schemes according to their effects on the application of the exclusive right to online use. This requires us to take the perspective of the rights holder, as the party affected in her pre-existing juridical entitlement. In this light, a sound organising criterion is that of the restrictions operated by an ACS on the exclusive right.\textsuperscript{483}

ACS can then be classified according to the gradual level of the restrictions to the exclusive right resulting from different statutory or contractual mechanisms. The approach reflects different ways in which rights can be acquired (in a broad sense) so as to enable use absent direct authorisation from rights holders. This allows the division of ACS into voluntary and mandatory legal mechanisms imposing gradually higher restrictions on the nature and exercise of exclusive rights. Table 1 provides a representation of the classification.\textsuperscript{484}

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|}
\hline
Level / Impact & Nature of right & Rights Acquisition Scheme or Type of Restriction \\
\hline
0 / - & Exclusive & Status quo: full individual exercise of right (Private Ordering) \\
\hline
1 / + & Exclusive & Voluntary Collective Licensing \\
\hline
2 / ++ & Exclusive & Extended Collective Licensing (ECL) \\
\hline
3/ +++ & Exclusive (debated) & Mandatory Collective Management \\
\hline
4/++++ & Remuneration or compensation & Compulsory or statutory licences with compensated or remunerated copyright limitations (“Legal licences”), typically exercised through collective rights management \\
\hline
5/+++++ & No economic substantive rights & Uncompensated limitation \\
\hline
6/++++++ & Remuneration claim (external to copyright) & State remuneration, compensation or reward systems; Cultural subsidies (“State Systems”) \\
\hline
\end{tabular}
\caption{Restrictions to Exclusivity}
\end{table}

\textsuperscript{482} See Kur & Schovsbo, 2011, on the reception of these terms in the field of intellectual property rights, while discussing the gradual loss of relevance of the exclusivity paradigm. See also: Merges, 1996, 2004a (arguing for the superiority of property rules due to the fact that parties contract around the same to avoid holdup problems); Oliar, 2012 (discussing property and liability rules in the context of the conflict on the legal protection of new technological uses of content between copyright owners and technological innovators); and Lemley, 2012 (arguing that parties not only contract around property rules, as suggested by Merges, but also around inefficient liability rules). For the original use of the term in law and economics scholarship, see Calabresi & Melamed, 1972.

\textsuperscript{483} Implicitly or explicitly, most scholarship adopts this basic criterion. For explicit adoption, see Séverine Dusollier & Colin, 2011; Gervais, 2010; von Lewinski, 2005. See also Kur & Schovsbo, 2011, using the “exclusivity” characteristic of intellectual property rights as the pivotal point of the analysis of liability rules.

\textsuperscript{484} Table 1 is inspired by Gervais, 2010, p. 26.
The departure point is full individual exercise of an exclusive right, absent restrictions (Level 0). This represents the status quo for most online use of works and includes inter alia private ordering models, such as creative commons. It can be understood as one end of the spectrum. At the other end are uncompensated limitations (Level 5), which fail to qualify as ACS due to their lack of a remuneration element. Between these extremes are the five legal schemes that satisfy a broad ACS definition. These are, from least to most restrictive:

- Voluntary collective licensing,
- Extended collective licensing (ECL),
- Mandatory collective management,
- Compulsory or statutory licences (jointly referred to as “legal licences”), and
- State remuneration, compensation or reward systems, and cultural subsidies (hereinafter jointly referred to as “State Systems”).

These models constitute stand-alone legal schemes to cover all relevant mass use. Levels 1 through 4 correspond to legal and legally enabled contractual mechanisms, namely regulated forms of collective rights management. They range from the most restrictive legal licences (Level 4), a term discussed in the previous chapter, to the least restrictive voluntary collective licensing (Level 1). All these schemes are internal to copyright and identified as preferred regulation models by ACS proponents.

State Systems (Level 6) differ from the previous schemes insofar as they are external to copyright. This label applies to proposals that eliminate copyright protection for (mostly non-commercial) online forms of use of works, placing the same (for the types of use in question) in the public domain. In these systems, creators are compensated not through a right of remuneration but rather through an array of tax or financing schemes to subsidise or reward creators. State Systems therefore shift the burden of incentivising the creation and dissemination of works from the copyright system to the State. As argued below, these characteristics make State Systems arguably more restrictive than uncompensated limitations (Level 5).

This classificatory method also reinforces one of the conclusions of Chapter 2, to the effect that copyright law’s approach to exclusivity is not absolute but nuanced. It is possible to represent the gradual approach in an axis or continuum (Figure 2).^{487}

^{486} Kur & Schovsbo, 2011, noting that although copyright is the richest example of this gradual approach in the field of intellectual property rights, the same point holds true at differing degrees to other such rights, with the notable exception of trademarks.
^{487} Figure 2 draws inspiration from Séverine Dusollier & Colin, 2011, pp. 817–820.
When gliding through the axis from least through increasingly more restrictive rights acquisition schemes, both the nature of substantive rights and the type of licence are affected. For instance, voluntary and extended collective licensing are typical models within which exclusive rights are managed. Their designation as “alternatives”, especially for voluntary collective licensing, should be broadly construed as relating to their opposition to full individual management in lieu of regulated forms of collective rights management.

Conversely, mandatory collective management, due to the restrictions imposed on the options of exercise of the right, has been subject to much scholarly debate regarding its impact on the exclusive nature of the right. This issue, anticipated in Chapter 2, is examined infra in 3.3.4.2.

At this stage, it is sufficient to state that mandatory forms of collective rights management can apply both to exclusive and remuneration rights. As noted in the previous chapter, these two cases are distinguished by using the term “mandatory” to refer to the application of the scheme to exclusive rights, and “obligatory” to refer to its application to remuneration or compensation rights, typically as an adjunct to a statutory licence. An example of mandatory collective management, provided in Chapter 2, is the special regime applicable to the exclusive right of cable retransmission in Articles 9–12 SatCab Directive. It is submitted that the legal imposition of collective management of an exclusive right does not per se affect its nature and transform it into a remuneration right. Instead, each collective rights management model—voluntary, extended, mandatory—imposes increasing restrictions on the options of exercise of the right.

Why does this distinction matter?

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489 See Lucie Guibault, 2002, pp. 26–27, with a similar distinction. See also supra 2.2.3.
490 See supra 2.4.4.
First, it matters because the legal qualification affects the scope of the right. An exclusive right allows the application of injunctions, making effective the prohibition of use through judicially backed enforcement mechanisms. Contrariwise, remuneration or compensation rights reduce the entitlement to remuneration claims (and enforcement of the same). Thus, the loss of ability to restrict access to the right and to \textit{ex post} enforcement implies the shift from a property rule to a liability rule-based copyright regulation.

Second, the distinction matters because the effect of a model on the exercise and nature of the right has consequences for its compliance with international law and the \textit{acquis}, its legal feasibility and even normative adequacy. Furthermore, the distinction helps to clarify legal concepts that are often used with overlapping meanings in legislative texts and academic writings.

A good example, with relevance here, is that of “non-voluntary” licences. As noted in the previous chapter, the term applies to two different models: compulsory licences and mandatory collective management. The first model is a legal licence and clearly implies that the underlying right is not exclusive, but subject to remuneration or compensation. Thus, if an ACS is adopted on the basis of such a licence and there is no legal rule in the \textit{acquis} that provides for its application to non-commercial online acts of reproduction and communication to the public, the validity of the licence depends on meeting the conditions of the three-step test in Article 5(5) InfoSoc Directive. However, if it is accepted that mandatory collective management does not constitute a copyright limitation, it will not have to meet the conditions of the test.

Of importance in drawing these distinctions is the term “exercise”. The term has multiple possible meanings, so it is important to be clear on its connotation here. A crucial use of the term is found in Article 5(2) BC, which bans formalities for the “enjoyment” and “exercise” of copyright. In that context, “enjoyment” refers to author’s rights coming into existence and being recognised absent any formalities, whereas “exercise” relates to formal requirements on the initiation of enforcement of copyright.

Together with other copyright scholars, “exercise” of copyright is understood here to cover a range of acts that do not touch upon the enjoyment or existence of the right. That meaning is broader but consistent with the use of the term in Article 5(2) BC. Exercise thus includes “performing, authorising or prohibiting rights under copyright and related rights and/or claiming remuneration for acts, or taking the necessary steps to have moral rights respected”; the main

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491 Kur & Schovsbo, 2011, pp. 1–16, discussing the implications of the different legal qualification of exclusive and remuneration rights.
492 Kur & Schovsbo, 2011, pp. 1–16.
493 Kur & Schovsbo, 2011, p. 21, concluding this in connection with limits to exclusivity in patent rights, but using identical reasoning for copyright. See also Oliar, 2012, on the conflict between property and liability rules and the trade-offs between authorship and innovation as the “copyright-innovation conflict”.
494 For example, the expression “conditions on the exercise” in Art. 11bis(2) BC is a euphemism for compulsory licensing. See supra 2.4.2.
modalities of exercise are individual exercise—including direct licensing, agency or representation—and collective rights management.\footnote{Ficsor, 2003b, p. 288.}

Restrictions on the exercise of copyright are conditions imposed by law or contract that affect its transfer, management and enforcement, but not its nature or existence. Only where a legally imposed restriction affects that nature or existence does it cause a transformation from an exclusive to a remuneration or compensation right, and therefore qualifies as a copyright limitation. This understanding of exercise leads to the observation that the exclusive right has significant \textit{elasticity}. It can stretch from individual management to the gradually more limiting collective rights management schemes, without losing its exclusive nature.

Hence, there is no complete overlap between the effect on the exclusive right of a legal model and the voluntary or non-voluntary type of licensing that underlies each scheme (see Figure 2). On the one hand, voluntary and extended collective licensing are models to which rights holders choose to adhere or can generally opt out of, retaining the possibility of unencumbered exercise of their copyright. (Where ECL does not allow opt-out, section 3.3.3 below contends that the model is equivalent to mandatory collective management, and therefore a non-voluntary licence.)

On the other hand, although the term non-voluntary licence appears to originate in the ambiguous terminology of international treaties on compulsory licences, the label also fits well for mandatory collective management and legal licences: for neither scheme does the rights holder have the initial choice to participate or the subsequent possibility of opting out. What differs here is that mandatory collective management technically translates into a statutory restriction on the options for exercise of a right, but not on its existence as an exclusive right, as is the case with legal licences.\footnote{In this sense, see Colin, 2011a; Sèverine Dusollier & Colin, 2011; von Lewinski, 2004, 2005. See \textit{infra} 3.3.4.2.}

Finally, “State Systems” (Level 6) place the regulation of online use outside the realm of copyright protection. This makes their impact on the exercise and nature of exclusive rights the highest among all the rights acquisition schemes considered. From a conceptual standpoint, it is arguable that these systems are more restrictive than uncompensated exceptions (Level 5), commonly qualified as user \textit{privileges} or \textit{defences}—not rights—subject to the fulfilment of certain conditions.\footnote{On the discussion of exceptions or limitations as restrictions to exclusive rights (perceived as user defences) versus their consideration as affirmative user rights see e.g. Geiger, 2010; Lucie Guibault, 2002; Karapapa, 2012, pp. 79–98.} If such conditions are not met, the use in question triggers the exclusive copyright.

The same does not hold true for State Systems. Here, because no copyright protection is afforded to the use in the first place, failure to comply with a condition of use does not imply the default application of copyright. As noted in Chapter 1, this dissertation takes a pragmatic approach to legal reform and examines models to adapt and improve EU copyright law, rather than abolish copyright protection.\footnote{Cf. \textit{supra} 1.2.} Adoption of State Systems would require abrogation or profound change
in international treaties, which makes them legally and politically unrealistic.\textsuperscript{500} Thus, they are only analysed in this chapter due to their influential nature in the ACS debate and the fact many of their attributes are susceptible of application to schemes internal to copyright, namely legal licences.\textsuperscript{501}

### 3.3 Types of Alternative Compensation System

This section builds on the previous conceptual design by delimiting the scope of ACS in light of the \textit{acquis}. The rights acquisition schemes identified above reflect the legal and contractual mechanisms under which ACS proposals authorise large-scale online use.

Authorisation can be direct or indirect. Authorisation is \textit{direct} if the end-user enjoys a legal or contractual entitlement to engage in the online use without intermediation. Authorisation is \textit{indirect} when granted to commercial users or intermediaries, even if for the ultimate benefit of end-users.\textsuperscript{502} An intermediate case is that of authorisation with “minimal” intermediation. This refers to contractual mechanisms between users and rights holders’ representatives (such as CMOs) authorising individual online use via intermediaries (commonly ISPs) that are instrumental to the contractual relationship, but not parties thereto.\textsuperscript{503}

This section analyses each rights acquisition scheme against the legal framework of the \textit{acquis}, and describes how different legalisation proposals apply to large-scale online use. The examination begins with a background summary of collective rights management, as most legalisation models are of this type (3.3.1). This section then examines in turn each type of ACS, from least to most restrictive: voluntary collective licensing (3.3.2), ECL (3.3.3), mandatory collective management (3.3.4), legal licences (3.3.5), and State Systems (3.3.6).

#### 3.3.1 Some Basics on Collective Rights Management

Collective rights management is both a deviation from and an alternative to the general principle of exclusivity and individual exercise of copyright. The objective of collective management is to achieve an efficient exploitation of works.\textsuperscript{504} The price of a CMO’s efficiency is “the limitation of the freedom of contract of right holders and users”.\textsuperscript{505}

Collective management addresses the problem of transaction costs associated with establishing, managing and enforcing copyright, inherent to its informal, fragmented, transferable and territorial nature.\textsuperscript{506} In offering a solution to this problem, collective management emerges as an answer to the so-called “copyright paradox”, as it reconciles the exclusive nature of the right—

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\textsuperscript{500} Noting the political challenge of such changes, see Gervais, 2005, p. 30; Griffiths, 2009, p. 11; Koelman, 2006, p. 411; Peukert, 2005, p. 52.

\textsuperscript{501} Cf. \textit{supra} 1.2.

\textsuperscript{502} See Gervais, 2001, using a comparable terminology when discussing models for the acquisition of rights.

\textsuperscript{503} Colin, 2011a.

\textsuperscript{504} Séverine Dusollier & Colin, 2011, p. 827.

\textsuperscript{505} R. Hilty & Nérisson, 2013, p. 4.

\textsuperscript{506} See Eckersley, 2012, pp. 230–231, for a discussion of the concept of transaction costs in ACS. The author focuses on the reduction of transaction costs in connection with collective rights management. See also Allen, 2000, for a broader law and economics discussion.
and its default prohibition on use—with the goals of access and dissemination of works.\textsuperscript{507} It is therefore unsurprising that legalisation proposals often rely on collective licensing.

CMOs are mostly private entities providing services that include licensing users, auditing and monitoring rights, enforcing copyright, and collecting and distributing royalties to rights holders.\textsuperscript{508} They also develop social and cultural functions, a role recognised in the CRM Directive.\textsuperscript{509}

Although the directive does not require CMOs established in the EU to adopt a specific legal form, it subjects them to a variety of rules on representation, membership, organisation, management of rights revenue, management of rights on behalf of other CMOs, relationships with users, transparency, reporting, and enforcement measures.\textsuperscript{510} In addition, the directive contains a special regime for CMOs established in the EU that manage authors’ rights in musical works for online use on a multi-territorial basis (more on that later).\textsuperscript{511}

In the EU, an organisation qualifies as a CMO only if its \textit{sole or main purpose} is to act for the collective benefit of its members. Furthermore, it must fulfil at least one of the following requirements: be owned or controlled by its members; or be organised on a not-for-profit basis.\textsuperscript{512} These organisations must act in the best interests of their members and may not impose on them obligations that are “not objectively necessary for the protection of their rights and interests or for the effective management of their rights.”\textsuperscript{513}

The CRM Directive distinguishes CMOs from “independent management entities”, to which it applies a more limited set of rules.\textsuperscript{514} This new concept in the \textit{acquis} refers to organisations authorised to manage rights on behalf of several rights holders for their collective benefit, as their sole or main purpose. In contrast to CMOs, these entities are commercial and not owned by right holders.\textsuperscript{515}

Recital 16 clarifies that independent management entities do not include audio-visual producers, record producers, broadcasters, and publishers (of books, music or newspapers), who license rights in their own interest. Managers and agents of creators do not qualify either because “they do not manage rights in the sense of setting tariffs, granting licences or collecting money from users”.

\textsuperscript{508} SWD CRM Directive 2012, p. 195.
\textsuperscript{510} Art. 2(1) CRM Directive.
\textsuperscript{511} Art. 2(2) CRM Directive, referring to Title III. It is noteworthy that the relevant provisions of the directive apply to entities directly or indirectly owned or controlled (wholly or in part) by a CMO, if such entities carry out an activity which, if carried out by the CMO, would be subject to the provisions of the directive. Cf. Art. 2(3) CRM Directive. On the issue of legal form, see recital 14.
\textsuperscript{512} Art. 3(a) CRM Directive. A “member” is a rights holder or an entity representing rights holders, including other CMOs and associations of rights holders, fulfilling the membership requirements of the CMO and admitted by it. Cf. Art. 3(d) CRM Directive.
\textsuperscript{513} Art. 4 CRM Directive.
\textsuperscript{514} Art. 2(3) CRM Directive. See Lucie Guibault & Gompel, 2016, pp. 143–144.
\textsuperscript{515} Art. 3(b) CRM Directive.
In some countries, establishment of CMOs may depend on government authorisation. In all cases, the organisation requires acquisition of authority to license works, collect royalties, and create a repertoire of works. Such authority stems from legal provisions, contracts with rights holders, or representation agreements between CMOs, whereby one organisation mandates another to manage the rights it represents. The organisation is then authorised to grant licences on the works in respect of which it manages rights for a given territory, i.e. its “repertoire”.516 The authority to license on behalf of rights holders can be granted to CMOs on an exclusive or non-exclusive basis. If granted on an exclusive basis, it will result on the organisations having a monopoly for their field and territory of operation. Indeed, most CMOs are de facto, and sometimes de iure, monopolies.518 In the EU and for the online exploitation of musical works, the CRM Directive attempts to counteract this by fostering a competitive regime of multi-territorial licensing.519

A CMO grants licenses to users based on agreed prices or fees, also called “tariffs”, and rights holders are paid by the organisation after usage data is collected and processed.520 In the CRM Directive, a “user” means any person or entity carrying out acts subject to authorisation by right holders, or the requirement to pay remuneration or compensation to right holders, which is not acting in the capacity of a consumer.521 A consumer, in turn, is a natural person acting for purposes outside his trade, business, craft or profession.522 In essence, CMOs operate as intermediaries in a two-sided market between rights holders and users (Figure 3).

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517 See Art. 3(l) CRM Directive. See also Gervais, 2016, p. 9.
519 See infra 3.3.2.
521 Art. 3(k) CRM Directive.
The licensing terms and tariffs are set in accordance with a combination of state intervention and CMO regulation, the level of which varies per territory. The CRM Directive mandates that negotiations with users for the purposes of licensing are carried out in good faith, in a timely manner, with disclosure of the necessary information, and that licensing terms are subject to objective and non-discriminatory criteria. Furthermore, refusals to license a particular service must be presented to users in a reasoned statement.

The directive further requires that rights holders receive “appropriate remuneration” for the use of their rights. This means that tariffs for exclusive or remuneration rights must be reasonable in relation to, inter alia, the economic value of the use of the rights in trade, taking into account the nature and scope of the use of the work and other subject-matter, as well as in relation to the economic value of the service provided by the collective management organisation.

The notion of “economic value in trade” as an objective criterion to set tariffs is used by the CJEU in *Kanal 5 and TV4*. The case involved determining whether tariffs applied by the Swedish CMO STIM for use of its music repertoire by a broadcasting organisation in television broadcasts were reasonable. The Court stated that “in so far as such royalties are calculated on

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524 Art. 16(1)–(3) and Recital 32 CRM Directive.
525 Art. 16(3) CRM Directive.
the basis of the revenue of the television broadcasting societies, they are, in principle, reasonable in relation to the economic value of the service provided by STIM.”

It concluded that a CMO does not abuse its dominant position by applying this tariff model, provided the same is proportionate to the actual or potential usage of the repertoire and the audience cannot be measured by a more accurate and cost-efficient method.

On this point, it is worth noting the challenges of reconciling this view of “appropriate remuneration”, linked to the standard of “economic value in trade”, with the concept of fair compensation in the InfoSoc and Orphan Works Directive, based on the notion of harm. As such, appropriate remuneration should be viewed flexibly so as to accommodate the conceptual nuances of the different remuneration entitlements inherent in voluntary royalties, remuneration rights, and fair compensation rights.

The income collected by a CMO on behalf of rights holders, whether deriving from an exclusive right, a right to remuneration, or a right to compensation is called “rights revenue”. The amounts charged, deducted, or offset by a CMO from rights revenue or from any income arising from the investment of rights revenue in order to cover the costs of its management services are the “management fees” (see Figure 3).

Finally, Article 5(3) CRM Directive provides rights holders a right to grant licences for “non-commercial uses of any rights, categories of rights or types of works and other subject-matter that they may choose”. CMOs must ensure that rights holders can exercise the right, inter alia by deciding on the “conditions attached to the exercise of that right” and informing their members of those conditions. Importantly, there is no right to non-commercially license individual works.

### 3.3.2 Voluntary Collective Licensing

#### 3.3.2.1 Characterisation and Legal Framework

Voluntary collective licensing is the least restrictive form of collective rights management. In this system, a CMO enters into a contract with users for the rights it represents. The licensees are typically users not acting in the capacity of consumers, as envisaged in the CRM Directive, but certain ACS proposals refer to the possibility of a CMO directly licensing end-users.

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527 CJEU, *Kanal 5 and TV4*, ¶41.
528 Cf. Lucie Guibault, 2014, p. 750; Quintais, 2013, p. 69. On the concepts of equitable remuneration and fair compensation, see supra 2.2.4, 2.3.3, and infra 4.4.3.3.
529 Art. 3(h) CRM Directive. See also Arts 11–13 CRM Directive with rules on the management of rights revenue.
530 Art. 3(i) CRM Directive.
531 Recital 19 CRM Directive.
532 Lucie Guibault & Gompel, 2016, p. 151.
534 Art. 3(k) CRM Directive. See also SWD CRM Directive 2012, p. 195, defining “commercial user” as “any person or entity involved in the provision of goods or services who for its activities needs a licence from rightheolders of copyrights and/or related rights”. 
Depending on how the system is set up, a commercial user (e.g. an ISP) may contract directly with a CMO and obtain the right to sublicense its customers, or act as a mere intermediary obtaining licences for the benefit of clients or subscribers, i.e. the actual users of works.\textsuperscript{535}

The system is voluntary for rights holders and users.\textsuperscript{536} The former are free to join a CMO and decide which works the organisation will manage. CMOs may partially curtail that freedom through contractual terms in membership requirements. Before the CRM Directive, requirements of this type might go so far as to make membership dependent on rights holders entrusting all rights to the organisation on an exclusive basis or preventing them from individual management. Since the directive, this possibility is now limited.\textsuperscript{537} Where membership agreements are non-exclusive, rights holders retain the possibility of licensing users directly or through representatives.\textsuperscript{538}

Voluntary licensing is a typical rights management model in the EU, increasingly used for optimising licensing activities, especially for particular rights in online music.\textsuperscript{539} The CRM Directive prescribes a special regime for multi-territorial licensing of author’s online rights in musical works, which can be viewed as a model of reinforced voluntary collective licensing.\textsuperscript{540} This regime is the most innovative part of the directive and constitutes a regulatory novelty in European copyright law. For this reason, and because it illustrates the complexity of copyright fragmentation in EU law, it is important to provide an overview of its mechanics.

The multi-territorial licensing system is a development of the regulatory framework advanced in the unsuccessful 2005 Online Music Recommendation, and aims at replacing the current predominantly territorial model of online music licensing by CMOs.\textsuperscript{541} The system aims to facilitate repertoire aggregation for online use of musical works at EU level, to develop common standards on multi-territorial licensing, and to foster efficient licensing practices.\textsuperscript{542} Through it, the Commission hopes to reduce the complexity caused by the fragmentation of the EU digital market for online music services, approximating it to consumer expectations.\textsuperscript{543}

In the EU, online service providers interested in music licensing need to license three sets of rights involved in the online exploitation of musical works: author's rights (from composers and lyricists), phonogram or record producer's rights, and performer's rights.\textsuperscript{544} For online providers to offer consumers download or streaming music services, or access to films and videogames

\textsuperscript{535} Colin, 2011a, pp. 64–77. See also Séverine Dusollier & Colin, 2011, pp. 823–824, arguing that the later use is known in civil law jurisdictions as a “stipulation for another person”. It is also conceivable that certain licence agreements qualify ISP’s as sub-licensors with the authority to licence end-users.

\textsuperscript{536} Lohmann, 2008, p. 2.

\textsuperscript{537} Arts 5–6 and Recital 9 CRM Directive. See also Lucie Guibault & Gompel, 2016, pp. 151–152.

\textsuperscript{538} Art. 3(b) and recital 15 CRM Directive.

\textsuperscript{539} von Lewinski, 2005, p. 15, indicating that “[t]his model is already practiced to some extent, in particular European countries”. See also SWD CRM Directive 2012, pp. 5–7.

\textsuperscript{540} Arts 23–32 CRM Directive.

\textsuperscript{541} Recitals 6, 39, and 40 CRM Directive.


\textsuperscript{543} Recital 38 CRM Directive.

\textsuperscript{544} Memo CRM Directive FAQ 2014, ¶14; Recitals 37 and 38 CRM Directive.
where “music is an important element”, they are required to obtain a licence for each of these rights.\(^{545}\)

The record producer usually aggregates the related rights of producers and performers; conversely, rights of authors are managed by CMOs. The CRM Directive’s special regime only regulates the online rights of authors. The regime does not apply to related rights of performers or producers, or to \textit{non-online rights} in musical works, like those in relation to cable retransmission or communication to the public by satellite (see Figure 4).\(^{546}\)

\textbf{Figure 4. Scope of Multi-Territorial Licensing Regime in the CRM Directive}

Multi-territorial licensing refers to any licence granted by a CMO covering the territory of more than one Member State, and relates to author’s “online rights in musical works” required for the provision of an online service: the rights of reproduction and communication to the public in Articles 2 and 3 InfoSoc Directive.\(^{547}\) Musical works include both stand-alone works and those incorporated in audio-visual works.\(^{548}\)

These exclusive rights can be managed individually by the rights holder (author or assignee, e.g. music publisher) or by CMOs. Different CMOs may manage each of the rights for the same author and further complications might arise from joint ownership of rights.\(^{549}\) Therefore, in order to provide online music services, online providers must aggregate all the necessary rights.

\(^{545}\) Recital 37 CRM Directive.

\(^{546}\) This is consistent with the understanding that the acts of cable retransmission do not include online use. Cf. \textit{supra} 2.4.4. Figure 4 is inspired in the “example of licensing for music rights in online uses” in Memo CRM Directive FAQ 2014, ¶14.

\(^{547}\) Art. 3(m) and (n) CRM Directive. See also recital 37.

\(^{548}\) Recital 40 CRM Directive. Musical works include lyrics but exclude sheet music.

\(^{549}\) Recital 37 CRM Directive.
from different rights holders and CMOs, and clear all of the applicable related rights (see Figure 4).550

CMOs established in the EU that wish to provide multi-territorial licensing for online rights in musical works must comply with a number of requirements and obligations set out in the CRM Directive.551 These include having the capacity to process these licences electronically in an efficient and transparent manner, the provision of information on the repertoire they represent, invoicing, and payment. Only CMOs meeting these requirements are authorised to offer multi-territorial licences.552

The CRM Directive’s special regime does not mandate multi-territorial licensing. Instead, it aims to foster and enable it by facilitating repertoire aggregation for the benefit of online service providers wishing to offer cross-border pan-EU services, while safeguarding cultural diversity and the position of consumers.553

In other words, the regime does not prevent CMOs from concluding reciprocal representation agreements to grant mono- or multi-territorial licences covering both their and foreign CMOs’ repertoires to online service providers. Hence, two regimes that enable multi-territorial licensing of works co-exist in the framework of the CRM Directive: that of reciprocal representation agreements and the special regime described.554

Multi-territorial licensing is allowed in different scenarios.555 In the first and simplest scenario, the authorised CMO can license its own repertoire to online service providers for two or more Member States.556 In a variation of this option, a CMO that does not meet the requirements to offer multi-territorial licences may outsource the functions that it is lacking to a third party.557

A more complex scenario incorporates the so-called “passport” system.558 A CMO failing the directive’s requirements can enter into a non-exclusive representation agreement with another CMO that meets them, who then grants multi-territorial licences for the repertoire of the first.559

In the terminology of the travaux préparatoires, the authorised CMO is the “passport entity”, to which the mandating CMOs would have a “right to tag on repertoire”.560

Under certain circumstances, the agreement is mandatory. If the CMO is already granting or offering multi-territorial licences for the “same category of online rights in musical works” in the

550 Recital 37 CRM Directive.
551 Art. 23 CRM Directive.
554 Lucie Guibault & Gompel, 2016, pp. 158–164, explaining the system of reciprocal representation agreements in the EU, which coexists with the special regime of multi-territorial licensing. See also Recitals 11 and 30 CRM Directive.
555 These scenarios mirror those presented as examples in Memo CRM Directive FAQ 2014, ¶15.
557 Memo CRM Directive FAQ 2014, ¶15, 23 (mentioning “quality standards”). Outsourcing of this type seems to be within the spirit of Recital 43 CRM Directive.
558 On the proposal, see Quintais, 2013.
559 Art. 29(1) and 30 CRM Directive. See also: recital 44 CRM Directive: “all multi-territorial licensing should be concluded on a non-exclusive basis”; Memo CRM Directive FAQ 2014, ¶15.
repertoire of at least one other CMO, it will have an obligation to conclude the representation agreement if so requested.561 The expression “categories of rights” refers to forms of exploitation of the rights of reproduction and communication to the public; examples are “broadcasting, theatrical exhibition or reproduction for online distribution”.562

The final scenario is that in which one or several CMOs create a subsidiary CMO to aggregate repertoire and provide multi-territorial licences.563 This subsidiary is also subject to the obligation to conclude representation agreements as a “passport entity”.

Importantly, whenever an authorised CMO represents another organisation for multi-territorial licensing, it has the obligation to manage the latter's repertoire on a non-discriminatory basis and subject to the same conditions applied to its own repertoire.564 The main derogation from the special regime of the directive applies to multi-territorial licences granted by CMOs for the online right of communication to the public of musical works required by a broadcaster for use in its radio and television programmes. The exemption covers the broadcaster’s use of musical works with or after the initial broadcast of programmes, including simulcasting and catch-up TV, and ancillary online materials.565

### 3.3.2.2 Legalisation Proposals

Legalisation proponents sometimes rely on voluntary collective licensing schemes, based on agreements between CMOs and commercial users, ISPs or both.566 In an influential example, the Electronic Frontier Foundation proposes that industry-created performance rights organisations (the US equivalent to a CMO for the right of public performance) offer non-exclusive blanket licences to end-users against payment of a flat fee. The fee would be paid through dedicated websites or intermediary “resellers”, such as ISPs, Universities, P2P software vendors, and employers.567 The direct or indirect licence granted to individuals using P2P subscriptions is designed not as a grant of rights but as a “covenant not to sue” by the representatives of rights holders. The covenant would immunise file-sharers from future civil (but not criminal) infringement suits.568

Other proposals exist. Earp and McDiarmid, for example, suggest a limited model adapted to University campus settings.569 Fisher, in a variation from his “tax-and-royalty” system, envisions

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561 Art. 30(1) and Recital 46 CRM Directive.
562 Recital 19 CRM Directive.
563 See Art. 2(3), Recital 17 and the relevant provisions in Title III CRM Directive, which apply to entities directly or indirectly owned or controlled, wholly or in part” by one or more CMOs.
564 Arts 29(1), 30(4)–(6) CRM Directive.
565 Art. 32 and Recital 48 CRM Directive. The exemption is subject to the external control of EU competition law. Simulcasting is the “simultaneous transmission by radio and TV stations via the Internet of sound recordings included in their single channel and free-to-air broadcasts of radio and/or TV signals, in compliance with the respective regulations on provision of broadcasting services”. Cf. Commission Decision, IFPI Simulcasting, p. 2 & n. 6. On the rationales and implications of the provision, see Lucie Guibault & Gompel, 2016, pp. 172–173.
566 See, e.g., Lohmann, 2008; Merges, 1996, 2004b, Fisher, 2004 (discussing his voluntary option), and Lincoff, 2008, reviewing and extending his 2002 proposal, making it voluntary. See also Lincoff, 2002.
567 Lohmann, 2008, emphasising that intermediaries are allowed to advertise such services.
568 Lohmann, 2008.
569 Earp & McDiarmid, 2008.
an atypical non-profit corporation that celebrates partnership agreements with ISPs that offer end-users regular and premium subscriptions.\textsuperscript{570}

A more ambitious proposal belongs to Sterling, who suggests a system for the worldwide licensing of a new exclusive “internet right” through a “Global Internet Licensing Agency”. This would be an umbrella organisation mandated by local CMOs to whom rights fragments have been granted, assigned or transferred.\textsuperscript{571} In a similar vein, Lincoff devises a complex collective rights management system for a new “digital transmission right” for online music, which co-exists with direct licensing practices and individual management. Lincoff’s system features one CMO per territory with quasi-universal repertoires and worldwide licensing mandates for transmissions originating in its territory.\textsuperscript{572} End-users, especially those using P2P platforms, would require licences only when playing an active role in the dissemination of works, i.e. in their communication to the public.\textsuperscript{573}

While this is certainly the most legally feasible type of ACS, voluntary collective licensing is not without its challenges. One risk is that of free riding by certain users. This may occur where multiple users share one P2P licence, thereby reducing royalties and removing incentives to membership.\textsuperscript{574} Another problem relates to cross-subsidisation, meaning low-volume users subsidising high volume users, motivating the first to opt out, thereby reducing the attractiveness of the licence.\textsuperscript{575} Yet another concern is voiced in relation to the prohibitive costs associated with the logistics and implementation of the system.\textsuperscript{576}

While these are valid concerns, perhaps the main issue with voluntary collective licences relates to the risk of insufficient participation and the model’s lack of suitability to provide an overarching blanket licence for mass non-commercial online use by individuals. Quite simply, the level of territorial and substantive fragmentation of copyright at EU level may prove an insurmountable obstacle to the voluntary aggregation of sufficient different rights in different territories to provide users with an all-encompassing repertoire.\textsuperscript{577} The current state of the online management of music rights in the EU, described above, is a good example, showing that for certain rights, rights holders (in this case phonogram producers) are unwilling to entrust CMOs with their rights, preferring to manage them directly or through other vehicles, including independent management entities.

The participation problem is compounded for sectors of the content industry where—unlike the music, visual arts and photography sectors—, collective management of online rights is not common practice.\textsuperscript{578} Examples include “film producers, book publishers, journal and magazine

\begin{bibliography}{10}
\bibitem{571} See Sterling, 2008, 2009. N.B. Sterling’s system seems to have provided the blueprint for Dimita’s global dissemination right.
\bibitem{572} Lincoff, 2008, p. 42.
\bibitem{573} Lincoff, 2008, p. 34.
\bibitem{574} Quintais, 2012, pp. 72–73; Yu, 2005, p. 715.
\bibitem{576} Dougherty, 2006, p. 429; Quintais, 2012, p. 73.
\bibitem{577} See, e.g., von Lewinski, 2005, p. 15, noting that voluntary collective licensing is most useful if CMOs manage significant parts of the available repertoire.
\bibitem{578} SWD CRM Directive 2012, p. 12.
\end{bibliography}
publishers or games publishers”, who typically handle mono and multi-territorial licensing of online rights in Europe without the intervention of CMOs. In the audio-visual sector, for instance, collective management is typical only for cable retransmission of audio-visual works. It is therefore unlikely that a sufficiently high number of copyright owners entrusts the management of their online rights in audio-visual works to CMOs. As a result, the repertoire available for licensing in an ACS would be unattractive to users.

In sum, a voluntary collective management ACS requires a high level of consensus from all categories of rights holders across the EU landscape in order to achieve a workable system and licence. In light of the above, that consensus appears unlikely.

### 3.3.3 Extended Collective Licensing

#### 3.3.3.1 Characterisation and Legal Framework

ECL is a type of collective management that allows the offering of blanket licences for the entire repertoire represented by a CMO. In this system, a CMO first enters into voluntary agreements with rights holders. When the organisation meets a representativeness criterion—meaning that it is authorised to manage a category of rights by a substantial number of domestic and foreign right holders—a statutory presumption extends its representation powers to non-member rights holders. This extension effect by operation of law increases the organisation’s repertoire and simplifies acquisition of rights. In this way, ECL aims to solve the problem of providing “fully covering licenses in cases of mass uses”.

In general, a CMO meets the representativeness criterion if it represents a statutorily defined “substantial amount of rights holders”, which can be of national or foreign nationality. In simple terms, the organisation must be mandated, directly by rights holders and indirectly through representation agreements, to represent a relevant share of substantive rights in works used in the national market.

This principle of “indirect representation” allows for the fulfilment of the legal requirement by allowing rights aggregation in primary and secondary CMOs. The former are umbrella organisations...
organisations. The latter are small and medium-sized CMOs covering specific categories of rights holders, members of a larger primary organisation qualifying to manage an ECL. ⁵⁸⁸

Importantly, a “substantial amount” does not necessarily mean a majority of rights holders, as such requirement might prove impractical. ⁵⁸⁹ As Gervais notes, “substantiality is contextual”: a new CMO organising rights holders in a certain area for the first time “should have a much lower substantiality threshold to pass than a well-established collective trying to obtain an extension of the repertoire for a new licensing scheme.” ⁵⁹⁰

ECL is a “mixture of autonomy with state intervention”: a combination of legal rules enabling and giving effect to it with agreements based on those rules, together forming a “unique kind of collective rights administration that operates as a hybrid between compulsory licenses and traditional collective agreements”. ⁵⁹¹

ECL has been characteristic of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) since the 1960s. ⁵⁹² It has also been deemed worthy of consideration in Central and Eastern Europe, Africa, Canada, and the US (for the licensing of orphan works), and is growing in popularity in other countries. ⁵⁹³ In 1984, the application of ECL provisions to cable distribution was acknowledged by WIPO. The organisation defined “ECL-rule” as a form of collective rights management subject to the fulfilment of the following conditions: an express legal basis for representation of non-members, an indemnification covenant from CMOs to cable distributors for claims by rights holders, and equal treatment of represented and unrepresented rights holders. ⁵⁹⁴

In the Nordic countries, ECL presents similarities and idiosyncrasies for each country. Common features are that all systems are based on the existence of functioning and transparent representative CMOs, the extension effect applies to unrepresented rights holders for the same category of works, agreements between CMOs and users are based on free negotiations, and unrepresented rights holders are guaranteed equal treatment and a right to claim individual remuneration. ⁵⁹⁵

Another important feature of some ECL systems is the possibility afforded to rights holders to opt out of collective management and restore full individual exercise of their exclusive right, also called a “veto right”. ⁵⁹⁶ The opt-out consists of a declaration from rights holders to the CMO.

⁵⁹⁰ Gervais, 2016, p. 24 & n.64.
⁵⁹² Riis & Jens Schovsbo, 2010, pp. 472–474, noting that ECL was initially developed to respond to administration of broadcasting rights in 1961 and in 1974 begun to be used in a coordinated way for the management of copyright.
⁵⁹⁵ Axhamn & Guibault, 2012, pp. 41–42.
managing the ECL to the effect that they do not wish the organisation to represent them. The declaration will come into effect after a reasonable deadline, following which the CMO will exclude the represented works or subject matter from its repertoire. As a whole, the procedure should be simple and not burdensome.\textsuperscript{597}

The opt-out mechanism is often described as an essential requirement of ECL models, which seems inaccurate. If we take the Danish Copyright Act as a blueprint, the right to opt out does not assist rights holders in most types of ECL after operation of the extension effect.\textsuperscript{598} In fact, once there is a legal extension of the repertoire of the CMO, unsatisfied rights holders can only challenge the calculated and distributed fees with the appropriate appellate body.\textsuperscript{599} This non-opt-out variant of the model has been termed as “compulsory ECL”.\textsuperscript{600} It is not a Danish idiosyncrasy. In fact, it is characteristic of the many approved ECLs in Denmark and Norway, as well as specific categories of licence in Finland and Sweden.\textsuperscript{601}

Whether the opt-out is a “feature” or mere “add-on” to the ECL model in international law or the \textit{acquis} is uncertain as a matter of law and in academic writings.\textsuperscript{602} Ficsor, for example, considers the presence of this option an “indispensable condition” for the compatibility of ECL with international norms.\textsuperscript{603} Of course, that would mean that at least some of the aforementioned compulsory ECLs in the Nordic countries would be in violation of international treaties. However, it is difficult to so conclude, not only in light of their longstanding existence, but also by reference to the model in the SatCab, InfoSoc and CRM Directives.

The SatCab Directive contains the outline of an ECL between CMOs and broadcasting organisations for the exclusive right of communication to the public by satellite concerning a given category of works. The regime is subject to two conditions, and one derogation. The first condition is that the act of communication simulcasts a terrestrial broadcast by the same broadcaster. The second condition is that the unrepresented rights holder may opt out of the system. The derogation is that the ECL does not cover cinematographic works. Furthermore, where an ECL is applied, Member States must inform the Commission of the identity of the beneficiary broadcasters, which will be publicised at EU level.\textsuperscript{604}

Some construe this provision as implying a restricted possibility for Member States to introduce ECL, limited to situations where the model “is indispensable or at least highly desirable for effective exercise of the given rights”.\textsuperscript{605} Still, even if the opt-out right is an indispensable requirement for ECL under the SatCab Directive, it is difficult to generalise this rule for all other hypothetical ECL systems outside communication to the public by satellite.

\begin{itemize}
\item \textsuperscript{597} Ficsor, 2016, p. 68.
\item \textsuperscript{598} Riis & Jens Schovsbo, 2010, p. 476.
\item \textsuperscript{599} Riis & Jens Schovsbo, 2010, p. 476.
\item \textsuperscript{600} Gervais, 2003, p. 40.
\item \textsuperscript{601} Axhamn & Guibault, 2012, pp. 30–44.
\item \textsuperscript{603} Ficsor, 2016, p. 68.
\item \textsuperscript{604} Art. 3(2)-(4) SatCab Directive.
\item \textsuperscript{605} Ficsor, 2016, p. 69.
\end{itemize}
Indeed, such generalisation may be inconsistent with Recitals 18 InfoSoc Directive, 24 Orphan Works Directive, and 12 CRM Directive, which offer grounds to argue for the admissibility of ECL for other uses. The recitals clarify that the respective directives are without prejudice to the arrangements in Member States concerning the management of rights such as ECL. At the very least, this wording puts to rest the argument that compulsory ECLs at national level are incompatible with the acquis.606 It also opens the door for application of the system to the digital networked environment.607

Regardless, the recognition of an opt-out right may influence the legal qualification of ECL. If the right of opt-out is retained, ECL remains voluntary and should be qualified as a restriction on the exercise of the right, but not its existence or nature. Consequently, it is not a copyright limitation.608

This conclusion is less clear for compulsory ECLs. In these systems, rights holders may no longer opt out and there is a statutorily imposed loss of individual exercise rights.609 In other words, after operation of the extension effect, the model is akin to mandatory collective management, and may therefore qualify as a non-voluntary licence. This has led some authors to consider that the model “affects the exclusive character of copyright” and constitutes a copyright limitation.610 Due to the near identity between both collective rights management models, this possibility is analysed below in 3.3.4.2, together with the legal nature of mandatory collective management.

Finally, there is no specific acquis rule applying ECL to online use, although the possibility was discussed for projects involving mass use (such as EUROPEANA) and in the preparatory works of the Orphan Works Directive.611 ECL was also viewed as a potential solution for the multi-territorial licensing of musical works in the preparatory works of the CRM Directive. The rejected proposal combined an ECL legal presumption for the aggregation of rights within each representative CMO, a right to opt out, and a country of origin rule for the substantive rights covered by the online use of musical works. The resulting system would allow licensing of the

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610 Cf. Riis & Jens Schovsbo, 2010, pp. 482–490, 497–498; Riis & Schovsbo, 2012, p. 933. See also Riis & Jens Schovsbo, 2010, p. 476, referring to the fact that the normal “effect of ECL rules in the DCA [Danish Copyright Act] has been to turn copyright’s exclusivity-based regime into a remuneration-based regime”. See also Gervais, 2003, p. 40: “A compulsory extended collective licence can exist only in situations in which a non-voluntary licence can be used (for example, cable retransmission).”
works through the clearing of a single pan-European licence by online music providers in their country of origin.\footnote{SWD CRM Directive 2012, pp. 45-46, identifying this as “Option B4 – Extended collective licensing combined with a country of origin principle”. On the use of the localisation criterion for acts of satellite transmission in the SatCab Directive, see supra 2.4.4.}

Rejection of this option was justified primarily by fears of large-scale opt-outs leading to the need for commercial users to obtain a number of licences from rights holders and CMOs, in addition to the ECL in their country of origin. Other justifications advanced were the cumbersome requirement for rights holders to opt out in (then) twenty-seven Member States, the compliance costs associated with the legislative amendments and supervision of the system, as well as doubts as to its effectiveness.\footnote{SWD CRM Directive 2012, pp. 172–175.}

\subsection*{3.3.3.2 Legalisation Proposals}

In light of the above, ECL appears to be an efficient licensing system for mass use online. Through the extension mechanism, it addresses two significant problems of standard voluntary collective licensing as an ACS proposition. First, the potential unwillingness of some rights holders to join the system and the resulting unrepresentative repertoire of works available for licensing to end-users. Second, it brings into the license the works of unknown rights holders.

Several ACS proposals rely on this model, but most bypass the legal risks inherent in compulsory ECLs by introducing an opt-out right.\footnote{See, e.g., Aigrain, 2008; Ciurcina, Martin, Margoni, Morando, & Ricolfi, 2009; Gervais, 2004. When discussing the application of ECL to mass online use, Gervais mentions the possibility of the opt-out constituting a simple email notice. Cf. Gervais, 2016, p. 29.} The notable exceptions, which do not allow opt-out by rights holders (or only do so in a very limited fashion), are the legislative proposals advanced in Italy by Beltrandi and others (in 2007 and 2008), and in Belgium by Green Party Members of Parliament Benoit Hellings, Freya Piryns, and Jacky Morael (at different times in 2010).\footnote{See Beltrandi et al., 2008, 2007 (Italy), Hellings & Piryns, 2010; Morael & Piryns, 2010 (Belgium), not including an opt-out feature for rights holders. However, at least the Italian proposals seem to allow a limited opt-out for copyright owners of works that have not exhausted their “commercial cycle” (“ciclo commerciale”).}

All ECL legalisation proposals require an \textit{ex lege} extension of the system to unrepresented national and foreign rights holders. Aigrain goes further by proposing that, where the representativeness requirement is not met, a back-up legal licence ACS would kick in to regulate mass-scale non-commercial use by individuals.\footnote{Aigrain, 2008, discussing possible regulations for non-commercial online use and manifesting a preference for ECL with specific provisions securing net neutrality. In a later work, the author favours a legal licensing approach as a default. See Aigrain, 2012.}

Other models apply solely to the right of making available, and operate in combination with a statutory remuneration right for the act of reproduction (e.g. the download), which is qualified as a private copy. The law would entitle CMOs and consumer organisations to conclude contracts on ECL, subject to the payment of a statutory remuneration for user downloads. That
remuneration would be incorporated in the ISP subscription fee and fixed by the existing CMO for private copying in the respective country.\textsuperscript{617}

All proposals prescribe that CMOs authorise ISPs to allow their clients to exchange files containing licensed works.\textsuperscript{618} In the study by Modot and others for the European Parliament, the contractual role of ISPs was designed to be that of mere intermediaries offering a voluntary, value-added, private use standardised licence and collecting flat-rate amounts on behalf of CMOs.\textsuperscript{619} This design is aimed at creating a content flat-rate “ring-fenced from any commercial networks”, but which allows all-inclusive ISP offers beneficial to consumers.\textsuperscript{620} In this way, the system attempts to preserve the commercial exploitation of works outside the sphere of ACS, aimed at non-commercial use by private subscribers.

Assuming an ECL model contains an opt-out rule, there are two main objections to its adoption as an ACS. The first objection relates to the need to effect legal changes to the acquis. Indeed, it would probably be necessary to adopt secondary EU law imposing an ECL framework for non-commercial acts of reproduction and communication to the public online (perhaps including a country of origin rule to enable cross-border effect to the national licences), and to create interfaces with the legal protection of TPMs.\textsuperscript{621} In the particular case of ECL, the costs of supervising and managing the system, especially its opt-out mechanism in the digital environment, should also be carefully considered.

The second objection is perhaps the most relevant. For the system to work, rights holders would have to, in the first place, adhere to collective management in large enough numbers to meet a representativeness threshold sufficient to trigger the extension effect. As noted above for voluntary collective licensing, the challenge is particularly great in sectors (such as the audio-visual) that do not have an established practice in collective rights management of online rights.\textsuperscript{622} Even if the challenge is met, the possibility of opting out is a constant threat to the viability of the system. This is especially true as the value of the licence to end-users is linked to the breadth of the repertoire and consequent licence, especially regarding the most popular works. If major rights holders decide to withhold or hoard these works systematically, the ACS is of little value to end-users.\textsuperscript{623}

\textsuperscript{618} See, e.g., Hellings & Piryns, 2010, proposed Art. 78 quarter(1).
\textsuperscript{619} Modot et al., 2011, p. 14.
\textsuperscript{620} Modot et al., 2011, p. 14.
\textsuperscript{621} Quintais, 2012, p. 65. See also Lucie Guibault, 2015, proposing “establishment of ECL systems as a solution for the clearance of rights for the digitisation and making available of works contained in the collection of a cultural heritage institution”. In this context, Guibault argues “that the only workable solution to the problem of extra-territorial application of ECL schemes would be to formally establish a “country of origin” principle.” But see infra 6.2.7, where it is argued that it may be possible to adopt an ECL without legislative changes beyond a Commission recommendation.
\textsuperscript{622} See supra 3.3.2.2 and references cited.
3.3.4 Mandatory Collective Management

3.3.4.1 Characterisation and Legal Framework

Mandatory collective management is the most restrictive model of collective licensing. It prevents rights holders from directly exploiting their works, imposing by law the transfer or assignment of the exercise of rights to a CMO, which will act on their behalf.\textsuperscript{624}

Mandatory collective management aims “to ease copyright clearance, to reduce transaction costs for users and to limit fragmentation of copyrights”.\textsuperscript{625} Due to the restrictions it imposes, application of mandatory collective management to exclusive rights is subject to strict requirements and should be considered only when voluntary models prove unsuitable to exercise the right.\textsuperscript{626}

For example, the model requires specific regulation, together with a system for authorisation, accreditation or registration of the relevant CMOs at national level.\textsuperscript{627} Also, it should be justified by market failure and high transaction costs thwarting the efficiency of individual licensing, taking into account the social or philosophical underpinnings of a particular copyright system.\textsuperscript{628}

As noted above, collective management can be imposed in order to regulate exclusive rights or rights of remuneration/fair compensation. In the most common scenario, which is labelled here as “obligatory” collective management, the regulation of a right of remuneration or compensation through a legal licence will imply that rights holders have a \textit{de facto} or \textit{de iure} obligation to administer the right through CMOs. More rarely, in what is called in this dissertation “mandatory” collective management proper, the law will require the collective administration of exclusive rights; it is this possibility in particular that makes it attractive to ACS proponents, and controversial among legal scholars.\textsuperscript{629}

It is sometimes argued that mandatory collective management can be more beneficial to creators than an unrestricted exclusive right.\textsuperscript{630} The model would afford them protection against the traditionally stronger bargaining position of industry stakeholders—due to the prominent role of CMOs in negotiating licensing terms with users—and avoid alienation of their exclusive rights to exploiters on imbalanced contractual terms and without appropriate remuneration.\textsuperscript{631}

From the perspective of rights holders, mandatory collective management is functionally similar to a legal licence: both constitute externally mandated restrictions on their ability to exercise rights without the possibility of opting out. (The same is true for compulsory ECL in relation to

\textsuperscript{625} S\textdegree{}verine Dusollier \& Colin, 2011, p. 819.
\textsuperscript{627} See Ficsor, 2016, p. 49, applying the same requirements to ECL.
\textsuperscript{628} Lucie Guibault, 2002, pp. 26–27. See also Geiger \& Sch\önherr, 2014a, p. 139, citing the CRM Directive proposal and stating that collective rights management is the preferred model of regulation for EU institutions where it “is justified by the practical impossibility of individual management of rights”.
\textsuperscript{629} See supra \textsuperscript{3.2}. See also Lucie Guibault, 2002, pp. 26–27.
\textsuperscript{630} Geiger \& Sch\önherr, 2014a, p. 141; Kur, 2008, p. 12.
non-members.) The similarities extend to procedural aspects, such as the determination of remuneration.\footnote{Lucie Guibault, 2002, p. 26. Noting that the process is analogous in mandatory collective management and compulsory licences, insofar as it relies on negotiation between all stakeholders involved and, failing an agreement, is subject to fixation by an administrative or judicial body.}

In this sense, and from the viewpoint of rights holders, mandatory collective management is a non-voluntary licence. However, this similar classification as a \textit{type of licence} (explained in Chapter 2 and adopted in Figure 2 above) does not necessarily result in a similar legal qualification or identical effects on the exclusive right. The question that then arises is whether mandatory collective management or compulsory ECL of \textit{exclusive rights} affect the nature of exclusive rights.

If the answer is affirmative, mandatory collective management qualifies as a copyright limitation, whose admissibility—and that of any ACS relying on it—hinges on meeting the requirements of international law, in particular the three-step test. Should the answer be negative, the right remains exclusive and the model can form the backbone of a policy option for mass online use, subject to specific requirements applicable to collective management of rights, but not to international rules on the admissibility of compulsory licences or copyright limitations.

Academic discussion on this topic with reference to international law revolves around the wording of Article 11\textit{bis}(2) BC, on broadcasting and communication to the public, and Article 13 BC, on mechanical recording of musical works. These articles allow countries to decide which “conditions” to “determine” or “impose” for the exercise of certain exclusive rights, subject to a set of requirements: respect of moral rights, express imposition, and equitable remuneration.\footnote{These provisions are incorporated by reference in the TRIPS and WCT. See Arts 9(1) TRIPS and 1(4) WCT.} In both cases, the provisions’ headings and preparatory works clarify that these terms refer to compulsory licensing (see Chapter 2).

\textit{A maiore ad minus}, if these rules allow compulsory licensing, they should also permit less restrictive models, such as mandatory, extended or voluntary collective management. However, part of the academic literature takes the interpretation further and considers that, because mandatory collective management determines or imposes conditions on the exercise of copyright, it is subject to the same constraints as compulsory licences.\footnote{See, for all, Ficsor, 2016, p. 51. See also Mazziotti, 2008, p. 267 calling this “prevailing doctrine of international copyright law regarding the mandatory collective management of copyrights”.} The implication is that admissibility of mandatory collective management is restricted to the scope of Articles 11\textit{bis}(2) and 13(1) BC. These provisions, it is noted, only partially cover mass online use. For use outside that scope, an ACS based on mandatory collective management would constitute a copyright limitation.\footnote{Ficsor, 2016, pp. 51–52.}

Before addressing this legal quandary, it is useful to have a complete picture of the legal framework. Mandatory collective management is common in Europe, largely for the management of certain categories of rights, such as the artist’s resale right, public lending, and cable retransmission.\footnote{Gervais, 2001, pp. 37–38.} The model is used in some cases to regulate exclusive rights, such as in
France and Austria, in the fields of reprography (outside a statutory licence) and communication of broadcasts to the public.\textsuperscript{637}

In the \textit{acquis}, regimes of mandatory collective management exist in relation to the exclusive right of cable retransmission, the equitable remuneration right for rental of a work or related subject matter, and the artist’s resale right.\textsuperscript{638}

The special regime for cable retransmission in Articles 9–12 SatCab Directive is explained in Chapter 2. As noted, the regime is unique in EU law, insofar as it is the only case of mandatory collective management of an \textit{exclusive right}. Article 9 elucidates that CMOs manage the right to refuse or grant authorisation to a cable operator for cable retransmission, even if rights holders have not transferred the management of their rights to a CMO. In this case, the CMO managing rights in the same category is deemed mandated to manage the rights of non-members. If more than one such CMO exists, rights holders may freely choose between the authorised CMOs.\textsuperscript{639}

The remaining regimes in the \textit{acquis} apply to remuneration rights and could therefore be qualified as instances of \textit{obligatory} collective management. Article 5 Rental Right Directive provides for an unwaivable right to equitable remuneration, and allows for the possibility—through the use of the word “may” in paragraphs (3) and (4)—of Member States imposing mandatory collective management of the exercise of this residual right. The paragraphs read:

\begin{quote}
3. The administration of this right to obtain an equitable remuneration may be entrusted to collecting societies representing authors or performers.

4. Member States may regulate whether and to what extent administration by collecting societies of the right to obtain an equitable remuneration may be imposed, as well as the question from whom this remuneration may be claimed or collected.
\end{quote}

Member States are therefore entitled to impose collective rights management, preventing authors and performers from individual management of the right. Instead, the same is administered by a CMO, who will claim and collect the remuneration from parties to be identified by law, typically producers and rental shops (see Figure 5).

\textsuperscript{637} Dreier, 2010, p. 451 & n.149, citing Arts L122-10 through L122-12 French Intellectual Property Code, and the “similar provision… already contained in Art. 59 of the Austrian Copyright Act of 1936…” See also Lucie Guibault, 2002, pp. 26–27, noting that France chose to regulate reprography through this model instead of a statutory licence, unlike other EU Member States; and Geiger, 2014a, p. 21, 2014b, p. 182, 2014c, p. 140. Colin, 2011a, p. 25, calls the French reprography system a type of \textit{cessio legis} with similar effects to mandatory collective management.

\textsuperscript{638} See, respectively, Art. 5 Rental Right Directive, Art. 9 SatCab Directive, and Art. 6(2) Resale Right Directive.

\textsuperscript{639} Art. 9(1)–(2) SatCab Directive. Art. 10 SatCab Directive exempts broadcasting organisations from this regime. For further detail, see \textit{supra} 2.4.4.
Finally, the Resale Right Directive establishes a residual right of remuneration. Article 6(2) thereof allows Member States to provide for “compulsory or optional” collective management of the resulting royalty.

There are no specific rules in the *acquis* applying this model to online use of works. In fact, even in the context of the special regime of the SatCab Directive, there is little room to argue that the right of cable retransmission applies to Internet retransmissions. 640 However, as explored below, it is common for ACS proponents to advance models based on collective rights management, either as a stand-alone solution or in combination with voluntary or legal licences. 641 From the viewpoint of consistency with international and EU law, the question that lingers is how to qualify the effect of this model when applied to the exclusive right.

### Theories on Mandatory Collective Management

In essence, the controversial question in copyright scholarship relates to the legal nature of mandatory collective management, and its effect on exclusive rights. This subsection explores the different theories on the limited or broader application of mandatory collective management to exclusive rights. It is submitted that, for the reasons above, the same theories are valid *mutatis mutandis* for compulsory ECL.

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640 Cf. *supra* 2.4.4.
641 See *infra* 3.4.1.
### 3.3.4.2.1 Limited Applicability to Exclusive Rights

One school of thought limits the admissibility of mandatory collective management to remuneration or compensation rights, or when exceptionally allowed in international and EU law. International law contains such a permission in Articles 11bis(2) and 13(1) BC.\(^{642}\) In the acquis, mandatory collective management is allowed when the law expressly prescribes it “because the right in question is too specific to be found in these international rules” (e.g. the rental right).\(^{643}\)

The position has undeniable pedigree. It is reflected in the WIPO Guide and Glossary and in a 2006 ALAI resolution, adopted in response to a legislative proposal for a “licence globale” in France.\(^{644}\) In both cases, it seems to mirror the view of its main proponent, Mihály Ficsor, who authored the WIPO publication and was a member of the Executive Committee of the ALAI at the time of the resolution.\(^{645}\)

The ALAI Resolution states that the ordinary meaning, object and purpose of the BC provisions is clear in that “determination or imposition of conditions” includes compulsory licences and mandatory collective management; the latter, furthermore, should be broadly construed as a copyright limitation.\(^{646}\)

The BC only allows imposition or determination of conditions in three cases.\(^{647}\) The first includes remuneration rights not based on limitations, such as the resale right.\(^{648}\) The second refers to compensated limitations, like private copying.\(^{649}\) The third covers “residual rights” of remuneration that survive transfer of some exclusive rights and are applicable thereafter as remuneration claims; these typically benefit authors/performers and are qualified as unwaivable or non-assignable.\(^{650}\) None of these cases involves collective management of exclusive rights.

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\(^{642}\) Sinacore-Guinn, 1993, pp. 298–299, theorises that “mandatory affiliation” is adequate only if predicated on economic necessity or the nature of the affected rights (i.e. of remuneration). In other cases, it should be “subjected to strict scrutiny as to whether a less intrusive option exists”. However, the author argues for the distinction of collective rights management from non-voluntary licences. See Sinacore-Guinn, 1993, pp. 370–378. See also Ficsor, 2016, pp. 51–52; Mihály Ficsor, 2010, pp. 53–59.


\(^{645}\) See Ficsor, 2016, pp. 49–66, for the most recent elaboration of this view.

\(^{646}\) Ficsor, 2016, pp. 57–66; Mihály Ficsor, 2010, pp. 49–51. In this respect, Ficsor states that mandatory collective management “is a limitation (not an exception since the rights is still applicable although in a limited form; an exclusive right is limited by the condition that it may only be exercised through collective management”). See also Sinacore-Guinn, 1993, pp. 300–303.


\(^{648}\) See Arts 14\textit{ter} BC. On a similar allowance for related rights of performers and phonogram producers, see Arts 12 RC (and the similar provision in Art. 15 WPPT). On the conceptual distinction between self-standing and limitation-based remuneration rights see von Lewinski, 2008.

\(^{649}\) See Art. 9(2) BC for the reproduction right.

To bolster this position, Ficsor points to the preparatory works of the 1928 Rome Conference of the BC, and notes the absence of clear indications that the term “conditions” excluded obligatory collective management. Instead, the debates between national delegations demonstrate that different types of mechanism could be included in this terminology. This, he believes, places the model squarely within the scope, and therefore the requirements, of Articles 11bis(2) and 13 BC. 651

This position would also find support in acquis regimes of mandatory (and obligatory) collective management. On the one hand, both the Rental Rights and Resale Right Directives state that Member States “may” impose or provide for the scheme. 652 This wording is a mere permission, not an obligation, to implement the model. Where such an obligation does exist, in the SatCab Directive (which omits the auxiliary verb “may”), a derogation is made for broadcasting organisations. 653

From here, Ficsor argues a contrario that mandatory collective management can only be implemented exceptionally, when in line with international treaty provisions and expressly recognised in the acquis. 654 In sum, the scheme is only admissible for “an exhaustively determined scope of exclusive rights”. 655

The consequence of this interpretation is that mandatory collective administration (or compulsory ECL) of mass online use covered by the exclusive rights of reproduction and communication to the public would likely constitute a copyright limitation, subject to the three-step test. 656 The only types of ACS escaping that qualification are voluntary collective licences or (arguably) ECL with opt-out. 657

3.3.4.2.2 Broader Applicability to Exclusive Rights

In contrast, another school of thought views mandatory collective management as consistent with minimum rights and limitations at international and EU level, and not bound by the compulsory licensing provisions of the BC. Despite the functional similarity, it is argued, mandatory collective management is not technically a copyright limitation but rather an option to regulate the exercise of exclusive rights. 658

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652 Arts 5(3) and (4) Rental Directive and 6(2) Resale Right Directive.
653 Arts 9(1) and 10 SatCab Directive.
656 See Séverine Dusollier & Colin, 2011, p. 827, concluding that “mechanisms authorizing P2P file sharing, although not explicitly provided for by the Berne Convention under a compulsory licensing or other scheme, could still be enacted if they pass the three-step test...”.
Proponents of this view argue that the regime of the BC compulsory licences should not determine the future scope of mandatory collective management schemes. Study of the respective preparatory works shows that Articles 11bis(2) and 13(1) BC have specific justifications. They are “permitted restrictions in favor of particular groups of users”, namely broadcasters and record companies, based largely on the fear of refusal to license by CMOs.\footnote{Ricketson, 1987, pp. 513–527; von Lewinski, 2004, p. 5.} The purpose of the licences is to benefit those users by pre-empting negotiating conflicts with CMOs, while ensuring that rights holders receive fair remuneration for the permitted uses.\footnote{See supra 2.4. See also von Lewinski, 2004, pp. 5–6.}

In that light, von Lewinski interprets the BC reference to “conditions” as meaning not “any conditions” on the exercise of rights but only “certain conditions” favouring some types of user (broadcasters and record producers) whose interests justify the compulsory licences.\footnote{von Lewinski, 2004, pp. 5–6.} Consequently, only those limited conditions fall within the scope of Articles 11bis(2) and 13(1) BC. In other words, we should not generalise the requirements of the BC compulsory licences to other schemes designed to regulate the exercise of copyright, such as mandatory collective management.

In support of this point, it is noted that the only international or EU copyright regime for mandatory collective management of exclusive rights is in the SatCab Directive.\footnote{von Lewinski, 2004, pp. 3, 5; Geiger, 2007b, p. 9.} This is relevant because collective rights management has existed in Europe since the mid-eighteenth century, and from an early stage copyright treaties recognised compulsory licences and copyright limitations.\footnote{For a brief historical account, see Schierholz, 2010, pp. 1151–1153.} Therefore, the argument goes, the absence of a reference in the text of the BC favours the view that mandatory collective management was not considered to affect the nucleus of exclusivity.

A more persuasive argument draws a conceptual and legal-technical distinction between legal licences and mandatory collective management. Whereas the first restrict the nature or existence of copyright, mandatory collective management restricts the “options of exercise”.\footnote{See Geiger, 2007b, p. 10, citing IFPI Simulcast (Commission Decision 2003/300/EC) and Uradex (CJEU), where in relation to Art. 9(2) SatCab Directive the CJEU “reaffirms that the Directive has, for legal certainty and simplification of procedures, implemented a mandatory collective management of the exclusive right of cable retransmission”. See also Dreier, 2010, pp. 451–452; P. Bernt Hugenholtz, 2006, pp. 280–281.} The effect of legal licences is to place copyright uses “outside the field of exclusiveness”,\footnote{Geiger, 2007b, p. 10.} meaning that the permission to use a work does not flow directly (individual licensing) or indirectly (through a CMO) from the rights holder. Rather, the authorisation flows from the law.

In mandatory collective management, the powers to authorise and enforce copyright shift from the authors to their representative, the CMO, whose sole and main purpose is to act for the collective benefit of its members. As members, authors have an indirect path to influence the
terms and conditions of licensing and distribution. In this way, although the options for exercise of copyright are modulated, the right remains exclusive. Article 9(1) SatCab Directive is a case in point, as the positive dimension of the right (to grant an authorisation) remains intact, but there is some regulation of its exercise. While moral rights are left untouched, the economic right remains transferable by contract or legal presumption. This can happen for example in the case of a “broadcasting organization initially transmitting the subject matter”, provided no prior transfer of the right was made to a CMO. Where the transfer to the broadcaster occurs, the right cannot be subject to collective exercise.

This view would be consistent with recital 12 CRM Directive, which lists mandatory collective management as a type of arrangement “concerning the management of rights”, along with individual management or ECL. From the conceptual and legal standpoints, then, a legal licence effects a much deeper transformation in the relationship between author and user, effectively severing the tie between them. This tie, while eroded and intermediated, is retained in mandatory collective management.

The distinction can be questioned where CMOs have an obligation to license users. Peukert, for example, argues that if the law imposes an unqualified legal obligation to grant licences “to any person so requesting… exclusive rights are in fact reduced to a mere right to remuneration administered by a collecting society.” Kur and Schovsbo express a similar concern that obligations to license, coupled with the monopoly position of CMOs, might lead exclusivity to “become illusionary, at least in practice”. Although the argument is valid, it must be contextualised in the acquis. The CRM Directive does not impose a default obligation to license users. Rather, it imposes an obligation to negotiate in good faith with users, allowing justified refusals to license by CMOs. A similar rule is contained in Article 12 SatCab Directive. At best, these are mitigated and qualified obligations to license. Even then, their objective is to prevent abuse of a dominant position by CMOs, pursuant to Article 102 TFEU. Hence, the obligation to license finds its legal justification in competition

672 See Sinacore-Guinn, 1993, pp. 400–402, for an early critique.
674 Kur & Schovsbo, 2011, p. 14. The authors concede however that the case might be different if CMOs “were forced to enter in more efficient competition with each other”, as required in OMR Recommendation 2005. Cf. Kur & Schovsbo, 2011, p. 14 (& 79).
675 Art. 16, Recital 31 and Annex–1(c) CRM Directive. See supra 3.3.1.
law. In its interaction with copyright, competition law functions as an external limit on the exercise of rights, but not their existence.\textsuperscript{676}

In addition, a qualified obligation to license in mandatory collective management will not translate into significantly different practices from those occurring in voluntary collective licensing. CMOs are in the “business of yes”; even when managing exclusive rights under a voluntary licence, a CMO “would think twice before saying no to a willing licensee”.\textsuperscript{677}

Finally, from the viewpoint of a systematic interpretation of the \textit{acquis}, it is difficult to qualify mandatory collective management as a limitation. While this model is mentioned in the recitals of other directives, it was left out of the exhaustive menu of limitations and exceptions in Article 5 InfoSoc Directive.\textsuperscript{678} Thus, to qualify it as a limitation appears inconsistent with the \textit{acquis} from a legal-technical standpoint.\textsuperscript{679}

On balance, these conceptual and legal-technical arguments make the theory for a broader application of mandatory collective management more persuasive. However, they do not give \textit{carte blanche} to the application of this regime to exclusive rights. In fact, they simply set aside the requirement of compliance with the three-step test, but not the strict requirements for application of this regime to a category of online use. Where those requirements are met, the application of mandatory collective management should be considered a valid policy option for an ACS to “grant licences for non-commercial uses of any rights, categories of rights or types of works and other subject-matter” on behalf of rights holders, in line with Article 5(3) CRM Directive.

\subsection*{3.3.4.3 Legalisation Proposals}

Mandatory collective management is an enticing option for regulation of large-scale individual use in digital networks. The sheer number of end-users, conditions of use, territorial and substantive fragmentation of rights, and diversity of works make individual management too cumbersome or undesirable in the online environment, providing a good case for collective exercise of the exclusive rights involved.\textsuperscript{680}

In addition, the model is well suited to overcoming the challenges faced by voluntary collective licensing. First, it targets the problem of rights holders’ lack of willingness to rely on CMOs to

\footnotesize

\begin{itemize}
\item[677] Gervais, 2011, p. 429.
\end{itemize}
administer their rights. Secondly, it safeguards the integrity and value of the licence by avoiding the withdrawal of works through opt-out which is possible in voluntary ECL.

These challenges are addressed by making it mandatory for online exclusive rights to be managed by CMOs, reducing the possible opposition from rights holders. End-users are able to lawfully use works merely by obtaining a licence from CMOs or an intermediary licensee. In the context of an ACS, CMOs would likely negotiate with intermediaries—like ISPs or online service providers—to operationalise the end-user licence.

Among the ACS proposals studied, it is possible to find two modalities of mandatory collective management. In the first modality, the scheme applies to regulate two online rights (reproduction and communication to the public) and regulates the whole ACS. In the second modality, mandatory collective management applies to the right of making available, whilst the right of reproduction is regulated through a legal licence, usually an extension of the private copying limitation. A prominent example is the French “license globale”, which proposes that the right of making available is transferred by operation of law to a CMO approved by the government. A similar design has been suggested for the German content or culture flat-rate models, and Dimita’s global dissemination right.

In all instances, end-users can choose to opt-in to the system through agreements with ISPs, subject to the provision of adequate pre-contractual information. In effect, this makes the ACS voluntary for end-users. Finally, one French proposal uses mandatory collective management as a fall-back regulation model in case stakeholder negotiations for voluntary collective licensing are unsuccessful within a specified time period.

As noted in the previous paragraph, the main challenge to an ACS of this type relates to its functional similarity with compulsory licensing. Due to the contentious nature of the issue, even scholars that do not qualify mandatory collective management as a copyright limitation suggest, for reasons of legitimacy, subjecting this ACS option to the three-step test.

### 3.3.5 Legal Licences: Statutory and Compulsory

#### 3.3.5.1 Characterisation and Legal Framework

The terms “statutory” and “compulsory” licences are commonly used as synonyms. They generally refer to licences imposed by law to regulate certain copyright use against the payment of compensation, remuneration, tariffs, contributions, or levies. But use of the terms is not uniform in legal and academic texts, which often denote diverse but partially overlapping

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681 von Lewinski, 2005, discussing P2P.
682 Bernault & Lebois, 2005, noting that this variation would be based on stakeholder agreements.
684 See Roßnagel et al., 2009, and Dimita, 2010, designing a complex international multi-layered CMO system.
686 See Zelnik, Toubon, & Cerutti, 2010, discussing an ACS for on-demand music download services.
688 Peukert, 2005, p. 18, exemplifying with US law and academic writings.
schemes.\textsuperscript{689} To grasp the scope of ACS proposals based on these models, it is important to explore the possible meanings of statutory and compulsory licences.

In Chapter 2, while recognising the interchangeable use of “compulsory” and “statutory”, a preliminary distinction was made with reference to international and EU law.\textsuperscript{690} It was stated that statutory licences restrict the nature of a pre-existing exclusive right by the application of a compensated limitation, whereas compulsory licences apply to self-standing remuneration rights.\textsuperscript{691}

Another distinction can be drawn on the basis of the procedure used to determine the compensation or remuneration. Thus, Colin defines a licence as “statutory” where the executive branch, via delegation of its legislative counterpart, is unilaterally entitled to fix the amount of compensation without prior stakeholder consultation.\textsuperscript{692} In this context, the compensation paid is often qualified as a “levy”.\textsuperscript{693} Conversely, a licence is “compulsory” if the remuneration is fixed through a bilateral or multilateral negotiation between the parties involved in the use of works.\textsuperscript{694}

The term compulsory licence typically applies where there is a legally predetermined obligation to contract, i.e. “where the right holder is obliged to grant a license according to a specific procedure”.\textsuperscript{695} In this scenario, the legislator forces upon rights holders the basic terms of the license in the law. If no agreement is reached pursuant to those terms, users can appeal to administrative or judicial authorities, who can unilaterally fix the compensation or remuneration amount.\textsuperscript{696} The law thus incentivises licensees and licensors to negotiate under the shadow of the licence. An example of such a provision is the “cover” licence under the compulsory mechanical licensing scheme in the US Copyright Act.\textsuperscript{697}

In the field of competition law, a compulsory licence means a remedy for actual or potential anti-competitive behaviour.\textsuperscript{698} The licence is construed as an \textit{inter partes} obligation between rights holders and users to contract on reasonable terms, pursuant to a judicial or administrative ruling.\textsuperscript{699} Here, the licence operates more as a direct restriction to freedom of contract than to exclusivity.

In this dissertation, “legal licence” is the shorthand for the entire gamut of statutory or compulsory licences discussed above, \textit{excluding those imposed as remedies for competition law violations}. For a legal licence, the law defines the scope and subject matter of the scheme, designates the CMO responsible for its management, and identifies the intermediary debtors of

\textsuperscript{689} The interchangeable use of these terms is typical in copyright scholarship. See Lucie Guibault, 2002, p. 25.

\textsuperscript{690} Compulsory licensing is mentioned in Arts 11bis(2) and 13(1) BC, Art. 15(2) \textit{in fine} RC, and Art. 10(2) Rental Right Directive. (On the BC compulsory licence, see supra 2.4). Art. 8(2) and Recital 21 SatCab Directive mention statutory licensing in the negative.

\textsuperscript{691} Cf. supra 2.2.3.

\textsuperscript{692} Colin, 2011a, p. 21.

\textsuperscript{693} Peukert, 2005, pp. 18–19.

\textsuperscript{694} Colin, 2011a, p. 21.

\textsuperscript{695} Peukert, 2005, p. 18.


\textsuperscript{698} Lucie Guibault, 2002, p. 25.

\textsuperscript{699} Lucie Guibault, 2002, p. 25.
the remuneration. The law can establish the tariff paid under the licence directly or indirectly, through delegation to a governmental, administrative, judicial, or even an independent authority. Within those modalities, the law may subject the determination of tariffs to stakeholder negotiations, which can involve CMOs, intermediaries, consumer representatives, and experts.\(^{700}\)

From a normative standpoint, a legal licence—like a copyright limitation—can have economic and/or non-economic motivations. The first relate to technology-based market failures that make effective individual management impractical or too cumbersome. The second relate to significant public interests requiring unrestricted (but remunerated) use, for example relating to the promotion of access and dissemination of works, fair remuneration to creators, or the respect of fundamental rights.\(^{701}\)

A potential ACS will apply to use covered by the existing exclusive rights of reproduction and communication to the public.\(^{702}\) As noted in Chapter 2, international law leaves little space for a broad legalisation scheme applying to these rights under the compulsory licences for broadcasting and communication to the public in Article 11bis(2) BC.\(^{703}\) The same conclusion is valid for the compulsory licence in Article 13 BC. This licence is limited to the recording of musical works and accompanying words (provided the authors consented to a first recording) and to the country where it is imposed (i.e. it does not automatically “carry its lawful character” outside that territory). It is therefore unsuitable for the types of content and use covered by a broad ACS.\(^{704}\)

In light of the limited scope of compulsory licences in international law, a legal licence ACS will likely affect the nature of the exclusive rights of reproduction and communication to the public, transforming them (for the licensed uses) into non-exclusive rights of remuneration or compensation.\(^{705}\) In the acquis, it is possible to identify a myriad of such rights traditionally recognised as benefiting creators in relation to exploiters.\(^{706}\) Table 2 provides an overview of these rights.

**Table 2. Acquis Remuneration and Compensation Rights**

<table>
<thead>
<tr>
<th>Right / rights holders</th>
<th>Type and nature</th>
<th>Legal basis</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rental of films and phonograms / author and performer</td>
<td>Equitable Remuneration (unwaivable)</td>
<td>Article 5 Rental Right Directive</td>
</tr>
</tbody>
</table>

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\(^{700}\) P. Bernt Hugenholtz & Quintais, 2016 (forthcoming). See also SWD CRM Directive 2012, p. 197, with a definition of “compulsory licence” that includes many of these elements.

\(^{701}\) See, identifying some of these motivations, Ginsburg, 2014b; Lucie Guibault, 2002, p. 22. On the respect of fundamental rights as an emerging justification for limitation in the case law of the CJEU, see *infra* 4.4.1.4, 4.4.4.1, 4.4.4.3, and 5.3.3.6.

\(^{702}\) See the detailed analysis in Chapter 4.

\(^{703}\) Cf. *supra* 2.4.

\(^{704}\) Historically, Art. 13 BC reconciled the rights of authors and music publishers with those of record producers in relation to the mechanical reproduction of musical works. Cf. Ricketson & Ginsburg, 2006, pp. 809–814. N.B. Art. 14(3) BC expressly excludes audiovisual works from this regime.


<table>
<thead>
<tr>
<th>Right / rights holders</th>
<th>Type and nature</th>
<th>Legal basis</th>
</tr>
</thead>
<tbody>
<tr>
<td>Public lending of works and related subject matter / at least authors</td>
<td>Remuneration (optional)</td>
<td>Article 6 Rental Right Directive</td>
</tr>
<tr>
<td>Broadcasting (wireless) of phonograms / performers and phonogram producers</td>
<td>Single Equitable Remuneration</td>
<td>Article 8(2) Rental Right Directive</td>
</tr>
<tr>
<td>Annual supplementary remuneration (during term extension) for transfer or assignment of</td>
<td>Annual Supplementary Remuneration</td>
<td>Article 3(2a)-(2e) Term Directive (2011)</td>
</tr>
<tr>
<td>exclusive rights in exchange for a non-recurring payment / performer</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Resale of art works / author of an original work of art</td>
<td>Remuneration (inalienable, unwaivable)</td>
<td>Arts 1 and 2 Resale Right Directive</td>
</tr>
<tr>
<td>Use of orphan works by specific organisations / holders of right of reproduction and the right of making available to the public provided in Articles 2 and 3 InfoSoc Directive</td>
<td>Fair Compensation (unwaivable)</td>
<td>Article 6(5) Orphan Works Directive</td>
</tr>
</tbody>
</table>

The contours of equitable remuneration and fair compensation are explained in Chapter 2. As noted there, the main distinction between the concepts is that equitable remuneration is based on the notion of “economic value of the use”, whilst fair compensation is based on the notion of “harm”. Furthermore, while the CRM Directive relies on an umbrella concept of “appropriate remuneration” based on the “economic value of the use”, a systematic interpretation of the InfoSoc Directive suggests that future compensated limitations to its exclusive rights should probably be subject to fair compensation.707

These distinctions matter because they will shape the nature and method of calculation of the remuneration or compensation of any legal licence ACS under EU law, especially as both fair compensation and equitable remuneration are autonomous concepts of EU law.708

### 3.3.5.2 Legalisation Proposals

The most common ACS proposals are for stand-alone or combined legal licences.709 The majority of those refer to limitation-based licensing schemes for online use that expand existing

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707 This view relies on recital 36 InfoSoc Directive. See supra 3.3.2.1. The fact that the limitation to these rights in the Orphan Works Directive in linked to a right of fair compensation seems to confirm this interpretation.
708 See supra 2.2.4 and, regarding fair compensation, infra 4.4.3.3. On the shape of the compensation element in a future legal licence ACS, see infra 5.3.3.3, 5.3.3.4, and 6.2.
systems, commonly private copying. Only in rare cases do authors suggest legal licences for newly created self-standing remuneration rights, such as Dimita’s “global dissemination right” or Lincoff’s “online transmission right” for music.710

In many cases, it is unclear whether the legal licence provides direct authorisation to consumers or to commercial users acquiring them for the benefit of the former.711 However, the bulk of sources can be read as providing the legal authorisation directly to end-users712, with few instances of explicit licensing of commercial intermediaries.713 As the proposals are diverse, it is important to explore some representative examples.

One of the most influential and developed proposals is Netanel’s non-commercial use levy. This model aims to enable unhindered non-commercial P2P file sharing for most protected works, excluding software and unpublished works.714 The proposal, in many respects, approximates European private copying systems, which are usually coupled with obligatory collective management of the respective fair compensation right.715

Netanel’s model would impose a levy on the sale of products/services whose value is substantially enhanced by P2P, and distribute the resulting proceeds to rights holders in proportion to the volume of downloads and use of works, as measured by digital tracking and statistical sampling. It would cover acts of uploading, downloading, streaming, and digital adaptations (including remixes). Users would have either a right or a protected legal privilege to engage in these acts and rights holders would be barred from using technological measures to prevent such acts.716 The non-commercial nature of the uses would eliminate secondary liability for the provision of related products/services, which would however subsist for commercial uses, considered to be excluded from the levy’s scope.717

In its initial five years of existence, the levy amount would be based on the adjusted net revenues displaced by P2P. The rate would be set through negotiation by interested stakeholders under the

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710 Dimita, 2010; Lincoff, 2002. These rights are explained in more detail infra in 3.4.2.
713 For such rare cases, see: Lincoff, 2002 (proposing a one-stop-shop for music where licences are granted to “service operators” or end-user members of P2P networks and similar online communities); Sobel, 2003, (advancing a digital retailer model where ISPs act as first level licensees of digital works by paying a wholesale price to rights holders and then “reselling” such works to subscribers at market-based retail prices); and Seay, 2010 (suggesting a model for commercial use similar to broadcasting licences).
714 Netanel, 2003. An updated version of Netanel’s proposal is reported in Quintais, 2014, pp. 4–6. The original 2003 proposal excluded books because there were no established practices or markets for e-lending of digital books at the time.
716 Netanel, 2003; Quintais, 2014, pp. 4–6. Because of the proposed payment structure, product and service suppliers would likely not support the levy. Therefore, from a feasibility perspective, Netanel argues that the best option is to spread the payment obligation among a wide pool of debtors and targets, subject to the “substantially enhanced value” criterion. Potential candidates include Internet access subscriptions, P2P platform providers, personal computers, tablets, CD burners, MP3 players, blank CDs, mobile phones, and mobile phone data plans.
717 Quintais, 2014, p. 5. The exclusion is justified by the political challenges in restricting exclusivity for such uses.
threat of mandatory arbitration and pursuant to a “fair income/return” standard set forth in the US Copyright Act for compulsory licences. The latter would not only recognise the contribution of P2P devices/services but also of authors to the creative sphere, while maximising public access to works and securing a “reasonable remuneration” for rights holders.\textsuperscript{718}

In contrast to Netanel, Litman advances a proposal for a hybrid legal licence ACS, combining statutory and voluntary licences for online music sharing. The system would operate on a “presumption of shareability”, meaning that unless digital copies of works indicate otherwise through a specific format (a “*.drm” file) containing electronic rights management information, the work can be freely shared. By using such a format, subject to specific requirements and a pre-determined grace period, rights holders could opt out of the system and make their works ineligible for sharing under the legal licence. The system would preferably be managed through a regulated government agency, and the compensation paid solely to creators via a mechanism designed to “bypass unnecessary intermediaries”.\textsuperscript{719}

In a more recent work, Depreeuw and Hubin explore—and ultimately disavow—the possibility of a limited ACS based on the application of the compulsory licence of Article 13 BC. This licence would apply to the first downstream reproduction of musical works by end-users, meaning the download or streaming of works following their lawful online availability. To avoid territorial fragmentation and be consistent with the requirements of the BC, the authors propose that the licence is implemented in the acquis, that the authority competent to determine the remuneration is set up at EU level, and that the debtor of the remuneration is the person or entity making the work available (i.e. the content provider). The latter could then pass on the amount to end-users, as occurs in private copying systems.\textsuperscript{720}

The main benefit of a legal licence ACS is that it would efficiently solve most challenges associated with territorial and substantive fragmentation, representing a comparative advantage in relation to pure collective management systems. However, to the extent a legal licence covers use within the scope of the exclusive online rights of reproduction and communication to the public in the InfoSoc Directive, it entails expansion of existing limitations to those rights. The licence must therefore pass the three-step test, which looms as a significant legal obstacle. (Chapter 4 maps the potential scope of a legal licence ACS, and Chapter 5 assesses its admissibility under the three-step test.)

\begin{flushleft}
\textsuperscript{718} Netanel, 2003; Quintais, 2014, p. 5. According to Netanel, the criterion suggested takes into consideration: that not all P2P displaces copyright revenues, that the system should not finance pre-digital models or ensure oligopoly profits, and that consumers should be empowered in digital markets.
\textsuperscript{719} Litman, 2004.
\textsuperscript{720} Depreeuw & Hubin, 2014, pp. 96–98, drawing a parallel with the American tradition, where compulsory licences of different types exist in relation to online use of musical works and sound recordings. The authors are sceptical of the benefits of imposing such a solution in the EU and call for empirical research on the matter (especially as they consider the market to be functioning in respect to these uses). See also Bernault & Lebois, 2005, pp. 44–45, arguing that a licence based on Art. 13 BC would be compatible with international law.
\end{flushleft}
3.3.6 State Systems

3.3.6.1 Characterisation and Legal Framework

State Systems are legal regimes external to copyright that allow unfettered online use while guaranteeing some level of remuneration for creators. For the most part, they are theoretical constructs presented as alternatives to the recognition of intellectual property rights.\(^{721}\)

Economics scholars suggest that grants or subsidies awarded by the State may sometimes be more efficient in fostering and rewarding creative endeavour than intellectual property rights.\(^{722}\) The earliest literature on this topic focuses on alternative regulation of patents, as viewed from the perspectives of economics and law and economics.\(^{723}\) This literature challenges the economic justification for patent systems and argues for more efficient alternatives, ranging from publicly funded research and development frameworks, taxation-based funding through \textit{ex post} rewards or prizes for inventors.\(^{724}\)

In this context, Shavell and Van Ypersele propose reward systems where innovators are paid directly by the government and innovations pass directly into the public domain, thus implementing an incentive without monopoly.\(^{725}\) The problem, common to industrial reward systems, is the information required for determination of reward systems or, put differently, the need to index rewards to the value of inventions.\(^{726}\) Still, the authors conclude that intellectual property rights do not possess fundamental social advantages over reward systems; furthermore, an optional reward system, where innovators can choose between such legal protection and a reward system, is superior to an intellectual property regime.\(^{727}\) The conclusion seems to be that for most alternative systems based on patent rewards or prizes, the success of their implementation depends on the definition of “appropriate conditions... carefully selected for the particular economic environments in which they are to operate”.\(^{728}\)

Beyond \textit{ex post} reward proposals for patents, it is possible to find precedents for State Systems in the inception of public lending rights and, to a more limited extent, in publicly funded private copying systems.

Public lending right systems are “government schemes to pay writers for their public good authorship, without interfering with users’ ability to access large bodies of works through free


\(^{723}\) For an historic analysis of such proposals in England, prior to 1800, see MacLeod, 1988. On the topic, see also Arrow, 1962; Machlup & Penrose, 1950; Polanyi, 1944; B. D. Wright, 1983.

\(^{724}\) See the sources listed in the preceding footnote. For all, see Ekersley, 2012, pp. 95–98.


\(^{728}\) Ekersley, 2012, p. 98. See also Abramowicz, 2003.
Such schemes predate current EU legal systems for public library lending, which rely on a harmonised exclusive or (optional) self-standing remuneration right for acts of lending. In the acquis, “lending” is defined as “making available for use, for a limited period of time and not for direct or indirect economic or commercial advantage, when it is made through establishments which are accessible to the public”.

This harmonisation was the end result of an increase in lending activities by public libraries, which caused several European countries to introduce a public lending right for authors over the course of the twentieth century. Although in some instances this right was internal to copyright, the majority of European countries initially dealt with public non-commercial lending outside the copyright system.

This was done in a plethora of ways. These included national funds constituted by library subscription taxes, direct budget allocation, government attribution/distribution of amounts per author/volume represented in public libraries, or through grants and assistance on the basis of works made available without charge in public libraries (proportional to their annual budget).

In the field of private copying, the situation is different. Most Member States implemented Article 5(2)(b) InfoSoc Directive with device or media based levy systems. However, at least three countries—Norway (since 1995), Spain (since 2012), and Finland (since 2015)—have adopted systems where fair compensation is paid out of the State budget, a model that resembles State Systems.

The Norwegian Copyright Act states that authors shall receive fair compensation through annual grants via the State budget. The fair compensation is “funded by the Norwegian Government, as a post on the national budget”, and subsequently collected by an umbrella CMO (Norwaco).

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729 Eckersley, 2012, p. 99, noting that historically, the application of public funds to copyright was viewed with scepticism, as the subsidising entities’ preferences could lead to lack of losses in cultural diversity and raised concerns of censorship.

730 Arts 2(1)(b) and 6 Rental Right Directive. For an analysis of the public lending right in several countries prior to the implementation of the Rental Right Directive, see ALAI, 1983.

731 Report on the Public Lending Right in the EU 2002, p. 3.

732 Ibid., pp. 3 –4. See also ALAI, 1983: “it is possible to distinguish two main groups: countries that do not recognize and those that apply the public lending right. Among the latter, some have sought a solution outside the province of copyright, and in fact only one, the Federal Republic of Germany, has accepted public lending right as an integral part of its copyright law”. Countries that did not recognise any public lending right were Italy, France and Belgium (to the extent that the existing law was considered “dead letter”). For a description of the UK example of the 1979 Public Lending Right Act, see ALAI, 1983.

733 ALAI, 1983, for Belgium.

734 ALAI, 1983, for the Netherlands and Sweden.

735 ALAI, 1983, for Denmark, noting that works of multiple authorship were outside the system and translators had a special regime. N.B. the distribution of amounts could be done on a simple pro rata basis (e.g. as in the Dutch “Fund for Literature” system) or pursuant to complex distribution mechanisms and detailed payment matrices (e.g. the system implemented via the Swedish Author’s Fund, an apparent precursor of modern private copying levy systems).

736 ALAI, 1983, for Finland.

737 WIPO & Stichting de Thuiskopie, 2016, p. 8. On the history and development of private copying systems, see supra 2.3. See also Opinion AG in EGEDA II, ¶16, mentioning in addition Estonia as a country that finances the compensation for private copying from the General State Budget.

738 See Art. 12 Norwegian Copyright Act.
which then distributes it to member (secondary) organisations representing national and foreign rights holders categories. In Finland, as of 2015, an amendment to the copyright law “introduced a new financing system for fair compensation”, which replaced the previous device-based levy system with “financing from the annual state budget.”

Spain has had a similar regime since December 2012. The Ministry of Culture determines the amount of compensation, which is paid once a year to competent CMOs from the State budget. According to the law, the amount in question should reflect “the damage actually caused to the rightholders as a result of reproduction of works which have been accessed legally”, calculated on the basis of various criteria. However, since 2012, the total amount distributed to CMOs has been exactly EUR 5 Million each year. Furthermore, payment of the amount to rights holders is made on the basis of pre-defined distribution keys.

It is doubtful whether the indirect market proxy systems implemented by either legal regime for determination of compensation adequately preserves a link—as required by Article 5(2)(b) InfoSoc Directive—between the act of reproduction causing the harm to rights holders and the amount of fair compensation. If they do not, a significant part of these systems is functionally similar to State Systems for the private copying activities covered.

At least in relation to the Spanish system, some doubts were clarified by the CJEU in EGEDA II. The Spanish Supreme Court asked whether the Spanish scheme is compatible with Article 5(2)(b) of the InfoSoc Directive, taking into account that it is based on an estimate of the harm actually caused but cannot “ensure that the cost of that compensation is borne by the users of private copies”. Should this be answered in the affirmative, the Spanish court further asked whether that scheme remains compatible if the total amount allocated by the budget for these purposes must be “set within the budgetary limits established for each financial year.”

In its judgment, the CJEU noted that under Spanish law the revenue allocated to the payment of fair compensation is financed from the general budget resources, i.e. by all taxpayers, including legal persons. Furthermore, the law does not contemplate exemptions for legal persons in this respect, or allow for their reimbursement. Therefore, because it fails to “guarantee that the cost of compensation is ultimately borne solely by the users of private copies”, the Spanish scheme is incompatible with Article 5(2)(b) of the InfoSoc Directive. (This conclusion made it unnecessary for the CJEU to examine the second question referred by the Spanish court.)

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739 WIPO, 2012, pp. 102–103. The most recent WIPO survey on private copying confirms that the “[t]he remuneration is funded by the Norwegian government as an item on the national budget” and “The rate is set unilaterally in the national budget each year.” Cf. WIPO & Stichting de Thuiskopie, 2016, p. 123.
740 WIPO & Stichting de Thuiskopie, 2016, p. 68.
743 CJEU, EGEDA II, ¶16.
744 Ibid., ¶39.
745 Ibid., ¶40.
746 Ibid., ¶41–42. On this point the CJEU strays from the AG’s Opinion, according to which financing the compensation from the General State Budget is consistent with the InfoSoc Directive, “since this is not a matter of
Despite this outcome, *EGEDA II* does not preclude a system that finances fair compensation for private copying through the State Budget. Rather, it opens the door for such a system provided it ensures payment of fair compensation to rights holders and guarantees its actual recovery. In disavowing the specific set-up of Spanish law, the CJEU clarified that any such alternative to the traditional levy scheme must ensure that the cost of compensation is ultimately borne solely by the final user. This goal can, in theory, be achieved by allocating the revenue for private copying compensation to a budgetary item that excludes taxes imposed on legal persons. Whether any implementation of this model is practical or cost-effective is, of course, a separate empirical question. Looking forward, it remains unclear what the impact of this judgment will be on those Member States (currently: Finland and Norway) that, like Spain, finance the private copying compensation through the State Budget.

### 3.3.6.2 Legalisation Proposals

Pure State Systems are external to copyright. A good early example is provided by Shavell and Van Ypersele’s 2001 proposal for a mandatory or optional reward system. The *mandatory* system provides that works enter the public domain upon release or publication, entitling creators to a mere claim to government rewards. In the *optional* variant, authors have the choice whether to join the system. In neither model, however, are authors allowed to opt out.

Another early proposal, dating from 2003, is Baker’s “artistic freedom voucher” (or “AFV”) system. The AFV, presented as “an Internet Age alternative to copyrights”, was meant to function as a different mechanism to incentivise the creation and supply of works. In this system, individuals would be given refundable tax credits of about USD 100, which they would allocate to specific “creative workers” or intermediaries (similar to CMOs) set up to pass the collected funds to creators. Both creators and intermediaries could only benefit from the voucher if registered in the system. Once registered, the recipients of the vouchers would be ineligible for copyright protection of their works for a period of time (e.g. five years). All works created by individuals within the AFV system would automatically enter the public domain. Creators would be allowed to opt out of the system at a later stage, subject to certain conditions, namely a grace period from the date a creator last received public funds.

In 2004, Fisher published his influential monograph on legalisation models, in which he proposes the adoption of a “tax-and-royalty” system. Although the author advances different ACS designs (e.g. based on legal licences and voluntary collective licensing), his preferred extending the scope of a levy to all taxpayers, but of a system of financing based on a different rationale.” See *Opinion AG in EGEDA II*, ¶52

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747 CJEU, *EGEDA II*, ¶43. For an analysis of the second question, see *Opinion AG in EGEDA*, ¶¶54–70.

748 CJEU, *EGEDA II*, ¶37.

749 For example, national laws could provide for a scheme for exempting legal persons’ taxes from inclusion in this budgetary item or, alternatively, allow legal persons to seek reimbursement of their taxes used for this purpose. Another possibility, briefly addressed by the AG, would be to introduce a specific tax or duty on natural persons to finance fair compensation. See *Opinion AG in EGEDA*, ¶51. Whether any of these variants is practical or cost-effective is, of course, a separate empirical question.

750 See Shavell & Ypersele, 2001, noting that the *ex post* calculation can be based on sales or other more sophisticated methods.

751 Shavell & Ypersele, 2001

option appears to be for a “governmentally administered reward system”. The system would apply to commercial and non-commercial use for “entertainment” works (mostly audio and video recordings). For a work to deserve consideration, a rights holder would have to opt in to the system and register it with a government agency (the Copyright Office). This agency would attribute a unique filename to the work, later used to track all transmissions of digital copies thereof and estimate its usage. The money to compensate rights holders for use of their works would be raised through taxes. Periodic payments amounting to a share of the tax revenue would be made to registrants by the competent agency, based on the relative usage and popularity of works. Once in place, this system would lead to the amendment of copyright law so as to eliminate most exclusive rights for online use. As result, music and films would be “readily available, legally, for free”.

Conversely, Eckersley sets forth a “virtual market reward/remuneration system” that provides blanket licensing for online use. The system relies on a government-run administrative structure. It includes a tripartite compensation structure, comprising (1) progressive income taxation, (2) levies on goods, and (3) levies on Internet access services. An original feature of this proposal is that the distribution of the sums collected is determined based on end-user voting mechanisms. As described by Eckersley, this system approximates a state-run model with little reliance on copyright protection for the digital works and use covered.

Finally, French scholar Philippe Aigrain and the advocacy group Quadrature du Net advance a high level proposal for the application of the doctrine of exhaustion to online acts of “non-market sharing of digital works between individuals”, namely those involving the rights of reproduction and communication to the public. The objectives of this proposal are twofold. First, to place online acts of non-market sharing between individuals outside the scope of copyright protection. Second, to enable “the recognition of new social rights to remuneration and access to financing for contributors.”

To achieve this second aim the proponents discuss different models for the remuneration of creators affected by the exhaustion of rights for digital works, but indicate a preference for the “Creative Contribution scheme”. This scheme would be implemented through a legally organised resource pooling system, including a statutory contribution. Creators would be entitled to a “remuneration/reward” funded through a monthly “flat-rate contribution” on Internet household

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754 Fisher, 2004, pp. 199–258. In his preferred model, Fisher proposes financing the ACS through an income tax; however, the possibility of taxing devices, media and services (like Internet subscription) are also analysed. Cf. Fisher, 2004, pp. 249–251.
756 See Eckersley, 2004, expanded by the author in Eckersley, 2012. In the latter version, the underlying legal mechanism lacks detail but the author expressly promotes a public funding approach, based on precedents external to copyright, such as public lending rights and government reward systems. Only the 2004 version entertains the notion of an opt-in right. Cf. Eckersley, 2004, p. 165.
758 La Quadrature du Net & Aigrain, 2013, pp. 5–6.
connections, distributed “on the basis of data stored by voluntary users about their non-market use in the public sphere (P2P sharing, recommendation, posting on blogs, etc.”).  

3.4 Attributes of Alternative Compensation Systems

The preceding sections provide a typology of models for copyright reform. It is now clear that most ACS are not radical departures from past and existing copyright laws, but rather adaptations of the same to regulate mass online use. This section furthers the taxonomy of ACS by looking into their constituent parts. It categorizes a set of attributes that assist in defining the scope and characteristics of ACS and provides a snapshot of how they are addressed across different proposals.

The attributes analysed are the following: subject matter scope, substantive rights scope, compensation type, management system, compensation target, and burden of compensation. Depending on the type of ACS or specific legalisation proposal, the composition of each attribute may vary. By breaking proposals down into these components, it is possible to identify elements susceptible of transplant across ACS. These transplants may in turn improve the legal feasibility or normative desirability of the “recipient” system.

The results of this analysis are twofold. First, it allows a better understanding of legalisation proposals, enabling comparison of benefits and costs between proposals and against the status quo, as well as their impact on rights holders and users. Second, it identifies discrete attributes that can be selected from different models to devise a more flexible ACS.

3.4.1 Subject Matter Scope

In theory, an ACS can cover any type of digital content used online that is susceptible of copyright and related rights protection. This includes music, video, text, e-books, photos and other visual works, databases, software and videogames. Some of these categories can be aggregated into different classifications reflecting the nature of the work (e.g. “multimedia works”) or specific content valuations (e.g. “entertainment works” or “pornography”).

Legalisation can therefore fluctuate between universal and restricted approaches regarding subject matter scope. A universal approach, applying to all types of subject matter, is consistent with the objective of wholesale legalisation professed by many ACS proponents. On the other hand, a vertical or sectorial approach is legally more feasible and susceptible of customisation to areas with higher levels of unauthorised file sharing—audio-visual content and, to a lesser extent, music and e-books—while not applying to areas where infringement by end-users is less problematic, like videogames, software and databases.

From a different perspective, because most types of ACS rely on collective rights management, pragmatism favours applying an ACS to the categories of content traditionally managed by

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759 La Quadrature du Net & Aigrain, 2013, pp. 5–6, 11–14. On the design of the creative contribution system, see Aigrain, 2012. See also Patry, 2011, p. 182, proposing a “worldwide exhaustion of digital rights once a work has been licensed in one country” as “[n]ational or regional exhaustion is a relic of the analog world”.

760 Heijden, 2014, discussing case selection and the importance of comparative research by design.

761 See, e.g., Kantar Media, 2015, showing a low level and volume of online infringement of videogames and software in the UK for the period between March and May 2015.
CMOs: music, text, visual and audio-visual. This would operate to the exclusion of subject matter such as videogames, software and databases.\textsuperscript{762}

These considerations are not lost on legalisation proponents, whose models vary in the subject matter covered, ranging from ACS covering online music, through online music and audio-visual works, to all types of content.\textsuperscript{763} Even in models that are universal by default, it is possible to find proposals that carve out certain categories of works, such as software (possibly including videogames), software and databases, and periodic publications.\textsuperscript{764}

Another variation of note are proposals that subject the inclusion of works in the system to certain requirements, such as prior publication or making available (either offline or online)\textsuperscript{765}, absence of restrictions through TPMs\textsuperscript{766}, lawfulness of source of the digital copy of the work\textsuperscript{767}, and embargo periods in the context of media chronology systems.\textsuperscript{768} Beyond these conditions, subject matter exclusions are either unjustified or grounded in particular market failures, technological limitations (e.g. of tracking and measurement systems), the non-expressive nature of certain works (e.g. software and databases), or legal compliance concerns.\textsuperscript{769}

\textbf{3.4.2 Substantive Rights Scope: Authorised Use}

In general, an ACS authorises use protected by copyright that takes place in the digital network environment, meaning use over the Internet, either through wired or wireless means. Because an ACS aims at solving a problem situated in the digital realm, it does not usually apply to analogue use of works. Beyond that common core, there is a significant diversity of legalisation proposals.

A common approach is to identify the types of online act authorised in the system. Thus, while some proposals target discrete acts like downloading, uploading, or webcasting, others legalise bundles of online acts involved in specific technologies, such as P2P.\textsuperscript{770}

These acts or bundles are then subject to legal qualification as substantive rights according to the law applicable to the proposal. In general, the rights include reproduction, communication to the

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\textsuperscript{762} P. Bernt Hugenholtz & Quintais, 2016 (forthcoming).
\textsuperscript{763} Applying to music, see, e.g., Lincoff, 2002; Litman, 2004; Love, 2003. Applying to music and audiovisual works, see, e.g., Beltrandi et al., 2007; Fisher, 2004. Applying to all types of content, see, e.g., Grassmuck & Stalder, 2003; Peukert, 2005; Sterling, 2008, 2009.
\textsuperscript{764} Excluding software, see, e.g., Netanel, 2003 (discussing previously publicly released expressive subject matter), and Roßnagel et al., 2009 (describing the proposal by the German Green Party). Excluding software and databases, see, e.g., Aigrain, 2012; Bernault & Lebois, 2005. Excluding periodic publications, see, e.g., Partido Comunista Português (Grupo Parlamentar), 2012.
\textsuperscript{765} See, e.g., Netanel, 2003, and Aigrain, 2012, pp. 84, 102, 116, 158 (requiring the first publication to be online).
\textsuperscript{766} See, e.g., Eckersley, 2012; Fisher, 2004; Grassmuck & Stalder, 2003, pp. 4–5.
\textsuperscript{767} See Beltrandi et al., 2007 (covering file sharing reproductions from legal sources), and Creation-public-internet, 2011.
\textsuperscript{768} This is of particular relevance in the exploitation of audiovisual works. See, e.g., Creation-public-internet, 2011; L’ALLIANCE public.artistes, 2006b, 2006c.
\textsuperscript{769} See, e.g., Fisher, 2004, Netanel, 2003, pp. 41–42, and Eckersley, 2012, pp. 135–139 (considering “non-monolithic” works to be the best fit for his virtual market, and excluding DRM-ed subject matter). Pornography is a special case, as it is implicitly or explicitly excluded from analysis in most ACS proposals. See, e.g., Eckersley, 2004, p. 163 & n.266; Gratz, 2004, pp. 428–429. For the example of an author whose proposal includes pornography, see Aigrain, 2012, p. 164.
\textsuperscript{770} See, e.g., Colin, 2011a; Lohmann, 2008; von Lewinski, 2005.
public, making available, online distribution, and adaptation (or the right to prepare derivative works). The identification of such types of right is either express or derives from the reference to a category of rights.

For instance, proposals for online music may refer to “mechanical rights” and “performing” or “performance” rights, terms whose meaning evolved over time. In EU law, “mechanical rights” traditionally meant rights “to reproduce musical works in a physical music carrier such as a record or a CD”, but the term currently refers to rights “to reproduce a musical work for online uses”; i.e. online reproductions. “Performing rights”, on the other hand, generally refer to rights in the communication of works through acts like “broadcasting on TV or radio, playing of music in places such as bars or concert halls”; the term is nowadays used with reference “to the making available of work or other protected subject matter in the Internet”. The legal qualification also depends on the technical characterisation of acts. For instance, whether an act is on-demand (an upload in a P2P network) or linear (the transmission of a webcast) may lead to different qualifications as, respectively, an act of making available online, or a wireless communication to the public. In international copyright law, the former act triggers an exclusive right while the latter allows for compulsory licensing.

The qualification may also vary depending on the applicable law. For example, in EU law, acts of download and upload in a P2P network qualify as a reproduction and communication to the public respectively (Articles 2 and 3 InfoSoc Directive). However, in the US, there are conflicting views on the application of the distribution right in Section 106(3) US Copyright Act to this type of interactive dissemination of works.

Furthermore, it is not always clear what right applies to certain online activities. A case in point is that of remixes, mash-ups and user-generated content. These activities involve different exclusive rights, some harmonised at international level and the acquis—reproduction and communication to the public—and others not, like the right of adaptation. (It is also worth noting that the vast majority of ACS deal only with economic rights, to the exclusion of moral rights.)

To address these substantive fragmentation challenges, some reform proposals suggest the creation of new rights that encapsulate the relevant acts authorised by the ACS, typically

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772 Ibid., p. 197.
773 See supra 2.4.2.1.
775 See Quintais, 2012, p. 75. On the right of adaptation in the acquis, see Eechoud et al., 2009, pp. 83–84, noting that the only explicit reference to this right in the acquis is found in Art. 4(b) Software Directive, despite general recognition of the right at national level. See also P. Bernt Hugenholtz & Senftleben, 2011. At international level, a general adaptation right and specific provisions for translations and cinematographic adaptations are found, respectively, in Arts 12, 8 and 14 BC.
776 In this respect, an ACS could raise concerns in its articulation with the moral rights of disclosure and integrity (where transformative uses are authorised in the system). See Quintais, 2012, pp. 75–76. See also Goldstein & Hugenholtz, 2013, pp. 363–365, discussing the moral right of integrity under international copyright law and several national laws.
applying to online acts of communication to the public and functionally dependent acts of digital reproduction. Illustrations are Lincoff’s “online transmission right”, Sterling’s “Internet right”, Dimita’s “global dissemination right”, and Aigrain’s “positive social right of sharing”. It is noteworthy that few proposals address the right of adaptation and, those that do, allow its withdrawal from the ACS.

Beyond the online character and type of authorised use, a major distinction in legalisation proposals relates to the purpose or nature of use, namely whether the same is “commercial” or “non-commercial”. Most proposals target non-commercial, not-for-profit or “non-market” activities over the Internet, as their ultimate aim is to enable large-scale online use by individuals.

As noted in Chapter 1, this dissertation also focuses on copyright reform for non-commercial online use. Based on its use in the acquis—in relation to compensated limitations and collective rights management—“non-commercial” should probably be qualified as an autonomous concept of EU law. The concept, however, has nebulous contours.

The term “commercial” can encompass several meanings, including “economic”, “for profit”, “business” and the like. Yet, the scope of non-commerciality is difficult to define, especially in the online environment. At the very least, commercial should not be a synonym for economic. In private copying, for example, a limitation the scope of which excludes all economically significant use would be devoid of meaning and application, as many copying acts bear that significance.

The challenges inherent in defining the concept could explain why ACS proponents often shy away from drawing hard and fast lines as to its meaning, beyond linking the use to online acts of natural persons. For Netanel, for instance, non-commercial means that individuals “cannot be selling copies of, access to, or advertising in connection with the protected work”. Grassmuck adds that users cannot earn revenue nor solicit donations from the public, while a French law proposal requires use not be directly or indirectly commercial, a terminology borrowed from the private copying limitation in Article 5(2)(b) InfoSoc Directive.

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778 Sterling, 2008, 2009. The new internet right would cover the substantive rights of reproduction, communication to the public and making available when involved in the same transmission and for global purposes.
782 While the terms “non-commercial” and “not-for-profit” are of common usage, the term “non-market” is mostly used by Aigrain in works on this topic, most notably in Aigrain, 2012, pp. 15, 84, 207 & n.5. The author borrows the term from Benkler, 2006.
783 Cf. supra 1.2.
784 Karapapa, 2012, p. 82.
785 Poort & Quintais, 2013.
786 See, e.g., Dimita, 2010, p. 212 & nn.1513, 218, for whom non-commercial means use not made in the course of business and should be better defined at international level.
787 Netanel, 2003, p. 43.
Some ACS designs authorise only online use for “personal enjoyment”, excluding economic benefits. In one case, this entails a prohibition that “a site or a community makes available entire collections or provides its sharing services for any commercial purpose”. Others, however, permit the use of intermediary “sharing platforms”, enabling the operation of centralised and decentralised systems, while exonerating a broad swath of intermediaries (caching, browsing, hosting or others) from liability, irrespective of physical location.

3.4.3 Compensation Type

The type of compensation is the economic claim of copyright owners linked to the permission to use their works. This claim comes with different labels: payment, tariff, royalty, licence fee, remuneration, compensation, levy, contribution or tax. The compensation is influenced by the nature of the right subject to authorisation. Some terms, like “rights revenue” or “tariff” apply to different types of system irrespective of whether they involve exclusive or remuneration rights. Other terms are specific to the scheme they apply to. For example, the term “levy” is overwhelmingly used for the payment of compensation in a statutory licence, “licence fee” or “royalty” are more common in voluntary collective licensing, and “taxes” and “rewards” are the province of State System proposals.

3.4.4 Management System

The management system refers to the “nuts-and-bolts” of an ACS, namely the calculation, collection and distribution of the compensation. For the most part, legalisation proposals take inspiration from and extend upon existing models of collective management and statutory licensing.

The determination of the amount of compensation has two facets: the total amount of compensation generated by an ACS, and the specific amount paid by the users for the authorised use. The latter amount relates to the burden of compensation, and is dealt with below under that heading (3.4.6).

As regards the total amount generated by the system, in collective rights management models that quantum is determined through contractual negotiation and tariff setting by CMOs, and is usually not problematic. In legal licence and State System ACS, this determination is imposed by law, with the intervention of a government agency and/or stakeholder negotiations, subject to judicial or administrative review. The calculation of the amount is a complex and debated aspect of the system, mainly because it is one of the main elements in assessing its feasibility.

It is possible to calculate the overall amount of compensation in an ACS using different ranges and reference points, depending on the policy objective of the system. These objectives include

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789 See Rocha, 2010, with a translation and explanatory comments to Art. 88(B) of the Brazilian “Compartilhamento Legal” proposal.
790 See Partido Comunista Português (Grupo Parlamentar), 2012, proposed Arts 3 and 4.
791 See Geiger, 2010, p. 528, criticising the use of the term “levy” in this context.
792 Cf. supra 3.3.2
794 There are also hybrid systems containing newly created entities for this purpose. See, e.g., Mehra, 2008 (proposing a digital clearinghouse), and Dimita, 2010 (proposing a specific WIPO agency).
compensating revenue losses from piracy, curing a market failure, providing fair remuneration, or incentivising creation and access to works.

Some proposals set as a lower threshold the status quo rights revenues for comparable authorised use; if this threshold is met, the ACS is welfare increasing. Other proposals target the lost profits from unauthorised use; if the ACS covers these losses, it cures the market failure that motivated its adoption. A third approach establishes a welfare increasing compensation range, using current rights revenue levels as a floor, and the value attributed by consumers to an ACS as a ceiling, for example by measuring their willingness to pay through contingent valuation methods.

Whatever the model, there seems to be agreement that the total amount of compensation requires periodic adjustment after adoption of the ACS, as the baseline values become gradually less representative of changing market conditions over time.

Except for tax-based State Systems, collection of compensation is usually the competence of a CMO designated in the ACS. Most proposals include a variation of the following set-up. The law mandates an umbrella CMO to administer the system, including collection and subsequent distribution to second-level organisations, which represent different categories of rights holders. For reasons of efficiency, the CMO will collect the amount from an intermediary debtor, like an ISP or online service provider, who may then have the right to pass it on to the final user. Some proposals devise specific government agencies for purposes of collection and distribution.

The distribution of the compensation involves numerous considerations, many of which are well known to collective rights management. First, it is necessary to define the beneficiaries of the compensation, namely the categories of rights holders entitled to it. Here, there is a binary choice between proposals that benefit creators—often because of the unwaivable nature of their remuneration rights—or all rights holders. The allocation of the amounts to each category is determined by law or stakeholder negotiation, and often creators are allocated a fixed share due to the unwaivable nature of their remuneration rights under the ACS. Some proposals reserve a portion of the amounts collected for social and cultural purposes.

The subsequent issue is how to divide the compensation among individual rights holders within a category. Individual distribution is typically the competence of second-level CMOs representing

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796 See, e.g., Fisher, 2004, suggesting diverse criteria, including actual or potential losses. Critics argue that this last amount is difficult to establish due to the lack of information on production costs and the potential profits of rights holders absent infringement. See Stan J. Liebowitz, 2003; Stanley J Liebowitz, 2005.

797 Handke et al., 2015, 2013. This seems to be the approach followed in Eckersley, 2004, 2012. See also Baker, 2003 using a contingent valuation method in his proposal for an artistic freedom voucher.


800 For proposals benefiting solely creators, see, e.g., Attali, 2008; Ku, 2002; Litman, 2004. For an atypical proposal benefiting creators and intermediaries under different schemes, see Aigrain, 2012.

801 See, e.g., Eckersley, 2012, p. 289, introducing a mechanism similar to an unwaivable remuneration right for creators, by requiring the ACS to distribute a “fair minimum portion of… royalties” to creators, even if these are not the current rights holders.

802 See, e.g., Aigrain, 2008.
each category and only seldom of an umbrella organisation or central agency. Most proposals suggest distributing the compensation based on the measurement of online use—including relative and actual use of works online—, contingent valuation methods, or negotiated distribution keys. In one notable exception, Eckersley proposes a progressive distribution system, where the compensation for lower income creators is proportionally higher than for those with higher income.

Methods for measurement of online use include anonymous monitoring, sampling, tracking, census, or a combination thereof. Proposals that rely on monitoring online use typically require some type of registration of works or rights management information in a central registry to enable the measurement. More sophisticated ACS consider the length of works and trace units of consumption (e.g. download counts), or use decentralised metrics or contingent valuation surveys (e.g. by having end-users assume a role in distribution through voting mechanisms or user sampling). It is worth noting that a significant number of proposals stress the need for these methods to respect the privacy of end-users.

Regarding distribution, some authors note the need to define a distribution threshold, meaning that amounts collected are only distributed to rights holders if the administrative costs are covered (including management fees), and the rights holder has a minimum audience.

Finally, the implementation of an ACS would require the implementation of an operational infrastructure enabling the features described above. Although built on existing collective management infrastructures and expertise, most ACS proposals would require additional capabilities, namely related to the technical systems and databases for registration of works, and measurement of online use.

3.4.5 Compensation Targets

The compensation target is the good or service selected as the aim of the payment obligation. This attribute is less relevant for voluntary licences, where the payment is predominantly negotiated between CMOs and commercial users. These then have a right to offer file sharing licences to end-users, either as a stand-alone or bundled with other goods or services, such as

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803 See McDaniel, 2007, for a critical analysis of issues related to certain non-voluntary ACS proposals (limited to online music) for division and distribution of levied amounts, either through measurement of usage or contingent valuation methodologies. McDaniel ultimately denotes a preference for voluntary industry-led changes to the copyright system. Cf. McDaniel, 2007, p. 312. For an example of a specific method, see Lincoff, 2008, referring to benefits realised by online service providers.

804 Eckersley, 2012.

805 For an example of the first, see Fisher, 2004. For examples of the second, see Aigrain, 2008; Baker, 2003; Eckersley, 2012.


807 Eckersley, 2012; Fisher, 2004. For an example of the second, see Eckersley, 2012 and Baker, 2003 (relying on a selection by tax payers on their tax form of a beneficiary creators or intermediary, or alternatively on direct payments of the tax refund).

808 Proposals vary in this respect, but for examples of elaborate new systems with numerous implementation requirements, spanning from certification requirements for intermediaries, to specific administrative resolution procedures, see Baker, 2003; Eckersley, 2012; Fisher, 2004.
Internet access. In these models, users have the choice of participating in the ACS by acquiring a licence in addition to their normal service.  

In non-voluntary ACS, this attribute is more complex, involving a higher level of legislative intervention. For efficiency reasons, the majority of proposals target internet access services, imposing the compensation as a surcharge on the monthly household subscription paid by users to ISPs. In some cases, albeit rare, mobile connections are also targeted.

The payment obligation is either fixed (a “flat rate”) or varies according to type of connection, speed of access, income of the household, or other factors, which may influence the decision to exempt certain targets or users from payment (e.g. based on age, income, or low speed of connection). A few proposals view Internet access as a utility, and therefore suggest regulatory determination of minimum and maximum price bands for access.

In addition to services, a number of ACS target goods, like devices, equipment, media or supports selected on the basis of their susceptibility for use in unauthorised file sharing. In these models, the compensation amounts to a percentage of the wholesale or retail price of the good.

In legal licences and State Systems, user participation in the ACS is usually mandatory for those acquiring the relevant good or service. If the system targets ISP subscriptions, for instance, it is compulsory for all non-exempt connected households. Finally, it is noted that State Systems use direct or indirect taxation to generate compensation. The incidence of the taxes used to fund the ACS includes personal income and connected residential properties (e.g. proportional to the value of a household with Internet connection).

### 3.4.6 Burden of Compensation

This final attribute identifies the party bearing the direct and indirect burden of liability for payment. Such party will be the user or an intermediary. In voluntary collective licensing, the burden of compensation lies directly with the licensee, typically a commercial user, who then offers his services to end-users on market-based prices.

In other types of ACS, where the target of compensation is a good or service, the provider of the same is typically the debtor of the compensation, which is owed to the CMO with competence for collection. However, in an arrangement similar to private copying systems, most proposals allow that intermediary to pass on the amount of the payment or levy to the end-users. The result is that consumers effectively bear the burden of compensation, unless the intermediary chooses

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810 See, e.g., Dimita, 2010, p. 219; Grassmuck, 2010a; Partido Comunista Português (Grupo Parlamentar), 2012.
811 See, in this respect, the considerations in Vallbé et al., 2015.
812 See, e.g., Hellings & Piryns, 2010; Morael & Piryns, 2010.
813 See, e.g., Netanel, 2003, targeting goods the value of which is substantially enhanced by P2P. See also Fisher, 2004, pp. 222–223, defining different goods as potential targets.
814 Discussing some of these options in depth, see Eckersley, 2012; Fisher, 2004, pp. 216–223. See also Baker, 2003; Eckersley, 2012, suggesting exemptions for individuals or households without Internet connection.
815 See, e.g., L’ALLIANCE public.artistes, 2006b, 2006c; Lincoff, 2008.
to absorb it or the consumer is exempt from payment. This approach is justified to the extent the beneficiary of the authorisation to use works in the ACS is the end-user. 816

Whichever the model, from the perspective of end-users, an ACS is a single-interface black box through which they either choose or are obliged to pay money in return for the authorisation to use works online, which money is distributed to rights holders. 817 In this respect, most proposals are silent on whether the ACS “levy” should be visible for end-users acquiring it, allowing it to be incorporated in the price of the Internet subscription without discrimination. 818

3.5 Conclusions

This chapter aims at an in-depth conceptual and legal understanding of the nature, scope and effects of ACS. Based on existing legalisation proposals, it advances a taxonomy of legal schemes that qualify as ACS, their attributes, and possible combinations, against the background of international and EU copyright law.

The taxonomy categorises five types of ACS or rights acquisition schemes for the wholesale legalisation of online use. These are, from least to most restrictive of the exclusive right: voluntary collective licensing, ECL, mandatory collective management, legal licences, and State Systems. Outside the classification are private ordering models that do not involve collective rights management, and proposals relying on uncompensated limitations, which lack the essential remuneration element.

The first three models are based on collective rights management. Both voluntary and extended collective licensing (with opt-out) are restrictions on the exercise of the exclusive right, but not on its nature. They may apply as legal mechanisms for ACS with legislative amendments that, although challenging, would retain the exclusive nature of the licensed rights.

However, issues with territorial and substantive fragmentation of copyright, costs of management and supervision, and the reliance on the continued participation of rights holders—including, in ECL, not exercising large-scale opt-outs—raise serious doubts that systems of voluntary licensing can provide the type of all-encompassing multi-territorial and multi-repertoire blanket authorisation for mass non-commercial use required by an ACS.

In this respect, the remaining types of ACS, classified as “non-voluntary” licences, are more promising. As noted, the term in quotations is used ambiguously in law and commentary. Here, it means that the exercise of copyright is imposed prima facie on the rights holder, but does not require a transformation from exclusive to remuneration right. While it is not contentious that such a transformation results from the application of legal licences (with the accompanying copyright limitation), it is less clear whether that is the case for mandatory collective management, or for compulsory ECL (without opt-out).

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816 For examples of proposals allowing the payment to be passed on to end-users, see: Aigrain, 2008; Attali, 2008; Baker, 2003; Beltrandi et al., 2007; Bernault & Lebois, 2005; L’ALLIANCE public.artistes, 2006a; Lincoff, 2002; Love, 2003; Netanel, 2003; Zelnik et al., 2010.
817 The remaining attributes constitute a hidden complexity for end-users and are usually defined and managed by legislators, rights holders and intermediaries.
818 Exceptionally requiring visibility of the levy, see Creation-public-internet, 2011; Modot et al., 2011; Songwriters Association of Canada, 2011.
To solve this conundrum, the analysis contrasts the opposing theories on the application of mandatory collective management to exclusive rights. Although this regime has functional similarities with compulsory licences, it does not seem possible to qualify it as a copyright limitation from the conceptual or legal-technical perspectives.

The consequence is that the adoption of a mandatory collective management ACS for online exclusive rights for non-commercial purposes is not subject to the three-step test. Instead, it must respect the stringent requirements for the imposition of collective management as the sole mode of exercising those rights. However, this issue is unsettled in scholarship and not formally recognised in international treaties, meaning that such a proposal is contentious both as a matter of law and as a legitimate policy option. Therefore, it is advisable to explore whether an ACS following this regime would pass the three-step test.819

Legal licences, which can be statutory and compulsory, require the adoption of a compensated limitation to the rights authorised by an ACS. As noted in Chapter 2 and further explored in the present chapter, international copyright law leaves limited space for EU-wide compulsory licensing of mass use, and certainly not for a broad blanket non-commercial licence for the rights of online reproduction and communication to the public. Where these rights are exclusive and not covered by a copyright limitation at EU level (a topic explored in Chapter 4) a legal licence ACS is subject to the three-step test.

Yet, aside from this legal challenge, a legal licence combined with collective management of underlying remuneration or compensation right(s) is conceptually the best solution to achieve wholesale legalisation of non-commercial use with fair remuneration. The main reason is that it adequately addresses the territorial and substantive fragmentation challenges of EU copyright law, while leveraging the infrastructure and expertise of CMOs.

State Systems, for their part, are proposals based on tax or rewards models external to copyright. Their adoption would require the replacement of copyright protection for the authorised use by a publicly funded system. Thus, even for non-commercial mass use, they constitute an unrealistic path for reform.

Further to the identification and characterisation of the above types of ACS, this chapter categorises and provides a snapshot of a set of attributes of legalisation schemes: subject matter scope, substantive rights scope, compensation type, management system, compensation target and burden of compensation. The analysis of attributes assists in defining the scope and characteristics of legalisation schemes.

The examination of carefully selected models and attributes reveals a complete picture of the scope and effects of legalisation schemes. The analysis confirms what the previous chapter hinted at, namely that most ACS types and attributes are not radically different from existing copyright mechanisms.

819 See, following a similar logic, Colin, 2011a, pp. 45–46; Séverine Dusollier & Colin, 2011, pp. 819–827. See also Geiger, 2015b, p. 19: “...a less ‘intrusive’ alternative would be subordinating creative uses to the mandatory collective administration of works, as this would not be a limitation but a way of exercise of the exclusive right, which would therefore be more likely to be compatible with the three step-test”.

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Rather, they are extensions and adaptations of existing regimes—namely of collective rights management and legal licences—with the objective of enabling a model of fairly remunerated access to (predominantly) mass non-commercial use online. The point is important as it is often obscured by the presentation of these models as holistic, and therefore impractical, alternatives to the status quo. Instead, by looking at ACS as a matrix of interoperable models and attributes, the taxonomy offers not only an exploration of flexibility in copyright law, but also a toolbox for policy makers to select the most legally consistent and adequate ACS blend of copyright reform.
4 Between Rights and Limitations: Mapping the Space for the Legalisation of the Online Use of Copyright Works

4.1 Introduction

Legal reform is a normative proposition. In this dissertation, the proposition is to improve the acquis and define what the law should be for the regulation of mass online use of copyright-protected works. The assessment requires clarification of what the law is in this respect. That is the task of the present chapter, which examines the following research question:

How does the bundle of exclusive rights and corresponding copyright limitations in the acquis apply to unauthorised mass online use of works by individuals?

The question aims to be technology neutral, meaning that the online use of works it refers to includes all modes and acts of dissemination, transmission, communication or making available of works online. To prevent technological obsolescence of the analysis, these acts are categorised in a typology of online uses that attempts to trace CJEU case law on application of exclusive rights and limitations to digital networks. The legal analysis refers to this typology.

The aim of the question is not only to define the baseline legal status for these non-commercial online use of works, but also to clarify whether the current framework can accommodate an ACS and, if not, what the future scope of legalisation should be. The chapter examines rules that apply to online uses, with an emphasis on the InfoSoc Directive’s exclusive rights and limitations (Articles 2 to 5) and their interpretation by the CJEU. The directive implements the WIPO Treaties, which include by reference multiple provisions of the BC; hence, these international treaties are briefly mentioned in order to shed light on the origin, context, meaning, and purpose of some provisions in the acquis.

Orbiting around the issue of the legal qualification of online uses are several elements central to the overall theme of this dissertation. Chief among those are considerations on possible flexibilities in the interpretation of exclusive rights and limitations, as well as the autonomous concept of fair compensation. Doctrinal discussion of these topics is infused with normative considerations on the desirable scope of rights and breathing space provided by limitations in the acquis. Where relevant to the study of ACS, such arguments are highlighted and woven into the examination of the legal provisions, making this chapter partly normative. 820

The analysis proceeds as follows. After this introduction, section 4.2 advances a typology of forms of online use by individuals. This typology is then subject to legal analysis against the regimes of the harmonised rights of reproduction (4.3.1) and communication to the public (4.3.2). The analysis demonstrates that the majority of online acts by end-users, even if non-commercial, trigger the application of one or more overlapping exclusive rights and that many of the uses are subject to legal uncertainty. Section 4.4 then examines the limitations that might exempt some of the acts covered by exclusive rights. After providing background and context to the framework of limitations in the acquis (4.4.1), it tests the application of several limitations to previously identified uses, namely: the mandatory limitation for transient copying (4.4.2); the

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820 The three-step test, only briefly mentioned here, takes centre stage in Chapter 5.
optional limitation for private copying (4.4.3); and the optional limitations susceptible of application to digital adaptations, namely quotations, incidental inclusion and parodies (4.4.4). The analysis shows that, despite the existence of relevant breathing spaces, a plethora of restricted acts by Internet users are not privileged by limitations. Therefore, it is in respect of such uses that the need for an ACS-type of copyright reform is more pressing. Section 4.5 summarises the chapter’s findings and offers conclusions.

4.2 Typology of Online Uses

ACS proponents traditionally focus either on discrete acts (e.g. downloading, uploading, webcasting, sharing), or on bundles of acts triggered by specific technologies. The acts are then abstracted into substantive rights under the relevant applicable law. The present chapter uses a similar method, but first clusters different acts into a typology of online uses.

This section selects and categorises the types of use carried out by end-users in the online environment, and flags the corresponding legal issues, providing a basis for subsequent legal analysis. The selection takes into account CJEU case law on the application of the InfoSoc Directive’s exclusive rights and limitations in the digital environment, thus aligning the typology with existing law at EU level. From the perspective of Internet users, the types of use involved in digital content sharing are the following: browsing, downloading, streaming, stream capture, uploading, and digital adaptations. The following paragraphs analyse each of these in turn.

4.2.1 Browsing

Web browsers are software applications whose function is to retrieve, present and traverse information resources (such as Uniform Resource Identifiers or Uniform Resource Locators Identifiers) on the Internet. End-users resort to these applications to navigate the web.

The mere action of viewing a website does not cause Internet users to download content. However, the technical process of browsing requires the automatic making of on-screen and cached copies. The copies are made without human intervention beyond that of accessing the website. Moreover, the copies are retained solely for the normal duration of the user’s session and deleted automatically after a certain period of time. That period varies according to the “capacity of the cache and the extent and frequency of internet usage by the internet user concerned”.

Both on-screen and cache copies are essential and universal technical features of browsing technology, necessary for the proper and efficient functioning of the Internet. Therefore, unless a user sets out to download or print a protected work he is viewing, the copies in question are “merely the incidental consequence of the use of his computer to view a website”. The legal question raised by browsing is whether on-screen and cache copies qualify as copyright reproductions by the end-user.

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821 Cf. supra 3.4.2.
823 CJEU, Meltwater, ¶15.
824 CJEU, Meltwater, ¶16.
825 Ibid., ¶17.
4.2.2 Downloading

Downloading involves the initiation, reception and saving of data—for more than transitory duration—transferred from a remote system or server (whether web, File Transfer Protocol, email or other). In the context of mass online use of works, the data in question would correspond to a file that includes a protected work. Examples of relevant acts are downloading and storing films, e-books, and sound recordings from authorised and unauthorised sources on the Internet (e.g. websites, cyberlockers or P2P systems), and making subsequent copies thereof. The result of downloading is that the end-user makes a permanent downstream copy of the work.

Online service providers usually allow their subscribers to make downstream reproductions in a “mixed form”, between streaming and downloading. This model is characterised by the potential to access works offline during the period of subscription (e.g. as happens with Spotify premium playlists) for longer than a short period of time, typically subject to access and use restrictions through TPMs. Such a hybrid model—sometimes presented as an offer of “lending” services—is more akin to (temporary) downloading than streaming, even where the user does not, strictly speaking, make a “permanent” copy.

The legal issue at stake with downloading is when and to what extent it is covered by an exclusive right and, if so, whether it is privileged by the private copying limitation.

4.2.3 Streaming

Streaming can be defined as “a method of transmitting data packets so that the earlier packets can be reassembled and processed before the entire file is downloaded, allowing for immediate display or playback”. In essence, streaming involves downloading a file and subsequently causing the downloaded data to become inaccessible. This feature has caused some technologists to define streaming as a subset of downloading that is “an implausible and inefficient use of wireless bandwidth”.

It is possible to divide streams into non-interactive/linear and interactive/on-demand. Non-interactive streams are comparable to broadcasts, as they are only available and accessible at a specified time. They include simulcasting, understood as the “unaltered and simultaneous online retransmission of a TV or radio broadcast”, and certain types of linear online streaming in webcasting. For end-users receiving a live stream, the same will be “split (copied) and sent to multiple consumers through a multicast system”. In contrast, interactive streams are available on demand at a time and place chosen by the end-user; they include, for example, certain forms of on demand streaming of films and phonograms (e.g. Netflix and Spotify).

In either case, the streamed copy/performance received is transient and unique to the final user; its later use is dependent upon the availability of the work at the transmitting party or uploader’s

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827 Discussing these mixed forms, see Depreeuw & Hubin, 2014, pp. 70, 77; Jutte, 2015.
829 Doctorow, 2009.
830 SWD CRM Directive 2012, p. 12 (fn. 51), using this terminology.
end. It disappears after the transmission and is retained in a memory medium only as long as required for enjoyment or, depending on the software set-up and the temporary memory capacity of the receiving device, it may be retained for longer than the user’s specific “session”. The legal issue here is whether in these cases a copyright-significant reproduction has occurred.

The implications are different for the individual or service providing or transmitting the stream. Depending on the technical set-up, linear streams may or may not produce more than transient copies of the content transmitted. In contrast, interactive streams likely require permanent copies in cloud storage, from which content is “recalled” by end-users, whereupon a unique stream/copy is produced. The legal issues are twofold and relate to whether there are independent copyright-significant (1) reproductions and (2) transmissions in connection to the provision of the stream.

4.2.4 Stream Capture or Ripping

Stream capture or ripping technology works by using a software tool to “capture, aggregate, and save all streaming data”; it is the “Internet audio analog of VCR and DVR technology.” Users employing this technology will retain a permanent copy of the protected content streamed. In this way, a stream is turned into a download, giving rise to similar legal issues plus a further issue: the extent to which this technology conflicts with legally protected forms of copy control TPMs.

4.2.5 Uploading

In contrast to downloading, uploading refers to the process of sending or transferring data from a local to a remote system—either a server or a different client—for the purpose of storage of that data. Uploading involves making an upstream permanent reproduction of a work on a remote storage medium, which may be accessible only to the user or a close circle of family and friends (e.g. a cloud locker such as Dropbox), or to the public, as happens with YouTube or most P2P systems. The latter enable technologically sophisticated forms of uploading. For instance, the popular file sharing protocol BitTorrent used by The Pirate Bay platform functions in such a way that a final downloaded version of a file constitutes a combination of contributions from different versions of an identical file uploaded by different users.

The main legal issue with uploading is the legal qualification of the acts of (1) making a copy on the server and (2) subsequent provision of access to protected works, bearing in mind that the purpose of the first is usually to enable the second.

833 Depreeuw & Hubin, 2014, p. 43 (and fn.116), defining “uploader” as the “person performing the acts of upload that leads to the work being accessible to a public.”
836 Anderson, 2011, pp. 167–168, providing examples of stream capture services and products. See also Jutte, 2015, pp. 2–3, discussing “stream ripping”.
4.2.6 Hyperlinking

Hyperlinking is an umbrella term encompassing similar types of references and means of access to other sources on the web. Hyperlinking can be characterised according to the different techniques employed and includes modalities such as “deep-linking, framing, inline linking and embedded linking”.839

“Standard” hyperlinks are clickable pointers, like text, a thumbnail or other format. Once clicked, the pointers cause the web browser to redirect or “push” the user to a different “target” or “destination” page. A link to a main or homepage is called “surface” linking, while a link to a sub-page or resource is referred to as “deep” linking.840

“Inline” or “embedded” links are links where the “browser transparently fetches material (e.g. image or another web page) and displays it as part of the current page”. In other words, the link does not push the user from the source to the target page. Instead, the content stored in another website is “pulled” and embedded in the source website, where it appears to users.841

In “framing” links, the original web page address is preserved even when linking to external pages. The content is displayed in such a way as to appear part of the linking site, within a “frame” (e.g. a pop-up window) and without the need to open a new browser window.

Standard hyperlinks are therefore “push” links, while the remaining techniques (inline, embedded and framing) are “pull” links. Because all hyperlinks operate as means to refer to and access other sources online, they constitute essential reference tools for programmers, online service providers and end-users. These tools are central to the functioning of the Internet.

At the same time, hyperlinks provide an indirect means to make works available online, meaning that they may qualify as a communication to the public under copyright law. The legal status of hyperlinks and the desirability of subjecting them to the copyright regime are debated topics in academia, having given rise to several CJEU judgments and preliminary references.842

4.2.7 Digital Adaptations

The making and sharing of adapted versions of works is a daily part of the online practices of end-users.843 The results of these activities receive different and partially overlapping labels, such as derivative works, “mash-ups”, “remixes”, or “user created/generated content” (UGC).844

UGC is a controversial concept to define and regulate in EU copyright law.845 It can be defined as content “published in a specific context that required a certain creative effort and was

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840 Such links are addressed by the CJEU in Svensson.
841 This type of linking to a YouTube video is at stake in CJEU, BestWater.
842 See infra 4.3.2. For discussions in academia, see, e.g., ALAI, 2014, 2015; Arezzo, 2014; European Copyright Society, 2013; Ginsburg, 2014c; Savola, 2014; Tsoutsanis, 2014.
844 On UGC, the “remix” culture, and their legal, social, and cultural implications, see Borgne-Bachs Schmidt et al., 2008; Lessig, 2008; McLeod & DiCola, 2011; Sinnreich, 2010. See also: Gervais, 2009 attempting a taxonomy of UGC divided into user-authored content, user-derived content, and user-copied content; and Triaille et al., 2013, pp. 447–545, for an in depth study of UGC against the EU legal framework.
produced outside of the professional routines and practices\textsuperscript{846} in which “a pre-existing work is
taken by a user as a starting point for his/her own expression… [and is] modified in one way or
another to then be made available online”.\textsuperscript{847}

There are different types of UGC, across a variety of platforms and distribution models, such as
social network sites, wikis, blogs, P2P systems, music and video sharing sites, etc.\textsuperscript{848} Among the
types of UGC are remixes or mash-ups, terms that usually refer to creative new works produced
“through changing and combining portions of existing works”.\textsuperscript{849}

In this chapter, all these terms are included under the shorthand “digital adaptations”. The
concept includes the use of pre-existing works and their manipulation— modification, changing
and combination—through software editing tools, leading to the creation of a new and
distinguishable digital object (which may qualify as a protected derivative work or adaptation),
and its subsequent making available over the Internet. Furthermore, only digital adaptations
made by individuals for non-commercial purposes are considered in this context.

The degree of distinction or transformation of the pre-existing work in an adaptation varies. As
used herein, the concept requires a low threshold of creativity and includes “merely adding,
subtracting or associating some pre-existing content with other pre-existing content”.\textsuperscript{850}
Furthermore, while in some adaptations the pre-existing work (or part thereof) is easily
recognisable, in others the copyright inputs are difficult to discern.

The purpose of the adaptation may also vary, including personal enjoyment, caricature, parody,
pastiche, criticism, commentary, creative expression, quotation, etc.\textsuperscript{851} Mere technical
adaptations, such as “format-shifting” are outside the concept and fall squarely within the scope
of the right of reproduction.\textsuperscript{852}

The issues that arise regarding this type of use relate to the legal qualification of the acts
involved in digital adaptations: the reproduction of the borrowed pre-existing works; the
adaptation and preparation of derivatives from those works; and the follow-on making available
of the works to the public via online platforms (e.g. YouTube or Vimeo).

\textsuperscript{845} European Commission, 2013, pp. 28–29, describing the setting up of a specific Working Group on this issue in the
framework of the "Licences for Europe" stakeholder dialogue, on which “[n]o consensus was reached among
participating stakeholders on either the problems to be addressed or the results or even the definition of UGC… In
any event, practical solutions to ease user-generated content and facilitate micro-licensing for small users were
pledged by rightholders across different sectors as a result of the ‘Licences for Europe’ discussions”. See also
European Commission, 2014, pp. 67–71, on the responses to the public consultation regarding UGC.

\textsuperscript{846} OECD, Vickery, & Wunsch-Vincent, 2007. Wider definitions encompass smaller contributions which require less
creative effort, such as “posting to a blog or uploading a self-made photo to a website”. See Esmeijer, Nieuwenhuis,
Mijs, & Verslout, 2012.

\textsuperscript{847} Triaille et al., 2013, p. 452, excluding from the definition works created without basis on a pre-existing work
(“creation from scratch”) and the mere online dissemination of pre-existing works (“mere upload case”).

\textsuperscript{848} Triaille et al., 2013, pp. 453–454.

\textsuperscript{849} The Department of Commerce and Internet Policy Task Force, 2013, p. 28.

\textsuperscript{850} Triaille et al., 2013, p. 455, making this clarification in order to draw a distinction with other UGC definitions which
require a high degree of creativity.

\textsuperscript{851} For an in depth analysis of the music UGC, remix and mash-up genre, see: Borgne-Bachschmidt et al., 2008; Menell,
2015b.

\textsuperscript{852} Triaille et al., 2013, p. 453.
4.3 How Does the Bundle of Exclusive Rights in the Acquis Apply to Mass Online Use of Works by Individuals?

International and EU law define broad exclusive rights that extend to online use. The BC sets forth minimum standards for the economic rights of translation, reproduction, public performance, broadcasting, public recitation, and adaptation.\(^{853}\) Online acts by end-users might call into question the application of the BC rights of reproduction, communication to the public (i.e. public performance and recitation), and adaptation, as incorporated or adapted to the digital age by the WCT and WPPT.

The latter treaties include, under the purview of the public communication right, the so-called making available right, which applies in the context of interactive, on demand situations.\(^{854}\) In what has been termed the “umbrella solution”, treaty members have flexibility as to the manner of implementation of this right.\(^{855}\)

The WIPO Treaties were implemented in the EU by the InfoSoc Directive, which harmonised several economic rights and adapted them to the digital age.\(^{856}\) The harmonised rights are reproduction, communication to the public, making available to the public, and distribution.\(^{857}\) The most significant right not harmonised at EU level is the right of adaptation, although different manifestations of the same can be found in the BC and national laws.\(^{858}\)

In EU law, and with the exception of distribution, these rights are susceptible of application to mass online use of copyright-protected works by individuals. The distribution right solely controls “distribution of the work incorporated in a tangible article” and is subject to exhaustion under Article 4(2) InfoSoc Directive.\(^{859}\) Hence, as a rule, this right does not apply online.

There is at least one derogation to this general rule. In its landmark UsedSoft judgment, the CJEU recognised the possibility of exhaustion in relation to computer programs in specific circumstances.\(^{860}\) The Court ruled that the right of distribution of a copy of a software program is exhausted if the copyright holder who authorised the downloading of that copy from the Internet onto a data carrier also conferred a licence to use that copy for an unlimited period. The first lawful acquirer can rely on that exhaustion to resell their copy and unlimited licence to a subsequent acquirer. However, each reseller must make their own copy unusable at the time of its resale. Maintaining the copy would constitute an unauthorised reproduction.\(^{861}\)

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\(^{853}\) See, respectively, Arts 8, 9, 11, 11bis, 11ter and 12 BC.

\(^{854}\) Arts 8 WCT, 10 and 14 WPPT.


\(^{856}\) Recital 15 InfoSoc Directive.

\(^{857}\) Arts 2, 3, and 4 InfoSoc Directive.

\(^{858}\) P. Bernt Hugenholtz & Sentftleben, 2011, pp. 26–27. Manifestations of the right of adaptation can be found in Arts 8, 12 and 14 BC. In US law, this right is equivalent to the right to prepare derivative works (a work based on or derived from one or more pre-existing works), protected under sections 101 and 106(2) US Copyright Act. On which, see Menell, 2011; Samuelson, 2013.

\(^{859}\) See recitals 28 and 29, Art. 3(3) InfoSoc Directive, barring exhaustion of the right of communication to the public of works and right of making available to the public other subject-matter.

\(^{860}\) See CJEU, UsedSoft.

\(^{861}\) CJEU, UsedSoft, ¶¶70–72, 88.
There has been much academic debate on the potential extension of *UsedSoft* to other subject matter, in particular e-books. In a recent opinion in the *VOB* case, AG Szpunar contributed to this debate by stating that the public lending right “includes the making available to the public of electronic books by libraries for a limited period of time.” In his view, online lending of books by libraries should be allowed, provided the making available of the e-book was first authorised by the rights holder and the book was obtained from lawful sources.

However, even if the CJEU follows the AG in *VOB*, it is doubtful that this logic applies outside the realm of the specific subject matter of software or the lending of electronic books. In fact, another recent judgment in *Art & Allposters* clarified that the right of distribution in Article 4 InfoSoc Directive can only be exhausted in relation to the tangible support of a work, and is not subject to digital exhaustion. This same conclusion is supported by the AG in *VOB*, who interprets the concept of public lending as separate from the right of distribution and the commercial rental of subject matter other than books. In this light, the present chapter does not further examine the right of distribution.

Having identified the relevant harmonised rights, the next step is to apply them to the typology of online uses developed in the previous section. The analysis focuses first on the right of reproduction (4.3.1) and then on the right of communication to the public (4.3.2).

### 4.3.1 Uses Covered by the Right of Reproduction

#### 4.3.1.1 Legal Framework

International copyright law provides for an exclusive reproduction right with broad application in the digital environment. The right arguably includes all forms of incidental, transient or technical copies. Article 9(1) BC grants authors the exclusive right of authorising the reproduction of works “in any matter or form”. Article 1(4) WCT stipulates that the “Contracting Parties shall comply with Articles 1 to 21 and the Appendix of the Berne Convention”, and the corresponding Agreed Statement qualifies “the storage of a protected work in digital form in an electronic medium” as a reproduction within the meaning of Article 9 BC.

This represents a paradigm shift for Internet users as compared to the physical world. Because the nature of communication networks and devices technically requires acts of reproduction and transmission, most consumptive uses of works—like acts of personal enjoyment—are now...
potentially subject to copyright, unless privileged by a limitation. The same conclusion applies to acts of online service providers.

In the EU, the InfoSoc Directive has implemented the WIPO Treaties as part of the so-called “Digital Agenda”, with the express aim of horizontally harmonising several economic rights and adjusting them to the digital age, thus improving “the means to fight piracy worldwide”. The implementation, consistent with an international trend, contemplates in Article 2 a broad reproduction right for authors and related rights owners: performers, phonogram producers, film producers, and broadcasting organisations.

Performers and broadcasters have a specific right of first fixation, meaning that the general reproduction right applies only to the reproductions of those fixations. This distinction should not affect the assessment of the activities of Internet users, as they generally relate to digital copies of first fixations.

The scope of the right is comprehensive. It includes the prohibition of any direct or indirect, temporary or permanent reproduction by any means and in any form, in the whole or in part, of the works or subject matter of rights holders, with the exception of software and databases. This generous scope results in part from the letter of the provision and the related recitals, which require a broad definition of the acts covered by the right. It also results from the CJEU’s expansive reading of Article 2—in cases like Infopaq I, Infopaq II, Murphy, and SAS—and strict reading of exceptions (more on which below).

As a result, the right increasingly applies to online dissemination of content, of which reproduction is an essential constituent. In fact, the current understanding of the right is technical, meaning “in practice… a reproduction in the technical sense, a ‘copy’, is equated to a reproduction in the legal sense”, irrespective “of the function or the economic value of the copy”. Importantly, some of the activities that trigger the exclusive right may be covered by a limitation to that right under Article 5 InfoSoc Directive.

874 See Art. 1(a) and (e) InfoSoc Directive. Arts 2–5 of this directive do not apply to software and databases, which are subject to special provisions in Arts 4–6 Software Directive and 5–6 Database Directive.
875 See recital 21 InfoSoc Directive and Leistner, 2014. For examples of CJEU interpretation, see e.g.: CJEU, Infopaq I, applying such a broad interpretation; CJEU, Infopaq II, narrowly interpreting exemptions for temporary acts of reproduction; CJEU, Murphy, interpreting the reproduction right in Art. 2(a) InfoSoc Directive as extending to transient fragments of the works within the memory of a satellite decoder and on a television screen, although exempting such acts under Art. 5(1); CJEU, SAS, interpreting Art. 2(a) “as meaning that the reproduction, in a computer program or a user manual for that program, of certain elements described in the user manual for another computer program protected by copyright is capable of constituting an infringement of the copyright in the latter manual if… that reproduction constitutes the expression of the intellectual creation of the author of the user manual for the computer program protected by copyright”.
876 Triaille et al., 2013, p. 120.
4.3.1.2 Application to Activities of Internet users

In light of this broad scope, the question is what types of use trigger the reproduction right? It is possible to divide these into uses clearly covered by the right and uses for which there is no legal certainty.

In the first group—clear cases—are all those that involve a permanent copy: downloading, stream capture, permanent copies made for the provision of interactive streams, uploading to the cloud, and uploading to a publicly accessible server. As noted in Table 3 below, some of these reproductions may be covered by a limitation, namely private copying in Article 5(2)(b) InfoSoc Directive.

The second group refers to legal uncertainty cases. These cases include, first, online activities of end-users that involve the making of temporary copies, such as browsing and copies made during the reception of linear or on-demand streams. These activities, as we shall see later in this chapter, may be covered by the mandatory limitation for temporary and transient copying in Article 5(2)(b) InfoSoc Directive (see Table 3).

A second set of unclear cases involves online activities of end-users that may trigger not only the right of reproduction, but also other exclusive rights, giving rise to issues of overlap between different rights. These overlaps raise the question of which right or rights apply to the individual use at stake. One such issue relates to the overlap between the rights of reproduction and making available, and is visible in activities such as uploading of a file containing a work to a publicly accessible server.\(^878\) Another issue relates to overlaps between the right of reproduction and the non-harmonised right of adaptation, and comes into play when assessing the legal status of digital adaptations, such as UGC. In the latter cases, it is possible that the use in question is privileged by copyright limitations to the reproduction right susceptible of application to certain types of adaptations, namely quotation, incidental use, or parody, in Article 5(2)(d), (i) or (k) InfoSoc Directive.

Table 3 provides a summary of the acts of Internet users covered by the exclusive right of reproduction pursuant to this categorisation. Section 4.4 below analyses which of these uses may be covered by exceptions and limitations to the exclusive right, such as those for temporary and transient copying (4.4.2) and private copying (4.4.3), and those applicable to reproductions made during the course of preparation or dissemination of digital adaptations (4.4.4).

**Table 3. Scope of Online Reproduction Right and Legal Certainty Issues**

<table>
<thead>
<tr>
<th>Type of Online Use</th>
<th>Reproduction Right</th>
<th>Legal Certainty Issues</th>
</tr>
</thead>
<tbody>
<tr>
<td>Downloading</td>
<td>Yes</td>
<td>Application of limitation in Article 5(2)(b) InfoSoc Directive</td>
</tr>
<tr>
<td>Stream capture</td>
<td>Yes</td>
<td>Application of limitation in Article 5(2)(b) InfoSoc Directive</td>
</tr>
</tbody>
</table>

\(^{878}\) For a study on the relationship between these exclusive rights, see Depreeuw & Hubin, 2014, pp. 40–106. This dissertation does not deal with issues of overlap between exclusive rights.
<table>
<thead>
<tr>
<th>Type of Online Use</th>
<th>Reproduction Right</th>
<th>Legal Certainty Issues</th>
</tr>
</thead>
<tbody>
<tr>
<td>Copying for provision of interactive streams</td>
<td>Yes</td>
<td>Overlap with making available right</td>
</tr>
<tr>
<td><strong>Uploading</strong> file to Cloud locker or server not accessible to the public</td>
<td>Yes</td>
<td>Application of limitation in Article 5(2)(b) InfoSoc Directive</td>
</tr>
<tr>
<td>Reception of linear or on-demand stream</td>
<td>?</td>
<td>Application of limitation in Article 5(1) InfoSoc Directive</td>
</tr>
<tr>
<td><strong>Uploading</strong> to a publicly accessible server</td>
<td>Yes</td>
<td>Overlap with making available right</td>
</tr>
<tr>
<td>Copies made in the preparation or making available of a <strong>digital adaptation</strong></td>
<td>Yes</td>
<td>Overlap with making available right. Application of limitations in Article 5(2)(d), (i) or (k) InfoSoc Directive</td>
</tr>
</tbody>
</table>

### 4.3.2 Uses Covered by the Right of Communication to the Public

#### 4.3.2.1 Legal Framework

At the international level, the BC divides the right of communication to the public into specific rights to perform, broadcast and recite. Article 8 WCT extends the BC’s subject matter and scope to the right of making works available to the public “in such a way that members of the public may access these works from a place and at a time individually chosen by them”, thus effectively including interactive and on-demand transmissions under copyright’s umbrella.

Article 3(1) InfoSoc Directive implements the WCT by granting authors a broad exclusive right to

authorize or prohibit any communication to the public of their works, by wire or wireless means, including making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

The right, which must be interpreted broadly, covers online and offline acts. According to recital 23 InfoSoc Directive, it includes the “transmission or retransmission of a work to the public by wire or wireless means, including broadcasting”, but “should not cover any other acts”. To this effect, the CJEU has clarified that the provision cannot be construed as allowing Member States to give “wider protection to copyright holders by laying down that the concept of

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880 Goldstein & Hugenholtz, 2013, p. 318. Arts 10 and 14 WPPT respectively contain identical provisions for performers and phonogram producers.
communication to the public includes a wider range of activities than those referred to in that provision".

Article 3(2) InfoSoc Directive gives related rights holders a narrower right of “making available”. This is because the InfoSoc Directive’s right does not affect categories of communication to the public regulated elsewhere in the acquis, such as broadcasting of programmes by satellite, and cable retransmission. However, the provision does not prevent national legislation from extending the exclusive right as regards (linear) acts of communication to the public online, “provided that such an extension does not undermine the protection of copyright”.

As a whole, Article 3 InfoSoc Directive covers communication at a distance, thus excluding from the scope of the right direct representation or performance. The “making available” prong refers to interactive “on-demand” services. It does not require simultaneous reception of the work by the public and is independent of whether, where and how often the work is accessed. Hence, the right applies to access by users to a website, even if at a different time and place from the original communication. Importantly, neither the right of communication nor making available is subject to exhaustion.

There is a vast CJEU jurisprudence on the right of communication to the public in the InfoSoc, SatCab and Rental Right Directives. From these judgments it has emerged that “communication to the public” is an autonomous concept of EU law. Consequently the concept should be given the same meaning and interpreted according to the same criteria whether it is used in the context of the InfoSoc Directive (in connection to an exclusive right) or the Rental Right Directive (in connection to a remuneration right). The concept of communication to the public involves a wide array of activities. These include the transmission of broadcasts in hotel rooms, spas, circuses, public places, and dental practices, as well as different aspects of communication to the public by satellite.

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882 CJEU, Svensson, ¶¶37, 41. To go above this ceiling would undermine the directive’s objectives of remedying legislative differences and legal uncertainty vis-à-vis copyright protection, in a way that adversely affects the functioning of the internal market.
883 See Art. 4 SatCab Directive and Art. 8 Rental Right Directive, which remain applicable by virtue of Art. 1(2)(b) and (c) InfoSoc Directive.
887 Art. 3(3) and Recital 29 InfoSoc Directive. N.B. since the judgements in Coditel I and II, the CJEU has considered communication to the public to be a service and, therefore, not subject to exhaustion.
888 These cases are, in chronological order: EGEDA I, Lagardère, SGA, Airfield, Organismos Sillogikis, Murphy, Circul Globus, PPI, ITV Broadcasting, Svensson, OSA, BestWater (Order), Sociedade Portuguesa de Autores (Order), C More Entertainment, SBS, and Reha Training. Regarding the admissibility of Orders in the context of references for preliminary ruling, see Art. 99 of the Rules of Procedure of the Court of Justice.
889 CJEU, SGA, ¶31.
890 CJEU, Reha Training, ¶¶27–34.
891 On transmissions in hotels, see: CJEU, EGEDA I: CJEU, SGA; CJEU, Organismos Sillogikis; CJEU, PPI; CJEU, Sociedade Portuguesa de Autores. On transmissions in a circus, see CJEU, Circul Globus. On transmissions in a spa establishment, see CJEU, OSA. On transmissions in the premises of a rehabilitation centre, see Reha Training. On
Several recent judgments elucidate the scope of the right in the online environment. They refer to activities such as the “live streaming” or broadcasting by a third party over the Internet of signals from commercial television broadcasters (ITV Broadcasting), the provision of “clickable links” giving access to protected works (Svensson), the provision of framing links to protected works (BestWater), and the direct broadcast of a sporting fixture on an Internet site (C More Entertainment). In addition, a number of preliminary references address the application of Article 3(1) InfoSoc Directive to different hyperlinking scenarios (GS Media, Filmspeler, Stichting Brein v Ziggo).

Taken together, these judgments and references illustrate how the concept of communication to the public follows the evolution of modes of exploitation of works and subject matter, and grows ever more intricate. They also allow the identification of the three main criteria used to assess the concept in EU law. First, the existence of an act of communication. Second, whether the communication is made to the public, including the assessment of the concepts of “new public” and “separate technical means”. Third, the profit-making nature of the communication. The first two criteria are essential and cumulative. The third criterion, as explained below, does not appear to be determinative in the eyes of the Court. Despite their different relative weight, these criteria have been classified as “complementary”; “not autonomous” but “interdependent”.

The following paragraphs explain each criterion to the extent required to understand the scope of the right in the online environment. The focus is on the InfoSoc Directive and the authors’ right of communication to the public. As a preliminary remark, it is noted that the CJEU sometimes relies on international treaties for the interpretation of different communication to the public rights in the acquis. Illustrations of this method are patent in SGAE (interpreting Article 3(1) InfoSoc Directive in light of Article 11(1) BC), Murphy (relying on Article 11bis BC), Circul Globus (explaining the concept of communication at a distance through Article 11(1) BC) and SCF (excluding direct effect of international treaties due to their lack of precision).

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892 See CJEU, Reference for Preliminary Ruling, Case C-160/15, GS Media, and Opinion AG GS Media; CJEU, Reference for Preliminary Ruling, Case C-527/15, Filmspeler, and CJEU, Reference for Preliminary Ruling, Case C-610/15, Stichting Brein v Ziggo.


894 On the need for an “individual assessment” of the concept in Article 8(2) Rental Rights Directive see CJEU, PPI, ¶29 (and case law cited). On the notion that the concept has the same scope in the InfoSoc Directive, see CJEU, Reha Training, ¶33.

895 N.B. AG Bot identifies four criteria as he considers the “new” character of the public and an independent third criterion. See Opinion AG Reha Training, ¶44.

896 See e.g. CJEU, Svensson, ¶16; CJEU ITV Broadcasting, ¶21, 31; CJEU, SBS, ¶15. See, by analogy regarding Art. 3(2) InfoSoc Directive, CJEU, C More Entertainment, ¶25; CJEU, Reha Training, ¶37.

897 CJEU, SCF, ¶79; CJEU, Reha Training, ¶35; Opinion AG Reha Training, ¶¶29–35.

898 See, respectively, SGAE, ¶35, Murphy, ¶¶200–203, Circul Globus, ¶¶35–36, and SCF, ¶¶46, 48. For an early reference to the principles of the BC in the interpretation of this exclusive right in the acquis, see Opinion AG in EGEDA I, ¶¶5–7, 15.
4.3.2.1.1 An “Act of Communication”

The InfoSoc Directive does not define the notion of “communication”, but some CJEU cases help to clarify its meaning. The Court’s view largely relies on a broad interpretation of the exclusive right in light of the objective of a “high level of protection”. The result is the inclusion of a comprehensive variety of acts within the notion of communication.899

In essence, a communication occurs when a work is transmitted or made available in such a way that members of the public may access it. This seems to imply two elements: first, an intentional intervention by the user to make the communication and, second, the sufficiency of transmitting or making the work available, as opposed to requiring its actual and subsequent reception or access.

The first aspect—intentional intervention—means that a user (the person or entity using a means of communication) will carry out an act of communication when they knowingly intervene to provide their customers access to a work, for example through a broadcast. Without that intervention, the customers, although physically within the area covered by the broadcast, would not otherwise be able to enjoy the broadcast work.900 In other words, to qualify as a “communication” the intervention must be more than a mere technical means that ensures or improves the communication.901

The Court uses this notion of intervention in a flexible and far-reaching manner, applying it to the activities of users in diverse settings. These include the transmission of football matches in a pub on a television screen (Murphy), and the broadcasting of films or music in hotel rooms (SGAE, PPI), in a circus (Circul Globus), or in the waiting room of a dental practice (SCF).

An example of the Court’s extensive approach is evident in ITV Broadcasting. The case analysed whether an Internet retransmission qualifies as a “communication”. The Court considered that the service provided by TV Catch-up amounts to a separate act of transmission or retransmission of a work through a specific technical means. In supporting this conclusion, the Court argued that TV Catch-up’s “intervention” goes beyond the provision of a mere technical means to ensure or improve reception of the original transmission in its catchment area.902

On the other hand, a communication occurs independently of whether the public actually receives or accesses the work. In SGAE, for example, this meant that a communication to the public occurred even if customers did not switch on the television and had not actually accessed the works.903 In Svensson, the Court considered that the provision of direct access to the work via a link from one website to another constitutes an act of “making available” and, therefore, a “communication to the public”.904

899 Recitals 9, 10, and 23 InfoSoc Directive. Confirming this broad interpretation of the concept of “communication to the public”, see: CJEU, SGAE, ¶36; CJEU, Murphy, ¶186; CJEU, Circul Globus, ¶33; CJEU, ITV Broadcasting, ¶20; CJEU, Svensson, ¶17; CJEU, OSA, ¶23; CJEU, SBS, ¶14.

900 CJEU, SGAE, ¶42; CJEU, Organismos Sillogikis, ¶38; CJEU, Murphy, ¶195; CJEU, SCF, ¶82; CJEU, PPI, ¶31.

901 CJEU, SGAE, ¶42; CJEU, Murphy, ¶194.


903 See, e.g., CJEU, SGAE, ¶43.

904 CJEU Svensson, ¶¶19-20.
On this point, the AG in *GS Media* disagreed with *Svensson*. He argued that where a link points to a freely accessible work it is merely facilitating the access thereto; the “actual ‘making available’ was the action by the person who effected the initial communication”.905 The key to establishing an act of communication, he continued, is whether the intervention of the linker is “vital or indispensable in order to benefit from or enjoy works”.906 Because the work is already freely accessible, the link does not constitute an indispensable intervention and is therefore not an act of communication to the public.907

Whether an act of “transmission” of the work is required for there to be a communication seems to hinge on the interactive or linear nature of the act. Thus, *Svensson* does not require that a transmission occurs for there to be an act of communication, which is consistent as a matter of law with the making available prong of the right of communication to the public.908 It has been argued that such a view is also consistent with a broad interpretation of the right, aimed at providing a high level of protection to rights holders and ensuring that the concept of “act of communication” retains sufficient flexibility to survive technological obsolescence.909

However, this approach is not followed by the CJEU in relation to non-interactive/linear acts of communication, whether or not over the Internet. In fact, judgments involving these types of communication appear to require a “transmission” of the protected works, irrespective of the technical means or process used.910

### 4.3.2.1.2 Communication to the “Public”

The second cumulative criterion is that an act of communication is made to the “public”. The CJEU considers that this concept must be construed similarly across the InfoSoc, SatCab and Rental Right Directives.911

The Court interprets “public” as including an “indeterminate” and “fairly large number” of recipients as potential beneficiaries of the communication.912 The concept further contains a *de minimis* threshold, which rules out groups of persons that are too small or insignificant.913 To

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905 *Opinion AG in GS Media*, ¶54.
907 *Opinion AG in GS Media*, ¶¶58–62, noting that this interpretation makes the analysis of the new public criterion unnecessary.
908 See Leistner, 2015, pp. 632–633: “the mere possibility of access for members of the public will suffice even if they do not specifically make use of that opportunity”. *But see* Computer & Communications Industry Association, 2016a; European Copyright Society, 2013, arguing on the basis of the *travaux préparatoires* of the InfoSoc Directive for the necessity of an act of “transmission” for the copyright qualification of the use.
909 *Opinion AG in GS Media*, ¶¶48–52.
911 CJEU, *Murphy*, ¶¶187–188: “…given the requirements of unity of the European Union legal order and its coherence, the concepts used by that body of directives must have the same meaning, unless the European Union legislature has, in a specific legislative context, expressed a different intention”.
912 CJEU, *Mediakabel*, ¶30; CJEU, *Lagardère*, ¶¶31 SGAÉ, ¶38; CJEU, *SCF*, ¶84; CJEU, *ITV Broadcasting*, ¶32; CJEU, *OSA*, ¶27; CJEU, *SBS*, ¶22; CJEU, *Reha Training*, ¶41. In applying this definition, the Court has found the concept of public to exclude “persons who can receive the signals from the satellite only if they use professional equipment” (in *Lagardère*), and transmissions from a broadcasting organisation to specified signal distributors without potential viewers being able to access those signals (in *SBS*). Cf. CJEU, *Lagardère*, ¶31; CJEU, *SBS*, ¶¶22–23.
determine that threshold, it is necessary to consider the “cumulative effects of making works available to potential audiences”, taking into consideration the number of persons having access to the same work at the same time and in succession. 914 Clearly, this threshold filters out communications of a work or subject matter that are “private”, in the sense that they occur within a delimited circle of family or friends. 915 Whether the concept of private encompasses all non-public acts is unclear.

As noted, the exclusive right only includes communications to a public at a distance, i.e. not present at the place of origin of the act. 916 Beyond that distance element, the Court sometimes requires that the public must be “targeted by the user and receptive, in one way or another, to that communication, and not merely ‘caught’ by chance”. 917

Finally, as a derogation to the principle that the concept of “public” should have a similar construction in copyright and related rights, SCF establishes a distinction between these two fields. This case established that the “public” does not include patients in a waiting room of a dental practice. To explain the exclusion, the Court states rather opaquely that those patients, albeit forming “a very consistent group of persons and thus… a determinate circle of potential recipients”, are in reality a “very limited” or “insignificant” number of persons; as such, they do not meet the standard of “persons in general” required to qualify as a “public”. 918

As explained below, this conclusion must be understood in light of the “profit-making nature” criterion and the type of right it applies to: a non-exclusive right of equitable remuneration. This much is confirmed in OSA, where the Court justifies the different treatment of related rights on the nature of the right. 919 For some authors, this pronouncement is both a blessing and a curse. A blessing, because it limits the effects of the questionable interpretation in SCF. A curse, as it leads to unequal treatment of related rights holders. 920

Having explaining the definition of “public”, the CJEU then adds two alternative sub-criteria to define whether there is a communication to the public. According to the first sub-criterion, the right applies if a work is communicated to a “new public”. 921 Alternatively, the second sub-criterion provides that the “new public” requirement is waived if the communication of a work is made through separate or different technical means as compared to the original communication. 922 Both sub-criteria are relevant for the application of the exclusive right in the online environment, and therefore deserve further scrutiny. However, it is worth noting in

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914 CJEU, SGAE, ¶39; CJEU, PPI, ¶35; CJEU, ITV Broadcasting, ¶33; CJEU, OSA, ¶28; CJEU, Reha Training, ¶44.
915 See infra 4.4.3.1, for the definition of “private use”. See also CJEU, SCF, ¶86, and CJEU, Reha Training, ¶42, excluding from the concept communications of works to “specific individuals belonging to a private group”.
916 CJEU, Murphy, ¶¶200, 203. CJEU, Circul Globus, ¶¶36, 37, 40.
917 CJEU, SCF, ¶91; CJEU, PPI, ¶37. But see Opinion AG in Reha Training, ¶¶66–68, giving less weight to this aspect.
918 CJEU, SCF, ¶¶84–85, 95–96.
919 CJEU, OSA, ¶¶34–35. See also CJEU, SCF, ¶74. See infra 4.3.2.1.3.
921 CJEU, SGAE, ¶¶37–38, 40, 42.
922 CJEU, ITV Broadcasting, ¶39.
advance the remarkable fact that neither sub-criterion has a clear basis in international or EU copyright law. Instead, they are creations of the Court.  

**New Public**

The term “new public” refers to a public not taken into account by the copyright holder when they authorised the initial communication to the public. The concept was first used in *SGAE* and is now a staple of the CJEU’s judgments on the interpretation of the right of communication to the public.  

In *SGAE*, the Court traced the criterion back to Article 11bis(1)(ii) BC and the 1987 Guide to the Berne Convention. Curiously, the Guide referred to that criterion in relation to Article 11bis(1)(iii) BC, which raises doubts as to the validity of the Court’s analysis on this point. This is because subparagraph (ii) of the BC provision relies instead on the criterion of an “organisation other than the original one”, i.e. a “new communicator” rather than a “new public”.  

Regardless, from the application in the offline world to acts of communication in public places (*Murphy*), hotels rooms (*SGAE*), spa establishments (*OSA*), rehabilitation centres (*Reha Training*), and in the context of satellite broadcasting (*Airfield*), the new public criterion has gained extraordinary relevance for the interpretation of Article 3(1) InfoSoc Directive in the online environment. This relevance is due especially to its use by the Court in hyperlinking cases, starting with *Svensson*. Hence, the criterion is of particular importance for the study of ACS.  

*Svensson* involved a Swedish company (Retriever Sverige AB) operating a website that provided clients with links to articles published on other websites. The applicants in the main proceedings (all journalists, among them Mr. Svensson) claimed compensation from Retriever for harm suffered as a result of the inclusion on its website of hyperlinks redirecting users to freely accessible press articles in which the former hold copyright. The main question before the Court was whether the provision on a website of links to protected works “freely accessible” on another website constitutes a restricted act of communication to the public under the InfoSoc Directive.  

First, the CJEU considered that the provision of direct access to the works via a link from one website to another constitutes an act of “making available” and, therefore, “communication to

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923 Cf. ALAI, 2014, arguing that both criteria are contrary to international law, and Velze, 2015, pp. 71–72, concluding similarly vis-à-vis the “new public” criterion.
924 CJEU, *SGAE*, ¶¶37–38, 40, 42; CJEU, *Murphy*, ¶197; CJEU, *Organismos Sillogikis*, ¶38; CJEU, *Airfield*, ¶76; CJEU, *Svensson*, ¶¶21, 24; CJEU, *OSA*, ¶¶32; CJEU, *Reha Training*, ¶45. For in-depth analysis of this criterion, see Velze, 2015, noting that the same is already used prior to *SGAE* in *Opinion AG in EGEDA I*. See also ALAI, 2014, concluding that the criterion is in conflict with international law.
925 CJEU, *SGAE*, ¶41.
the public". Second, because the link is aimed at all potential users of the website (an “"indeterminate and fairly large number of recipients”) works are indeed communicated to a public. However, for such a communication to trigger Article 3(1) InfoSoc Directive it “must also be directed at a new public”, meaning a “public… not taken into account by the copyright holders when they authorised the initial communication to the public”.  

In this case, there was no communication to a new public. The initial communication targeted all potential visitors to the website in question, consisting of “all internet users”, as access to the works was not subject to “restrictive measures”. Accordingly, Retriever’s website users were part of the public taken into account by the applicants when they first authorised the making available of their works.

Therefore, even if there is an “act of communication” to the “public”, no authorisation is required because it is not to a “new public”. The conclusion remains valid even if the link causes the work to appear “in such a way as to give the impression that it is appearing on the site on which that link is found, whereas in fact that work comes from another site”.

The focus of the analysis is therefore on whether a work is “freely accessible” online and not on the linking technique. This approach was confirmed later in BestWater. In that case, the Court considered that hyperlinking through “framing” of a YouTube video did not constitute a communication to a new public because the link pointed to a work freely available online.

Crucially, the Court in BestWater did not rule on whether it is relevant for the assessment of the right that the video is question was uploaded with or without the consent of the copyright holders.

A different conclusion applies if a link allows users to circumvent restrictions put in place by the linked website in order to limit access to subscribers of the same. The circumventing link “constitutes an intervention without which those users would not be able to access the works transmitted”; in such cases, those users are considered a new public (not targeted by the initial communication) and authorisation from the copyright owner is required.

It can be said that the introduction and development of a new public criterion for online communication to the public in Svensson and its progeny follow a “more technical-objective approach towards interpreting Article 3(1) InfoSoc Directive”. This approach is inconsistent with an “economic user-related overall assessment” of the right, which would warrant differentiated solutions for other types of link (e.g. pull links) susceptible of affecting the exploitative potential of the work.

928 CJEU, Svensson, ¶¶19-20.
929 Ibid., ¶25.
930 Ibid., ¶24.
931 Ibid., ¶¶27–28.
932 Ibid., ¶29.
934 Ibid., ¶31. On the different interpretative approach of AG Wathelet in his opinion in GS Media, see infra 4.3.2.3.
935 Leistner, 2015, p. 636. See also infra 4.3.2.3.
Specific Technical Means

Even if a communication does meet the new public criterion, it may still be restricted under the exclusive right if it is made through a “specific technical means”. In essence, this criterion is meant to safeguard situations where the act of communication of works to the public is made through different technologies, regardless of whether it reaches a new public. For example, where a primary communication of a work occurs through satellite broadcasting and the secondary communication over the Internet, the targeted public may be the same but the technical means not. Conversely, “on the internet all potential and different forms of communication appear to constitute the same technical means in the opinion of the CJEU.”

The criterion first appears in ITV Broadcasting and is restated in SBS.

The first judgment concerned the distribution of television broadcasts over the Internet, substantially in real time. TV Catchup offered a service allowing users to receive through the Internet “live” streams of free-to-air television broadcasts, including those transmitted by ITV. However, users could only access content which they were legally entitled to watch under a UK television licence.

The Court first determined the Internet retransmission to be an “act of communication” because TV Catchup’s service amounts to a separate act of transmission or retransmission of a work through a specific technical means. TV Catchup’s intervention went beyond the provision of a mere technical means to ensure or improve reception of the original transmission in its catchment area.

Second, this communication is to a “public”, understood as an indeterminate number of potential recipients, implying a fairly large number of persons, considering the number of persons who have simultaneous and successive access to the same work. TV Catchup’s Internet retransmissions were aimed at all UK residents with an Internet connection and valid television licences. As these users could simultaneously access the live streaming of television programmes online, the Court considered there was a communication to the public.

Because the Internet retransmission was a separate act requiring an independent authorisation—due to specific technical conditions, means and intended public—, it was not necessary to examine the new public requirement. It was also not necessary, for the qualification of the act, to analyse other complementary non-essential elements, such as the profit-making nature of the activity or the level of competition between the third party and the original broadcaster. SBS later unequivocally confirmed this interpretation when stating that “every transmission or

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938 Ibid., ¶28–30.
940 CJEU, ITV Broadcasting, ¶35.
941 Ibid., ¶39. On this requirement see: CJEU, SGAE, ¶40; CJEU, Murphy, ¶197; CJEU, Airfield, ¶72. On the latter case, see Vousden, 2012.
942 CJEU, ITV Broadcasting, ¶43–46. But see Klaflowska-Waswiowska, 2013, pp. 756–757, arguing that the profit making nature of the act may be determinative of its qualification under the communication to the public right of related rights holders.
retransmission of a work which uses a specific technical means must, as a rule, be individually authorised by the author of the work in question.\footnote{CJEU, SBS, §17, citing CJEU, ITV Broadcasting, §24.}

The Court in \textit{ITV Broadcasting} and \textit{SBS} took an economic approach and developed the “specific technical means” requirement to interpret the exclusive right in light of the “existence and degree of several interdependent criteria with regard to the person of the user (potential infringer) and the targeted public”.\footnote{Leistner, 2014, pp. 569–570, commenting on \textit{ITV Broadcasting}.} The function of this approach is to safeguard, for rights holders, new technological avenues of exploitation with economic significance.\footnote{Leistner, 2014, pp. 569–572.}

\textbf{4.3.2.1.3 Profit-Making Nature of the Communication}

Finally, the CJEU has sometimes resorted to a third criterion to determine if there is a copyright relevant communication to the public: whether the communication is of “a profit-making nature”.\footnote{CJEU, SGAE, §44; CJEU, Murphy, §204, CJEU, ITV Broadcasting, §§42–43; CJEU, SCF, §§79, 88, 97; CJEU, Reha Training, ¶49.}

In relation to this criterion, as with the notion of “public”, the Court has to this point drawn a distinction between copyright and related rights.\footnote{Nérisson, 2015b, p. 390, noting that the bifurcated approach is justified on the different nature of the rights in question (exclusive v. remuneration) and that it may rely on the sectorial nature of the Rental Right Directive, as opposed to the “copyright common law” status of the InfoSoc Directive.} For communications to the public of copyright-protected works, the Court considers this factor to be relevant but not a “necessary” or “essential” “condition for the existence of a communication to the public”.\footnote{CJEU, SGAE, §44; CJEU, Murphy, §204, CJEU, ITV Broadcasting, §§42–43; CJEU, SCF, §§79, 88, 97; CJEU, Reha Training, ¶49.} Hence, the criterion does not appear to be determinative of the exclusive right in Article 3(1) InfoSoc Directive.\footnote{CJEU, OSA, ¶35. Cf. also the reported position of Judge Malenovský in Marcela Favale, 2016.}

A different conclusion may be reached in relation to communication to the public of subject matter protected by related rights. This is clearly seen in \textit{SCF} and \textit{PPI}, which deal with the remuneration right in Article 8(2) Rental Right Directive, as well as in the subsequent judgment in \textit{Reha Training}.\footnote{CJEU, Reha Training, ¶49, where it is stated that Article 8(2) “requires an individual interpretation of the concept of communication to the public” as the right in question “is essentially financial in nature”.} The Court states that Article 8(2) “requires an individual interpretation of the concept of communication to the public” as the right in question “is essentially financial in nature”.\footnote{CJEU, Reha Training, ¶49, where it is stated that the profit-making nature of the communication is relevant for the qualification of a transmission as a communication to the public “in particular, for the purpose of determining any remuneration due in respect of that transmission”.} To make this individual assessment of the remuneration right, the Court considers it relevant to examine the profit-making nature of a communication.\footnote{CJEU, SCF, §§76–78.} This criterion, it seems, is used to qualify the intervention that communicates the work to the public and, in particular, whether the same aims to attract additional customers and revenue.\footnote{Ibid., §§79, 88, 89. See also CJEU, PPI, §36.}

\footnote{CJEU, SCF, §90, citing CJEU, SGAE, §44, and CJEU, Murphy, §205. See also CJEU, Reha Training, §§48–51.}
In SCF, which dealt with the communication to the public of phonograms broadcast by radio in a dental practice, the Court concluded that the activity in question could not be reasonably expected to “have an impact on the income of that dentist”. That conclusion was reinforced by the fact that the dentist’s clients are not receptive to the communication nor have an active choice in the same. As a result, the activity in question is not a communication to the public for the purposes of Article 8(2) Rental Right Directive.

Conversely, the PPI Court considered that “the guests of a hotel may be described as ‘targeted’ and ‘receptive’.” By allowing its customers access to the broadcast works, the hotel provided “an additional service which has an influence on the hotel’s standing and, therefore, on the price of rooms”. Consequently, the hotel operator’s broadcasting of phonograms is of a profit-making nature, leading to the conclusion that the operator makes a communication to the public pursuant to Article 8(2) Rental Right Directive. A similar line of reasoning was followed by the Court in Reha Training, which considered that the broadcasting of television programmes by the operator of a rehabilitation centre “has a profit-making nature, capable of being taken into account in order to determine the amount of remuneration due, where appropriate, for such a broadcast”.

The above analysis suggests the “profit-making” is of greater relevance the determination of the existence of a communication to the public in relation to the right of equitable remuneration in Article 8(2) Rental Right Directive. However, because the criterion is also available for the assessment of the concept of communication to the public in relation to exclusive rights, it cannot be excluded that the CJEU relies on it for the determination of the legal status of certain types of online use of works. Of course, whether such application of the criterion is advisable or contributes to resolving legal uncertainty in this field is questionable.

4.3.2.2 Application to Activities of Internet Users

How does the analysis of the legal framework of the right of communication to the public apply to the previously defined types of online use? To answer the question, this paragraph analyses linear uses (live streaming) and interactive uses (on-demand streaming, uploading and hyperlinking) involving the right of communication to the public.

The case of live streaming appears straightforward. If a user makes an Internet retransmission of broadcasts for non-commercial purposes, they are communicating the work to the public through a new “specific technical means”, in the sense of ITV Broadcasting. Therefore, unauthorised retransmissions of this type qualify as copyright infringement.

954 CJEU, SCF, ¶97.
955 Cf. CJEU, SCF, ¶¶98–100.
956 CJEU, PPI, ¶43.
957 Ibid., ¶44.
958 Ibid., ¶¶45–46.
959 CJEU, Reha Training, ¶64.
961 The fact that the use is non-commercial does not affect this conclusion, especially in light of the lesser relevance of the “profit-making nature” criterion in the field of copyright. See supra 4.3.2.1.3.
The conclusion is valid for online (re)transmissions of works through different communication means. It might not apply to Internet retransmissions of an existing online transmission, due to the fact that the communication does not use a novel and separate “technical means”.\textsuperscript{962} As many live Internet transmissions which rights holders wish to exploit commercially are subject to technological restrictions of some kind, it is probable that an online retransmission of the same by end-users constitutes a new technical act of communication or reaches a new public beyond that initially authorised by the rights holder. If it does, it will trigger the right of communication to the public and subject unauthorised users to liability for copyright infringement.

Interactive uses—on demand streaming, uploading and hyperlinking—require a more nuanced analysis. On the one hand, certain uses may not reach a “public”, notably in the context of uploading. In general, making an upstream copy to a cloud locker (and possibly to online personal video recorders) that is only accessible to the user making it, or to a close circle of family and friends, does not make the work accessible to the public. The act constitutes instead a reproduction and should be dealt with in the context of that exclusive right.\textsuperscript{963}

Similarly, the provision and use of cloud services that merely allow individual users (or a close circle of family and friends) to make upstream copies of works on hosting servers and subsequently download or stream their material for private or personal use do not trigger the making available right.\textsuperscript{964}

Less clear are uploads of works on social networking sites. These are intermediate cases with respect to the target audience. In these cases, the content is only available to a specific group of Internet users—consisting of a variable circle of family, friends and acquaintances—but not to the general Internet public.\textsuperscript{965} Is such a group of users a “public”, or even a “new public”? The answer is unclear as it depends on the concrete definition of the \textit{de minimis} threshold of public in specific cases.\textsuperscript{966} Furthermore, the question may be pre-empted by the finding that the platform itself is making the work available to the public (if not simultaneously, at least in succession), thereby exempting the end-user from the requirement of authorisation.

A different situation arises when the upload file is made accessible to a wide number of people, for instance through a P2P network or on a publicly accessible website. Here, the work is made available on demand to other Internet users. In such cases, the relationship between the rights of reproduction and making available is not clear and has led to divergent case law in national courts. These cases either consider the “upload copy” to be consumed by the right of making available or qualify it simultaneously as an act of reproduction and making available, thereby


\textsuperscript{963} Depreeuw & Hubin, 2014, pp. 70–71, noting cases where national courts did not find a “public” to exist in these technologies that allow for a more “individualised approach”.

\textsuperscript{964} Triaille et al., 2013, pp. 45, 119.

\textsuperscript{965} Senfleben, 2013a, p. 88, raising the issue.

\textsuperscript{966} Velze, 2015, p. 85, applies an economic interpretation method to note that “[a]n example of the de minimis rule on the Internet is if a work is communicated within the internal network of a company, only made available to a small number of employees”.
calling into question both rights.\textsuperscript{967} Regardless, placing the work on the Internet in such a way as to allow individualised on demand access to the same qualifies as a communication to the “public”.\textsuperscript{968}

The same conclusion should apply where P2P protocols (e.g. BitTorrent) cause the uploaded file to be split into several parts during the transfer process in such a way that one specific peer only effectively “transmits” part of the work to be downloaded by subsequent users. Despite the technical differences, the situation is functionally identical to standard uploads. Given that the decisive activity of offering access to a protected work on a network for (individual) access has effectively occurred, the legal status of the uploading act in these systems should not change.\textsuperscript{969}

If this was the entire story, the legal qualification of acts of uploading would be only relatively challenging. However, we might wonder how the criteria used by the CJEU to determine the existence of a communication to the public of works online—“specific technical means” (in \textit{ITV Broadcasting}) or “new public” (in \textit{Svensson})—influence this qualification.

In the simplest scenario, the “upload copy” refers to a work not previously available over the Internet. Here, there is a communication to the public via a different technological means (i.e. the Internet), subject to the consent of rights holders.

But what if the “upload copy” is of a work already accessible online? This scenario invalidates the application of the “specific technical means” criterion and seems to push the analysis towards the “new public” test. Following \textit{Svensson}, hyperlinks pointing to “freely accessible” content do not broaden the audience initially targeted. Therefore, they do not aim at a new public and do not constitute a communication to the public in the sense of Article 3 InfoSoc Directive.\textsuperscript{970} Is the same conclusion applicable to the upload copy?

To answer the question, we need to take a step back and look at the first cumulative requirement of the exclusive right. Namely, what type of act of communication is at stake here and does it justify the analogy to hyperlinking?

From the technical standpoint, uploading is different from hyperlinking insofar as it involves a prior reproduction of a digital copy of the work for purposes of subsequent accessibility and transmission to third parties over the Internet (which acts involve a series of ephemeral and possibly permanent reproductions). This is the quintessential case of interactive transmission meant to be covered by the right of making available.\textsuperscript{971}

\textsuperscript{967} Depreeuw & Hubin, 2014, p. 43. See also Eechoud et al., 2009, p. 91, on the challenges of distinguishing the making available right from that of broadcasting in the \textit{acquis}. The authors stress the relevance of the distinction for related rights owners, which do not have a right to prohibit the broadcast of works but a mere remuneration claim.

\textsuperscript{968} Eechoud et al., 2009, pp. 92–93.

\textsuperscript{969} Huygen et al., 2009, fig. 52; Quintais, 2012, fig. I.3.a)-I.3.b).

\textsuperscript{970} Moir, Montagnon, & Newton, 2014, p. 400. N.B. this might not prevent the possibility that injured parties avail themselves of unfair competition type of protection.

\textsuperscript{971} Arezzo, 2014, p. 549.
In hyperlinking, the intentional intervention of the user is of a different nature. It is a reference or pointer to a file and does not involve previous storage of the same for the purposes of making available the work. As Arezzo puts it,

an act of linking is, by definition, not an ‘uploading’ of content but the provision of a set of technical information about how such content may be reached, it goes without saying that linking always presupposes that the linked content already be made available on the net by someone else: this latter person being the actual infringer if the first act of uploading took place without the rightholder's consent.

This characterisation clarifies that uploading involves a preliminary reproduction step and an independent act of communication to the public. The hyperlink to the upload copy would be a subsequent and separate act. Because the act is different, and the exclusive right is not subject to exhaustion online, as a rule the uploading of works over the Internet should be subject to authorisation by the rights holder.

Of course, if the upload copy was previously “freely accessible” online, the act of uploading (together with the ancillary reproduction) could be authorised by contract (including via collective licensing), a copyright limitation, or national doctrines of implied licence. However, for the most part end-users will remain uncertain whether the work originates from an authorised source, which may affect its legal status.

Interactive stream provision is similar to uploading and the same conclusions apply. Where an end-user provides unrestricted access to a work for download or through a stream over the Internet at a time and place chosen by the recipient, they are communicating the work to the public.

As noted, the current jurisprudence of the CJEU is that hyperlinking only constitutes a restricted communication to the public in the sense of the InfoSoc Directive if it provides access to works not previously “freely accessible” online. Such a hyperlink is considered to broaden the original website’s audience to a new public by circumventing access restrictions.

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972 CJEU, Svensson, ¶31.
973 Arezzo, 2014, p. 551. Arezzo goes on to suggest that the right of making available could be clarified so as to comprise also the preliminary act of “technical act of storing copies for the purpose of making them available”, leading to the conclusion that linking would not qualify as a “form of communication of a work to the public”. Cf. Arezzo, 2014, p. 552.
974 This distinction between the initial act of making available and subsequent hyperlinks to that upload copy is used by AG Wathelet to conclude that linking to freely accessible unlawful sources is not an act of communication to the public. See Opinion AG GS Media, ¶54.
975 In this respect, the act of uploading could possibly be authorised under doctrines of implied consent, but not because of the new public criterion.
977 The issue, as it relates to hyperlinking, is the focus of CJEU, Reference for Preliminary Ruling, Case C-160/15, GS Media. See infra 4.3.2.3.
978 Depreeuw & Hubin, 2014, p. 29.
On this basis, some commentators draw a distinction between types of link. The ALAI, for example, argues that deep links and framing “make the referenced work available to the public” by making it “possible to bring the works directly to the computer or device screens of the user, or to download them directly to the computer or device, without further intermediation”. Therefore, these links are infringing unless authorised by the rights holder or privileged by a limitation. Conversely, a standard surface link to freely accessible content hosted on another webpage “is not itself a communication of a specific work to the public because what is communicated is the homepage, not directly the work”; an additional step is required, thus only the site linked to is communicating the work to the public.

Still, by relying on the criterion of the “new public” in hyperlinking cases, the CJEU introduced significant legal uncertainty as to the qualification of online use in the everyday practices of Internet users. This uncertainty is at the root of a slew of pending preliminary references to the Court (GS Media, Filmspeler, and Stichting Brein v Ziggo), which call into question the application of the right of communication to the public in the digital networked environment. The following section scrutinises these issues of legal certainty.

4.3.2.3 Issues of Legal Certainty

According to the new public criterion in Svensson, the right of communication to the public does not apply to hyperlinking if the work is freely accessible online and the link does not circumvent access restrictions. Hence, a work that is “freely accessible” is a work available online without access restrictions or “restrictive measures”. The use of these terms and the related term “circumvention” indicates that the restrictions in question are technological. (Some authors consider this wording to also include contractual restrictions.)

If a link provides access to content that is subject to access control measures (e.g. subscription pay-walls or “session IDs”), it is infringing. For example, current geo-blocking measures used by broadcasters and service providers in the audio-visual sector would qualify as technical restrictions. Infringement would result from the fact that the content is not freely accessible and the link circumvents access requirements, resulting in a communication to a new public. This would apply to content made available on demand, as well as to content originally streamed over the Internet (if subject to technical restrictions).

More problematic, however, is the possibility of the subsequent unavailability of a work which was initially freely accessible. In Svensson, the Court identifies such a scenario as one in which a link communicates the work to a new public:

This is the case, in particular, where the work is no longer available to the public on the site on which it was initially communicated or where it is henceforth available on that site only to

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979 ALAI, 2015.
980 ALAI, 2015.
981 CJEU, Svensson, ¶¶18, 26, 31.
982 ALAI, 2014, p. 27; Headdon, 2014, p. 665; Moir et al., 2014, p. 400. The example would be a link that provides access to content on freely accessible websites that impose restrictive terms and conditions, such as a notice on the webpage prohibiting embedded links to that content. But see Savola, 2014, pp. 282–283, arguing that Svensson does not prohibit linking in this scenario. See also Aretz, 2014, pp. 541–542.
a restricted public, while being accessible on another Internet site without the copyright holders’ authorisation.\textsuperscript{984}

For some commentators, this rationale implies a “duty to monitor” the freely accessible nature of the work by “linkers”.\textsuperscript{985} This concern can only be properly understood in connection with the issue of lawfulness of the source of the link. Imagine the following situation. Film producer Universal makes one of its films freely accessible online on the \textit{Universal Website}. Alice makes a copy of the film and posts it on her \textit{Wonderland Website}. Internet user “Mad Hatter” then puts two links on his blog, one to the \textit{Universal Website} (“link 1”) and the other to the \textit{Wonderland Website} (“link 2”). One month later, Universal places access restrictions on its website, a fact to which Alice and Mad Hatter are oblivious. Link 1 stops working as a result of the restrictions. Link 2, on the other hand, remains operational.

Following the logic of \textit{Svensson}, once the restrictions are imposed, link 2 is making the film available to a new public, and is therefore infringing, as is the upload copy on the \textit{Wonderland Website}, which is now unequivocally an unauthorised source. In this scenario, the subsequent public unavailability of the work causes the activities of Alice and Mad Hatter to qualify as copyright infringement.

This scenario becomes even more problematic for end-users if hyperlinking to unauthorised sources is prohibited as a result of the application of the new public criterion. This is the issue at stake in \textit{GS Media} and \textit{Filmspeler}, and scholars are divided on the topic.

On the one hand, it is argued, if the rights holder did not consent to the original communication of a work to the general Internet public, the hyperlink that points to an unauthorised upload copy constitutes an act of communication to a new public. Thus, both the unauthorised upload and the hyperlink that points to it are infringing.\textsuperscript{986} Some authors nuance this view by distinguishing between cases where the linker has knowledge of the unauthorised nature of the upload copy, in which case he is infringing (e.g. because he was notified of that fact by the rights holder and did not remove the link), and situations where he has no such knowledge, for which no liability arises.\textsuperscript{987}

On the other hand, it is said that the legal qualification of linking should not depend on the authorisation of the rights holder or lawfulness of the source, because such elements are typically unknown to the linker. Indeed, the “reasonable awareness” or “constructive knowledge” criteria are foreign to the InfoSoc Directive and a hotbed for legal uncertainty. This is particularly so as it is near impossible for end-users to ascertain the legal status of the destination page in advance of linking.\textsuperscript{988}

For proponents of this view, it would be preferable to judge infringement on the basis of secondary (rather than strict) liability, an area of law familiar with concepts of awareness and knowledge. Doing so would require, first, a determination of whether the reproduction and

\begin{footnotesize}
\textsuperscript{984} CJEU, \textit{Svensson}, §31.
\textsuperscript{987} Velze, 2015, p. 42, reporting on the position of Visser.
\textsuperscript{988} Computer & Communications Industry Association, 2016b; Velze, 2015, p. 42.
\end{footnotesize}
making available of the work on the third party website constitute copyright infringement. If so, the subsequent step would be to establish whether linking to that website gives rise to secondary liability, especially where the hyperlinker knowingly and systematically exploits or facilitates the unlawful uploads. 989 Furthermore, the existence of a framework for notice-and-takedown measures, consistent with the E-Commerce Directive, enables removal of the unlawful upload copy and automatic “breaking” of the link pointing to it. 990

Another option would be to abolish or restrict the new public criterion. For example, it is possible to consider the criterion independently from the status of the upload copy, meaning that with the unrestricted appearance of a work online “the internet public has already been reached”; therefore, any subsequent hyperlinks do not target a new public or “amount to a secondary act of communication to the public”. 991

In his Opinion in GS Media, AG Wathelet shares some of the above views, but adopts a different reasoning in their support. As noted, he focuses on the criterion of “act of communication”, rather than the “new public.”992 In his view, hyperlinking to unauthorised sources that are “freely accessible” does not constitute an act of communication to the public because the link does not constitute an indispensable intervention to make the work available to Internet users. Rather, the actual making available results from the “initial” communication, which is the infringing act.993 If there is no act of communication (a cumulative requirement to establish the application of the exclusive right), the linker’s motivation, knowledge, or awareness of the unauthorised nature of the source are irrelevant.994

In the alternative, the AG continues, the criterion of a new public “is applicable only where the copyright holder has authorised the initial communication to the public”, which is not the case if a link points to unauthorised sources.995 As the criterion is not applicable, the authorisation of rights holders is not required to link to such websites.996 Even if it was applicable, there is only a communication to the new public if the linker’s intervention was “indispensable” to reach that public. That is not the case where the works linked to were freely accessible, even if the link “facilitates or simplifies users’ access to the work in question”.997 There will be a communication to the public only if the link allows Internet users to circumvent restrictions on third party websites that limit access to protected works, such as TPMs under Article 6 InfoSoc Directive.998

990 Computer & Communications Industry Association, 2016b.
991 Computer & Communications Industry Association, 2016b.
992 See supra 4.3.2.1.1.
993 Opinion AG in GS Media, ¶¶48–64.
994 Ibid., ¶63.
995 Ibid., ¶67.
996 Ibid., ¶68 (citing CJEU, Svensson, ¶28, 30).
997 Ibid., ¶¶69–70, 74 (citing CJEU, Svensson, ¶27). N.B. this reasoning appears to conflate the two cumulative criteria of this right.
998 Ibid., ¶73 (fn. 43 referring to Art. 6 InfoSoc Directive; citing CJEU, Svensson, ¶31).
For the AG, the interpretation above also applies if the work linked to had not previously been made available to the public with the right holder’s consent. In essence, he believes that the scope of Article 3 InfoSoc Directive does not “cover the posting of hyperlinks to protected works freely accessible on another website”, a result that could only be achieved through “action to be taken by the European legislature.” Crucial to this position is the view that any other interpretation of that provision would “significantly impair the functioning of the Internet”, undermine the InfoSoc Directive’s main objective of “the development of the information society in Europe” (recital 2), and distort the directive’s fair balance aim (recital 31). From the normative perspective, the AG adds that

as a general rule, internet users are not aware and do not have the means to check whether the initial communication to the public of a protected work freely accessible on the internet was effected with or without the copyright holder’s consent. If users were at risk of proceedings for infringement of copyright under Article 3(1) of Directive 2001/29 whenever they post a hyperlink to works freely accessible on another website, they would be much more reticent to post them, which would be to the detriment of the proper functioning and the very architecture of the internet, and to the development of the information society.

To this point, it is important to add a fundamental rights argument in support of delimiting the scope of Article 3 InfoSoc Directive. To the extent hyperlinks are essential to the operation of the Internet, including access and exchange of a vast trove of information available in this network, they are crucial for exercising the fundamental freedom of expression and information online. This freedom is protected by Article 11 Charter and must be balanced with copyright protection, as recognised in recital 3 InfoSoc Directive.

Naturally, the AG’s interpretation does not preclude other remedies available to rights holders to protect and enforce their copyright. It is possible to bring proceedings for direct infringement against the initial uploader, and to obtain injunctions against website operators hosting the unauthorised upload copies—as they qualify as “intermediaries” for the purposes of Article 8(3) InfoSoc Directive and Article 11 Enforcement Directive. The AG considers these injunctions “a direct and appropriate remedy” for the initial infringing communication to the public. It is also possible, at a national level and in certain circumstances, for the intermediary to be liable for the storage of the unauthorised works, namely if it fails to comply with the strict requirements of the E-Commerce Directive’s safe harbours.

Finally, a different solution to this issue is to adopt an economic interpretation method to determine the scope of the right of communication to the public. This approach focuses on protecting the economic exploitation of the right against unauthorised use that affects that

999  Ibid., ¶75–79 (cit. ¶79), citing the “ceiling” imposed on the right in CJEU, Svensson, ¶41. See infra 4.3.2.1.
1000 Ibid., ¶77.
1001 Ibid., ¶78.
1002 European Copyright Society, 2013.
1003 See supra 5.3.3.6.1.
1005 Ibid., ¶84.
exploitation, rather than granting protection for technically defined acts of communication. Following this method, online acts of communication that are in direct or indirect competition with the exploitation of a work by rights holders are restricted. The method would entail the prohibition of unauthorised pull links but not mere push links, as only the first may affect the online exploitation of the work linked to (e.g. through online advertisement models), irrespective of whether the initial online availability was authorised.

The contrasting arguments highlight the uncertainty surrounding hyperlinking, which extends to the effect of imposing technical restrictions on originally freely accessible content. Therefore, online communication to the public remains a volatile legal area, where end-users are subject to non-negligible infringement risks.

Table 4 provides an overview of the online uses covered by the exclusive right and the related issues of legal certainty. The significant scope of the right and the areas of uncertainty for the non-commercial activities of Internet users highlight the need for a legal solution that, like an ACS, enhances legal certainty and promotes breathing space for acts of personal enjoyment and expression online.

Table 4. Scope of Online Right of Communication to the Public and Legal Certainty Issues

<table>
<thead>
<tr>
<th>Type of Online Use</th>
<th>Right of Communication to the Public</th>
<th>Legal Certainty Issues</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Upload or Upstream streaming</strong> of work to restricted group (e.g. within a group on social sharing website)</td>
<td>?</td>
<td>Definition of public</td>
</tr>
<tr>
<td><strong>Upload</strong> of freely accessible work from lawful source on publicly accessible server (no express authorisation)</td>
<td>Yes</td>
<td>Potential application of doctrines of implied consent</td>
</tr>
<tr>
<td><strong>Upload</strong> of freely accessible work from unlawful source on publicly accessible server (no express authorisation)</td>
<td>Yes</td>
<td>Potential application of doctrines of implied consent if unlawful source irrelevant</td>
</tr>
<tr>
<td><strong>Upstream streaming</strong> (transmission or retransmission) of freely accessible work from lawful source (no express authorisation)</td>
<td>Yes</td>
<td>Potential application of doctrines of implied consent</td>
</tr>
<tr>
<td><strong>Upstream streaming</strong> (transmission or retransmission) in circumvention of access restrictions</td>
<td>Yes</td>
<td>Potential application by analogy of new public criterion (in Svensson)</td>
</tr>
<tr>
<td><strong>Upstream streaming</strong> (transmission or retransmission) of work originating from unlawful source</td>
<td>Yes</td>
<td>Potential application of doctrines of implied consent if unlawful source irrelevant</td>
</tr>
<tr>
<td><strong>Linking</strong> to freely accessible work from lawful source</td>
<td>No</td>
<td>GS Media, Filmspeler</td>
</tr>
<tr>
<td><strong>Linking</strong> to freely accessible work from unlawful source</td>
<td>?</td>
<td>—</td>
</tr>
</tbody>
</table>

1008 Velze, 2015, pp. 86–90.
1009 Debating this issue, see Arezzo, 2014, pp. 545–547.


<table>
<thead>
<tr>
<th>Type of Online Use</th>
<th>Right of Communication to the Public</th>
<th>Legal Certainty Issues</th>
</tr>
</thead>
<tbody>
<tr>
<td>unlawful source</td>
<td></td>
<td>Application of Article 5(2)(d) InfoSoc Directive¹⁰¹⁰</td>
</tr>
<tr>
<td>Linking to work in circumvention of access restrictions from lawful or unlawful source</td>
<td>Yes</td>
<td>—</td>
</tr>
</tbody>
</table>

4.4 What limitations Apply to Uses Covered by Exclusive Rights?

4.4.1 General Framework, Objectives and Interpretation of Copyright Limitations

4.4.1.1 General Framework

The terms “limitations” and “exceptions” have multiple meanings and apply to a variety of legal mechanisms.¹⁰¹¹ In a broad sense, they include the concept of “negative rights”,¹⁰¹² exemptions from protected subject matter, conditions or limits on the scope and duration of protection, limitations and exceptions in the traditional sense, the minor exceptions doctrine, the three-step test, compulsory licences, and the doctrine of exhaustion (or first sale).¹⁰¹³

From a conceptual standpoint, the terms can be understood in many possible ways. On the one hand, an “exception” can refer to a permitted use that is unremunerated, a rule that provides immunity from liability, or a carve-out from the scope of an exclusive right. On the other hand, a “limitation” can mean a remunerated permitted use, a category of content excluded from copyright protection, or a boundary to exclusivity.¹⁰¹⁴

From a different perspective, “exceptions” can be seen as deviations from a broad principle of copyright exclusivity, which would otherwise apply without restriction. “Limitations”, in contrast, are limits to the exclusive right, which concern “the definition of the substance of the provision as such”, i.e. the scope of protection of the exclusive right.¹⁰¹⁵ In this way, using the evocative metaphor of Geiger, the exclusive right is akin to “an island of exclusivity in a sea of freedom (freedom of expression and competition)”.¹⁰¹⁶

As shown in this section 4.4.1, although the EU legislature adopts a compromise between different legal traditions and uses both terms in the title of Article 5 InfoSoc Directive, systematic interpretation of the acquis in light of fundamental rights leans in favour of considering “exceptions and limitations” as “limitations”. It is submitted that this meaning is both descriptively—from the legal-technical standpoint—and normatively preferable to

¹⁰¹⁰ See ALAI, 2015, pp. 7–8, discussing the application of the quotation limitation to hyperlinking.
¹⁰¹² Art. 17 BC.
¹⁰¹⁴ Christie & Wright, 2014, pp. 420–421, with a survey of influential literature. For terminology, see also Kur, 2008, pp. 5–8
¹⁰¹⁵ Dreier, 2015, pp. 139, 146.
“exceptions”. For that reason, the term “limitations” is preferentially used in this dissertation to mean the use permissions in Article 5.

Article 5 InfoSoc Directive contains the primary regulation for limitations at EU level. It applies to all copyright subject matter, except software and databases. Its first paragraph contains the directive’s sole mandatory limitation, applying to transient or incidental copies, the purpose of which is to facilitate the activities of ISPs or certain lawful uses. Articles 5(2) to (4) contain an exhaustive list of twenty optional limitations, applying to the otherwise exclusive rights of reproduction, communication to the public, and distribution. Where Member States choose to implement these, some are conditional upon the grant of fair compensation. For the others, Member States may nevertheless demand compensation in their national laws. Article 5(5) contains the directive’s version of the three-step test, which Chapter 5 discusses in depth.

Elsewhere in the acquis, the Rental Right Directive contains a list of optional limitations to related rights and allows Member States to apply in respect thereto limitations identical to those applicable to authors. Despite the overlap between the lists in both instruments, it is commonly accepted that Article 5 InfoSoc Directive also regulates related rights.

As noted, the InfoSoc Directive’s limitations do not apply to software or databases, meaning that reproduction or communication to the public thereof are restricted. Authorisation to perform these acts is required unless they are covered by the lex specialis limitations in the “vertical” Software and Database Directives.

The Software Directive exempts acts necessary by the “lawful acquirer”, the making of a backup copy, use of the program to “observe, study or test” its functioning, and decompilation of the program for purposes of interoperability. The Database Directive contains a list of mandatory and optional limitations regarding copyright protected databases (Article 6) and those protected by the sui generis right (Article 9). For copyright protected databases, a mandatory limitation

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1017 Cf. Dreier, 2015, pp. 139–140. See P. Bernt Hugenholtz, 1997, pp. 4–5, arguing similarly in relation to the legal nature of limitations in international law. See also Kur, 2008, p. 6, noting that both terminological choices are acceptable. The author further draws a distinction with “exclusions”, a term meant to identify provisions that ab initio exclude from protection certain subject matter.


1019 P. Bernt Hugenholtz et al., 2006, pp. 68–69.

1020 On the exhaustive nature of the list in Art. 5, see recital 32 InfoSoc Directive. The list contains four optional limitations for reproduction in Art. 5(2), fifteen optional limitations for reproduction and/or public communication in Art. 5(3), and the possibility to extend the previous limitations (applying to reproduction) to the right of distribution in Art. 5(4). N.B. Art. 5(3)(o) contains a deviation from the exhaustive nature of the list by including a “grandfathering clause” for pre-existing analogue uses of minor importance (de minimis).

1021 Namely, those in Art. 5(2)(a), (b) and (e) InfoSoc Directive.


1023 Chapter 5 provides a detailed analysis of this test, which is also incorporated (inconsistently) in the Software, Rental Rights and Database Directives.

1024 See Art. 10(1) and (2) Rental Right Directive and the very similar Art. 15 RC. On the later, see supra 2.4.3.


1027 Triaille et al., 2013, p. 246.

1028 See, respectively, Art. 5(1), (2) and (3), and Art. 6 Software Directive.
allows a “lawful user” to perform acts required “for the purposes of access to the contents of the databases and normal use of the contents”; furthermore, Member States may extend other copyright limitations to those databases.  

The relationship of limitations to contract law is in essence one between public choice or policy and private ordering. Although this relationship is generally unregulated by the InfoSoc Directive, commentators by and large accept that the instrument allows contractual disposition of the limitations in Article 5(2)–(4). This understanding relies on Article 9 being without prejudice to provisions concerning contract law, and recital 45 admitting contracts on fair compensation. In addition, this interpretation is systematically consistent with Article 6(4), fourth subparagraph of the directive, which allows contractual override of limitations where works are made available online with TPMs and on agreed contractual terms. From this perspective, the InfoSoc Directive indicates a predominance of private ordering over public policy.

However, contractual disposition may be prohibited in certain cases. These result from the definition of limitations as imperative in national law (e.g. in Portuguese and Belgian law), and the application of imperative provisions protecting end-users (e.g. consumer protection rules on adhesion contracts). Following a different approach, the Software and Database Directives afford absolute status to some of their limitations by explicitly prohibiting their contractual override and qualifying potential derogation clauses as “null and void”.

4.4.1.2 Relationship with Technological Protection Measures

The term digital rights management (DRM) encompasses both TPMs (e.g. access and copy control measures) and electronic rights management information, such as fingerprinting or watermarking, also known as “social DRM”. The directive’s regulation of the relationship between limitations and TPMs has been subject to significant criticism. The tension between both regimes cannot be understated: while limitations strive to ensure access to, and dissemination of, works, TPMs increase protection of exclusivity and restrict that access and dissemination, sometimes protecting non-copyrightable content. Article 6(4) InfoSoc

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1029 See Art. 6(1) and 2(d) Database Directive. See, in this sense, Triaille et al., 2013, p. 247. N.B. Art. 9 Database Directive does not allow analogous application of copyright limitations to the sui generis database right.

1030 Dreier, 2015, pp. 142–144.

1031 Bechtold, 2006, pp. 370–371; Janssens, 2009, pp. 341–342; von Lewinski & Walter, 2010, pp. 1022–1023, 1062. But see Lucie Guibault, 2009, pp. 529–530, 2010, p. 59, describing scholarship that holds an opposite view, relying on the letter of recital 45 InfoSoc Directive: “Whether the requirement that a contractual agreement must have the goal to secure the fair compensation of right holders means that contractual agreements with the purpose to override legitimate uses are impermissible is, according to these authors, questionable”.

1032 See Lucie Guibault, 2009, pp. 537–541; Triaille et al., 2013, p. 255 (n.548), 472, noting that the Danish legislation is not clear on this aspect despite some commentators arguing that it includes such a rule. On the Belgian law, see Geiger, 2015a, p. 22.


Directive regulates that tension through a formulation that mostly allows TPMs to override limitations. In doing so, it adds complexity to the balance of interests in copyright law.

Article 6 InfoSoc Directive implements and goes beyond Articles 11 WCT and 18 WPPT. It instructs Member States to provide adequate legal protection against the circumvention of effective TPMs, i.e. devices or components aimed at restricting unauthorised access to or use of works. “Access controls” are measures for protection of a work, such as encryption, scrambling or other transformation. “Use controls” refer to mechanisms that prevent, for example, the making of copies of works. The legal regime of TPMs includes protection against circumvention and preparatory acts.

Article 6(4) InfoSoc Directive entrusts rights holders (not legislators) with the role of providing the beneficiaries of certain limitations with the means of exercising the limitation through “voluntary measures”. If rights holders do not provide voluntary measures, Member States can step in to ensure exercise of the limitations and impose “appropriate” (i.e. mandatory) measures. Voluntary and mandatory measures are only required if the beneficiary has “legal access” to the work and to the extent necessary to exercise the limitation. The application of either type of measure does not prejudice the legal protection of TPMs.

Such legal protection is limited to the prevention of acts not authorised by the rights holder with respect for the principle of proportionality. Therefore, the application of TPMs must be suitable to achieve that objective and cannot “go beyond what is necessary for this purpose.”

The benefit of voluntary or mandatory measures is not available to all limitations in Article 5 InfoSoc Directive. Instead, these rules apply obligatorily to certain limitations and, optionally (at the discretion of the Member State), to private copying. Some commentators are critical of this

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1039  Arts 11 and 12 WCT prohibit the circumvention of TPMs, the removal or alteration of electronic rights management information, and the distribution (or other forms of marketing or use) of works or copies where that information has been removed or altered. These provisions are implemented in the EU through Arts 6 and 7 InfoSoc Directive. See also the corresponding Arts 18–19 WPPT. On the articulation of Art. 6 InfoSoc Directive with other anti-circumvention measures in EU law, notably on the Software Directive (Art. 7(1)(c)) and the Conditional Access Directive, see Bechtold, 2006, pp. 384–385. For an historical note and commentary, see von Lewinski & Walter, 2010, pp. 1065–1075.

1040  Art. 6(1)–(3) InfoSoc Directive. On the meaning of “effective” TPMs, see CJEU, Nintendo, ¶¶27–28.

1041  Janssens, 2009, p. 334 criticising this as a “remarkable policy reversal”.

1042  Recital 52 clarifies the InfoSoc Directive’s preference for the adoption of voluntary measures. Where these are not taken, Member States should impose them on rights holders, under the terms described above. There is little guidance on how and when to impose such measures. However, recital 51 InfoSoc Directive requires that Member States wait for a “reasonable period of time” before imposing appropriate measures.

1043  Art. 6(4), first subparagraph InfoSoc Directive. In this sense, see von Lewinski & Walter, 2010, p. 1073, providing examples of legal access (buying, renting, borrowing a legal copy or otherwise obtaining it with the consent of the right holder) and illegal access (“illegal peer-to-peer network”). N.B. the Court in ACI Adam, when deciding that copies from unlawful sources do not fall within the scope of the private copying limitation, failed to clarify the concept of “lawful source”. See Quintais, 2015b.

1044  Art. 6(4), third subparagraph InfoSoc Directive.

1045  CJEU, Nintendo, ¶¶29–31 (cit, ¶31), relying on Art. 6(2) and recital 48 InfoSoc Directive.
hierarchy, noting that the private use limitation, because it “is also justified by privacy and freedom of information”, should be listed as a “privileged” limitation.\textsuperscript{1046}

The regime also applies by analogy to limitations in the Rental Right and Database Directives.\textsuperscript{1047} Member States cannot impose any measures of this type in relation to the remaining limitations, which can be fully overridden by the application of TPMs.\textsuperscript{1048}

The privileged limitations that must benefit from such voluntary or mandatory measures are those in Article 5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b) and (3)(e) InfoSoc Directive. None of these limitations is susceptible of applying to acts licensed in an ACS.\textsuperscript{1049} Therefore, even if a limitation covers an online use, end-users may not benefit from it if the work is subject to TPMs, as that would require violating the prohibition against circumvention of technological measures.

Article 6(4), second subparagraph InfoSoc Directive, allows for the possible application of mandatory measures in relation to the private copying limitation in Article 5(2)(b), subject to additional conditions or clarification. Thus, no measures can be imposed by Member States: (1) if rights holders have adopted voluntary measures to enable private copying; or (2) vis-à-vis copy control TPMs that limit the number of reproductions made by users in accordance with such provisions.\textsuperscript{1050} In addition, any measures must respect rights holders’ entitlement to use TPMs, the condition of fair compensation, and the three-step test.\textsuperscript{1051}

The logic of these provisions is as follows: TPMs can restrict acts of digital reproduction and subject them to additional payment, even where those acts would otherwise be privileged private copying. That would make payments through a levy system unwarranted, because there would be no unauthorised copying or harm to compensate. Consequently, some commentators contend that the application of effective TPMs could lead to “phasing-out” of levies in the digital environment.\textsuperscript{1052} In this line, a recent economic study for the EU Commission concludes that, due to “changes in the consumption of content”, the best policy option in this field would be that of “entirely removing levies”.\textsuperscript{1053}

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\textsuperscript{1046} Geiger & Schönherr, 2014b, p. 469.


\textsuperscript{1048} These are the limitations in Arts 5(1), 5(2)(c), (d) and (f)–(o) InfoSoc Directive.

\textsuperscript{1049} N.B. not even the mandatory limitation in Art. 5(1) InfoSoc Directive can benefit from “appropriate” mandatory measures. See Bechtold, 2006, p. 392.

\textsuperscript{1050} Art. 6(4), first and second subparagraphs InfoSoc Directive. See von Lewinski & Walter, 2010, p. 1073, considering the first point redundant and the second a mere clarification.

\textsuperscript{1051} Recitals 39 and 52 InfoSoc Directive. Recital 39 addresses the articulation of TPMs and digital private copying and remuneration schemes, urging Member States to take into consideration “technological and economic developments” when applying this exception and limitation, noting that the latter “should not inhibit the use of technological measures or their enforcement against circumvention”.

\textsuperscript{1052} See: Helberger & Hugenholtz, 2007; P. Bernt Hugenholtz, Guibault, & van Geffen, 2003; and Eechoud et al., 2009, p. 118 raising the possibility that, for cases where the application of TPMs makes private copying activities impossible or near impossible (e.g. copy controls on DVDs), no compensation should be claimed as it would be unjustified. \textit{Contrà} the argument that the InfoSoc Directive provides for automatic phasing out of levies, see von Lewinski & Walter, 2010, p. 1034. For a critical analysis of the “phasing-out provision”, see Séverine Dusollier & Ker, 2009.

\textsuperscript{1053} Boulanger, Carbonnel, Coninck, & Langus, 2014, p. 103.
The little space available for limitations to apply where TPMs are used is further reduced by a special rule on licensed interactive on demand services.\footnote{1054} This rule prohibits Member States from implementing any measures limiting the effect of TPMs if the work in question is made available online for interactive on-demand transmission on agreed contractual terms.\footnote{1055} This includes rights holders making available works online (under Article 3 InfoSoc Directive) for streaming or downloading on-demand. Thus, in such a “technology plus contract” scenario, all limitations can be set aside.\footnote{1056}

To sum up, the application of TPMs overrides the possibility for end-users to exercise most limitations potentially applicable to online sharing, and leaves little space for the digital private copying limitation.\footnote{1057} This prioritising of TPMs over limitations regarding use over the Internet is also apparent in the CJEU’s case law on hyperlinks. Following Svensson, the choice by rights holders to impose technical access restrictions on a work will determine whether linking to that work (in circumvention of those restrictions) qualifies as a restricted act of communication to the public.\footnote{1058}

\subsection*{4.4.1.3 Objectives}

The InfoSoc Directive aims at creating a “general and flexible legal framework... to foster the development of the Information Society in Europe”.\footnote{1059} The directive is based \textit{inter alia} on the objectives of increasing legal certainty, providing a high level of protection for copyright and related rights, and ensuring the smooth functioning of the internal market.\footnote{1060} Subject to the principle of subsidiarity, the harmonisation of copyright and limitations are considered necessary to achieve those objectives.\footnote{1061}

Harmonisation must comply with fundamental principles of law, such as property in copyright, freedom of expression, and the public interest.\footnote{1062} Limitations serve such public interest goals, including the promotion of culture and dissemination of knowledge, by enabling use outside exclusivity for purposes related to private use, educational teaching, scientific learning and

\footnote{1054} Art. 6(4), fourth subparagraph, and recital 53 InfoSoc Directive.
\footnote{1055} “Agreed contractual terms” in this context seems to have a broad construction and likely applies also to standard form contracts such as typical online end-user licence agreements. See von Lewinski & Walter, 2010, p. 1074, (n.482). For a more restrictive view, arguing for the application of the provision solely to negotiated and agreed terms, see Lucie Guibault et al., 2007b, p. 112 (“the exception to the main rule of article 6(4) of the Directive could be interpreted as applying only in respect of the supply of online services for which the contracting parties have negotiated the terms of use...”).
\footnote{1056} Art. 6(4), fourth subparagraph, and recital 53 InfoSoc Directive, excluding from the scope of the provision non-interactive Internet transmissions. See also Poort & Quintais, 2013, p. 209.
\footnote{1057} Janssen, 2009, p. 334.
\footnote{1058} See supra 4.3.2.1.2. See the discussion in Dreier, 2015, pp. 144–145.
\footnote{1059} Recital 2 InfoSoc Directive.
\footnote{1060} On the objectives of EU copyright law, see supra 1.3 and infra 5.5.3.
\footnote{1061} On the directive’s general goal of harmonisation of copyright law in the EU, see recitals 1, 4, 6, 7, 9, 23, and 31 InfoSoc Directive. Recitals 31 and 32 refer in particular to the goal of harmonising limitations. See also Triaille et al., 2013, p. 250.
\footnote{1062} Recital 3 InfoSoc Directive.
research, news reporting, quotation, use by people with disabilities, public security use, and use in administrative and judicial proceedings. \(^{1063}\)

The CJEU has recognised that certain limitations have fundamental rights justifications underlying these purposes, such as freedom of expression and information. \(^{1064}\) Therefore, where rooted in public interest justifications and in fundamental rights, analysis of the existence and scope of limitations cannot be confined to market failure arguments. \(^{1065}\)

Against this framework, limitations function as internal tools to strike a balance between competing interests in copyright. Recital 31 InfoSoc Directive clarifies this function, as well as the need for harmonisation of limitations, especially in the digital networked environment, and in light of the cross-border exploitation of works, subject to the directive’s overall internal market objective.

The list of limitations in Article 5 InfoSoc Directive attempts to achieve this balance by simultaneously taking “due account of different legal traditions of Member States” and “aiming to ensure a functioning internal market”. \(^{1066}\) A further manifestation of the balancing principle is the need for Member States to consider the “increased economic impact” of limitations in the “new electronic environment”. \(^{1067}\)

Following Dreier, it is important to dispel the notion that the often-touted objective of providing a “high level of protection” for copyright (in recitals 4 and 9 InfoSoc Directive) is synonymous with an infinitely excludable scope of protection. Instead, from the economic perspective, “excessive protection” can have a negative impact on creativity and innovation”. Therefore, where broad exclusive rights are recognised in the acquis—as results from the analysis in 4.3—the function of limitations is to “reduce and confine the excessive protection afforded by the exclusive right to the optimal scope of protection”. \(^{1068}\)

In sum, limitations are an essential component of copyright, as they promote access to, and dissemination of, culture, education and knowledge. In doing so, they stimulate the creation goal of copyright, by fostering access to and use of pre-existing works. \(^{1069}\) Their essential role in pursuing the InfoSoc Directive’s objectives and balancing copyright exclusivity with the public interest and fundamental rights has been steadily recognised by the CJEU.

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\(^{1063}\) Recitals 14, 34, 39 InfoSoc Directive.

\(^{1064}\) See infra 4.4.1.4.

\(^{1065}\) Triaille et al., 2013, p. 256, noting that “[b]oth the European lawmaker and the international one refer to public interest as a key justification of copyright exceptions”.

\(^{1066}\) Recital 33 InfoSoc Directive.

\(^{1067}\) Recital 44 InfoSoc Directive refers to the conditions of the test. For a restrictive application of this rationale, see CJEU, ACI Adam, ¶¶25–27. See infra 4.4.3.6.

\(^{1068}\) Dreier, 2015, p. 140.

\(^{1069}\) Geiger & Schönher, 2014a, p. 110
4.4.1.4  The Court’s Case Law: From Strict Interpretation to Restricted Flexibility

The CJEU has interpreted the InfoSoc Directive’s system of limitations on multiple occasions. Its rulings shape Member States’ margin of discretion in implementing limitations and national courts’ leeway in interpreting them.

In general terms, the CJEU’s activity centres around the objectives highlighted above: fair balance, high level of protection for copyright holders, adequate compensation, circulation of culture, resolving legal uncertainty, technological development, fair competition, and harmonisation of copyright law to achieve a functioning internal market. Although recognising Member States’ margin of discretion in implementing limitations, the Court has held that this margin is to be exercised within the limits of EU law, and in line with the aforementioned objectives and the principle of proportionality.

The CJEU has primarily interpreted limitations according to the doctrine or principle of strict interpretation. The first case to do so in the copyright field was Infopaq I, which examined the mandatory exemption for transient copies in Article 5(1) InfoSoc Directive. In simple terms, the doctrine considers exclusivity the baseline for copyright protection; any deviation thereto is exceptional and, thus, must be interpreted strictly. The principle is drawn from previous case law on derogations to general principles and is further supported by a restrictive reading of the three-step test, from which the Court infers a requirement to interpret limitations stringently.

The doctrine is a staple of CJEU decisions on limitations. Of particular relevance to the ACS debate is the application of the doctrine in ACI Adam, where the Court discussed whether the scope of the private copying limitation covers reproductions from unauthorised sources. In this judgment, the Court relied heavily on the letter of recital 44 InfoSoc Directive, which allows the reduction of the limitation’s scope in connection with “certain new uses” of works. In contrast, it was noted, nothing in the InfoSoc Directive mentions the possibility of extending that scope. Therefore, despite the directive’s silence on this controversial issue, limitations should be interpreted strictly. As a result, the Court ultimately concluded that Article 5(2)(b) cannot cover private copies made from unlawful sources. This reasoning was later upheld in Copydan and Reprobel.

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1070 CJEU, Laserdisken II, CJEU, LSG, CJEU, Infopaq I, CJEU, Murphy, CJEU, Padawan, CJEU, Stichting de Thuiskopie, CJEU, Painer, CJEU, Luksan, CJEU, Infopaq II, CJEU, DR and TV 2 Danmark, CJEU, VG Wort, CJEU, Amazon.com, CJEU, ACI Adam, CJEU, Copydan, CJEU, Ulmer, CJEU, Deckmyn, CJEU, OSA, CJEU, Meltwater, CJEU, Reprobel.
1071 Triaille et al., 2013, pp. 251–252. See: CJEU, Infopaq I, ¶62; CJEU, Stichting de Thuiskopie, ¶23; CJEU, Padawan, ¶¶35–36; CJEU, Painer, ¶¶103–105, 107; CJEU, DR and TV2 Danmark, ¶36. Listing the objectives of EU law, see supra 1.3 and infra 5.5.3.
1072 CJEU, Infopaq I, ¶¶56–57; CJEU, Padawan, ¶¶103–105, 107; CJEU, DR and TV2 Danmark, ¶36. Listing the objectives of EU law, see supra 1.3 and infra 5.5.3.
1073 On which see Quintais, 2015b.
1074 CJEU, ACI Adam, ¶¶25–27.
1075 Ibid., ¶¶22, 29–30. See also CJEU, Infopaq I, ¶56, and case law cited therein.
1076 CJEU, ACI Adam, ¶41.
1077 CJEU, Copydan, ¶¶74–79; CJEU, Reprobel, ¶¶57–64.
The CJEU’s adherence to the strict interpretation doctrine is consistent with what Leistner labels an essentially “economic” (rather than flexible) approach to the interpretation of exploitation rights in the InfoSoc Directive. This interpretation attempts to ensure appropriate remuneration for any independent act of exploitation by users, primarily through the expansion of exclusive rights, namely reproduction.1078

Still, post Infopaq I—and with the notable exception of ACI Adam and its progeny,—, this doctrine has been tempered. In fact, it is possible to observe a gradual shift towards a more nuanced interpretation of limitations designed to secure their effectiveness in view of their objective and purpose, as well as the principle of proportionality.1079 This shift is coherent with the goal of striking a fair balance in copyright law, which is central to the InfoSoc Directive.1080 The goal, for its part, if not in direct contradiction with the strict interpretation doctrine, at least severely limits its application.1081 As noted in Painer and Murphy, the interpretation of the conditions for the application of limitations must

enable the effectiveness of the exception thereby established to be safeguarded and its purpose to be observed1082 ...as resulting in particular from recital 31 in the preamble to the Copyright Directive and from Common Position (EC) No 48/2000 adopted by the Council on 28 September 2000 with a view to adopting that directive...1083

By referencing recital 31 and Common Position (EC) No 48/2000, the Court clarifies that, in fulfilling the requirements of effectiveness and purpose-bound interpretation, it is essential to balance the interests of authors and rights holders, on the one hand, with those of users, on the other.1084 Recital 31 is a key element for interpretation of the InfoSoc Directive in light of international and EU copyright law and the external constraints imposed by fundamental rights in the digital networked environment.1085

In that light, Murphy and Meltwater—when discussing the mandatory limitation for transient copies—qualify this balancing exercise as vital towards achieving the goal of development and operation of new technologies. Murphy states:

In accordance with its objective, that exception must allow and ensure the development and operation of new technologies and safeguard a fair balance between the rights and interests of right holders, on the one hand, and of users of protected works who wish to avail themselves of those new technologies, on the other.1086

1078 Leistner, 2014, p. 569. See also Senftleben, 2013b, p. 93, using the expression “dogma of strict interpretation”.
1080 CJEU, Padawan, ¶43; CJEU, Murphy, ¶¶163ff.; CJEU, Painer, ¶132; CJEU, Deckmyn, ¶26; CJEU, Ulmer, ¶43;
1081 European Copyright Society, 2014b, p. 5.
1082 CJEU, Painer, ¶133; CJEU, Murphy, ¶163.
1083 CJEU, Murphy, ¶163.
1084 CJEU, Murphy, ¶¶163ff.; CJEU, Painer, ¶¶132 ff.; CJEU, Deckmyn, ¶27; CJEU, UPC Telekabel, ¶46; CJEU, Bonnier Audio, ¶56; CJEU, Netlog, ¶51; CJEU, Scarlet Extended, ¶53; CJEU, Tele2, ¶28; CJEU, Promusicae, ¶68; CJEU, Meltwater, ¶24.
1085 Chapter 5 elaborates on this point. See infra 5.2.1.4 and 5.3.3.6
1086 CJEU, Murphy, ¶164; CJEU, Meltwater, ¶24.
This understanding allows for teleological interpretation of the limitation to ensure its effectiveness and achieve its objectives, thereby mitigating the operation of the doctrine of strict interpretation.\textsuperscript{1087}

Further to the balancing component, CJEU case law explicitly recognises the impact of fundamental rights in the interpretation of limitations.\textsuperscript{1088} In \textit{Painer}, it is noted that the quotation limitation in Article 5(3)(d) InfoSoc Directive

\begin{quote}
is intended to strike a fair balance between the right to freedom of expression of users of a work or other protected subject-matter and the reproduction right conferred on authors.\textsuperscript{1089}
\end{quote}

In \textit{Deckmyn}, it is said that the parody limitation is justified by the fundamental right of freedom of expression and that it

\begin{quote}
must strike a fair balance between, on the one hand, the interests and rights of persons referred to in Articles 2 and 3 of that directive, and, on the other, the freedom of expression of the user of a protected work who is relying on the exception for parody, within the meaning of Article 5(3)(k).\textsuperscript{1090}
\end{quote}

From the aforementioned case law, it is possible to draw important conclusions regarding the influence of fundamental rights on a more flexible definition and interpretation of limitations. From an internal perspective, fundamental rights provide a justification for limitations, which is then considered when examining their purpose. At an external level, fundamental rights affect the balance of interests, functioning as rights of users (and third parties with legitimate interests) to be balanced against those of copyright owners.\textsuperscript{1091}

The latter point merits elaboration. Neither the fundamental right of intellectual property as applied to copyright (Article 17(2) Charter) nor that of freedom of expression (Article 11 Charter) are absolute. Rather, copyright is a functional right. Like other fundamental rights, its application can only impose narrow constraints on freedom of expression. In that light, the design and interpretation of a system of copyright limitations should strike a “fair balance” between competing fundamental rights, guided by the principle of proportionality.

Thus, and at least for limitations justified on the basis of fundamental rights, it does not seem consistent with EU and international law to impose a “horizontal” doctrine of strict interpretation. Rather, in certain cases, copyright might have to cede to fundamental rights.\textsuperscript{1092} This rationale underscores CJEU decisions finding that, where conditions for benefiting from limitations are met, the fundamental rights of users may prevail over the interests of authors.\textsuperscript{1093}

\begin{footnotesize}
\textsuperscript{1087} Triaille et al., 2013, p. 252.
\textsuperscript{1088} Leistner, 2014, p. 585.
\textsuperscript{1089} CJEU, \textit{Painer}, ¶134.
\textsuperscript{1090} CJEU, \textit{Deckmyn}, ¶¶25–28 (cit. ¶27).
\textsuperscript{1091} Leistner, 2014, p. 586: “...the judgment in that context implicitly acknowledges the impact of the fundamental freedoms on the interpretation of the provisions on the exceptions to copyright by fairly balancing the right of the authors with the right of the users to freedom of expression”.
\textsuperscript{1092} See: European Copyright Society, 2014b, pp. 4–7, and case law cited therein; Geiger & Schönherr, 2014a, pp. 118–119. See also \textit{Opinion AG in Deckmyn}, ¶¶80–85. On the application of Art. 10 ECHR to copyright, see ECtHR, \textit{Ashby Donald}, and ECtHR, \textit{The Pirate Bay}.
\end{footnotesize}
This conclusion is also in line with consistent case law of the Court that provides “shelter” to the “protection of fundamental rights in relation to copyright users.”

In this light, we can read the Court’s restrictive approach in *ACI Adam* and its progeny as resulting from a failure to consider the fundamental rights justification of the private copying limitation. As in the other cited cases, *ACI Adam* articulates the doctrine with the need to strike a fair balance of interests between authors and users. However, unlike *Painer* and *Deckmyn*, no reference is made to the impact of fundamental rights on the interpretation of limitations.

Given that the private copying limitation is intended, at least in part, to safeguard privacy interests of end-users (as is clear from the analysis in Chapter 2), that omission is open to criticism, as it would provide an essential counterweight to the strict interpretation doctrine. This argument, raised by the Dutch Government in *ACI Adam* and summarily (if unconvincingly) dismissed in the AG Opinion, is ignored by the Court, with important consequences.

When implementing optional limitations, Member States are subject to the principle of proportionality and the boundaries of the three-step test. Within those confines, their margin of discretion in specifying and qualifying the conditions of applicability of limitations is further subject to the principle of autonomous interpretation.

In *ACI Adam*, by overly relying on the doctrine of strict interpretation, the Court’s reading of the private copying limitation in connection with the three-step test apparently leaves Member States with a narrower margin of discretion for national implementation of limitations. To this effect, *ACI Adam* favours the position that national laws’ discretion can be used solely to restrict the scope of the limitation for “certain new uses of copyright works and other subject-matter”. (Arguably, the restrictive reading of the three-step test in *OSA* supports this approach.)

Still, such a position is inconsistent with the CJEU’s previous understanding in *Murphy* that limitations be interpreted so as to enable the development and operation of new technologies, balancing the interests of rights holders with those of users of new technologies. It is also inconsistent with the Court’s approach in *Deckmyn*, where it adopts a more liberal view of

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1095 See infra 4.4.3.6. For a detailed analysis, see Quintais, 2015b.
1098 Opinion of AG in *ACI Adam*, ¶78. For criticism, see Consumentenbond & Bureau Brandeis, 2014, p. 3.
1100 Similarly, see Eleonora Rosati, 2014, pp. 710–711.
1102 CJEU, *OSA*, ¶¶38–41. See Nérisson, 2015b, p. 391, stating that in *OSA* the CJEU closes the door to analogous or extensive interpretation of limitations.
limitations, in line with a growing body of case law considering them akin to “user rights”.1104

A flexible understanding of copyright limitations can also be derived from the structure and contents of the directive’s catalogue in Articles 5(2) and 5(3). Whereas the list is exhaustive, therefore proscribing implementation of additional limitations, a degree of elasticity may result from its qualification as “categorically worded prototypes”, rather than narrow “circumscribed exceptions”.

Quotation is a case in point, as it applies “for purposes such as criticism or review, provided that… their use is in accordance with fair practice, and to the extent required by the specific purpose”.1107

It is true that, in theory, Member States could use their margin of discretion in a restrictive way. This could be done by implementing and then narrowing the scope of the limitations through the imposition of additional conditions, in what has been described as a “homing” tendency.1108

However, this possibility is limited to the extent that the CJEU provides for autonomous interpretation of the limitation’s “prototype” or key concepts. In that line, the Court in DR and TV2 Danmark and Deckmyn denied that limitations should be implemented restrictively into national laws.1109 This is in contrast with ACI Adam, Copydan, and Reprobel, where it imposed a narrower margin of implementation and subsequent interpretation through the addition of the condition of “lawfulness of the source of reproduction”.1110 (Curiously, Copydan leaves to Member States discretion on the regulation of the use of third party devices for private copying, allowing the scope of the limitation to broaden.1111)

In fact, the practice of independent and uniform interpretation—rooted in the need for a uniform application of EU law and the principle of equality—is justified by the InfoSoc Directive’s goal of achieving a harmonious interpretation of limitations that is conducive to a proper and smooth functioning of the internal market. The goal, derived from recital 32, constitutes a manifestation of the CJEU’s intent to achieve a flexible, albeit uniform, interpretation of the limitations. However, this goal is constrained by the CJEU’s insistence on autonomous interpretation of the key concepts underlying the limitations, thereby limiting the scope of Member States’ discretion.

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1104 Eleonora Rosati, 2015b, p. 10.
1105 P. Bernt Hugenholtz & Senftleben, 2011, p. 2: “the enumerated provisions are in many cases categorically worded prototypes rather than precisely circumscribed exceptions, thus leaving the Member States broad margins of implementation”. But see: von Lewinski & Walter, 2010, p. 1021; Eleonora Rosati, 2015b, p. 9, arguing that, following the restrictive interpretation of the CJEU in Padawan, DR & TV 2 Danmark and ACI Adam, in most cases the limitations in Art. 5 “would not be just categorically-worded prototypes”; and Nérisson, 2015b, p. 284, arguing that OSA bars such interpretation.
1106 Art. 5(3)(d) InfoSoc Directive, emphasis added. The point is made inter alia in European Copyright Society, 2014b, p. 5; P. Bernt Hugenholtz & Senftleben, 2011, which mention Art. 5(3) (a) and (f) InfoSoc Directive as examples. For a broad view of the quotation limitation in international copyright law, see Bentley, 2016 [paper forthcoming]. Contra, after OSA, Nérisson, 2015b, p. 391.
1107 Lucie Guibault, 2010, p. 64, referring to the “tendency of the Member States’ legislatures when translating provisions of the Directive into national law, preserving as much as possible the old formulations and adding further specifications”.
1108 CJEU, DR and TV2 Danmark, ¶36; CJEU, Deckmyn, ¶16, 24.
1109 CJEU, ACI Adam, ¶¶33–34; CJEU, Copydan, ¶¶74–79; CJEU, Reprobel, ¶¶57–64. See Eleonora Rosati, 2014, pp. 710–711.
1110 CJEU, Copydan, ¶¶86–96. See infra 4.4.3.7.
of an overall objective of the directive, namely the harmonisation of EU copyright law. In part due to the lack of true harmonisation of the system of copyright limitations in the InfoSoc Directive’s design—i.e. the number of optional limitations, the wide margin of implementation, and lack of guidance on contractual overridability—and despite the Court’s efforts to the contrary, that goal has not been achieved. The result, mitigated by the CJEU’s expanding case law on the field, is a smorgasbord of divergent national implementation.

4.4.1.5 Interim Conclusions

To conclude, Member States’ margin of discretion in defining the conditions for applicability of limitations, and national courts’ freedom of interpretation, are curtailed by two opposing constraints. From one side, the strict interpretation doctrine and the three-step test seem to impede the broadening of the scope of limitations. From the other, the prototypical nature of certain limitations, the principle of autonomous interpretation, the requirements of effectiveness and purposive interpretation, the need for a balancing of interests, and the (external and internal) operation of fundamental rights, all seem to prevent an overly narrow reading of limitations. Moreover, a strict interpretation may hinder the directive’s objective of harmonising limitations, with detrimental effects on the functioning of the internal market.

These considerations significantly mitigate the scope of the strict interpretation doctrine. Furthermore, less conservative readings of the three-step test are possible. In fact, both legal scholarship and some CJEU decisions lay the groundwork for a flexible construction of its conditions and consideration as an enabling clause; one which adequately balances interests, rights and limitations, while being consistent with the InfoSoc Directive’s aims and the internal market objective.

It follows that CJEU case law allows for a flexible and functional reading of limitations, especially as these apply to digital technologies. This position is coherent with the normative role of copyright limitations, namely that of securing shared constitutional values stemming from fundamental rights and serving the public interest in the dissemination of culture and knowledge. However, this is true only insofar as the system of limitations ensures a fair balance between competing interests of creators/rights holders and users, as well as “protection of, and access to, copyright works”. Hence, despite this flexible and functional approach, the scope of limitations remains constrained.

These findings have important implications for the present study. From a descriptive standpoint, the analysis so far argues for a liberal interpretation of limitations. If the activities of Internet users cannot fit within these spaces, then ACS implementation will require copyright reform to

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1112 CJEU, DR and TV2 Danmark, ¶¶35–37; CJEU, Deckmyn, ¶15.
1113 Bechtold, 2006, p. 369; European Copyright Society, 2014b, pp. 2–3; Geiger & Schönherr, 2014a, pp. 113–114; P. Bernt Hugenholtz, 2000, p. 501; P. Bernt Hugenholtz et al., 2006; Janssens, 2009; Westkamp, 2007. But see von Lewinski & Walter, 2010, pp. 1021–1022, labelling this criticism as “unjustified from the outset, as Art. 5 was not aimed at complete harmonization”.
1114 Making the point in relation to Painer, see Triaille et al., 2013, p. 489.
1115 See infra 5.2.2.2.
1116 See, making a similar point, Senftleben, 2013b, p. 93.
1117 European Copyright Society, 2014b, p. 3.
1118 European Copyright Society, 2014b, p. 3.
adopt legalisation schemes. This clarifies the scope of an ACS by itemising which online uses trigger exclusive rights and require clearance through voluntary or mandatory models. Where copyright reform through legal licences is required, its admissibility hinges on compliance with the three-step test. (For some legal scholars, the same conclusion applies to mandatory collective management.\(^\text{1119}\))

Here, too, this chapter’s analysis is important. First, because the limitations studied herein function as prototypes for “certain special cases” (first step). Second, because the normative considerations on flexibility and balancing of interests (including the role of fundamental rights) apply, \textit{mutatis mutandis}, to the three-step test. Third, as any voluntary or mandatory ACS should articulate with the \textit{acquis} and the breathing spaces it provides.\(^\text{1120}\)

In the context of this chapter, the relevant question now is whether and to what extent the limitation prototypes in Article 5 InfoSoc Directive exempt any of the end-user acts of digital content sharing that trigger exclusive rights. Examining that list against the typology of online uses, five limitations emerge as potentially relevant, and are for that reason analysed in the following paragraphs: the mandatory limitation for temporary and transient or incidental copying (4.4.2); the optional limitation for private copying (4.4.3); and the limitations susceptible of application to digital adaptations, namely quotations, incidental inclusion and parody (4.4.4).

### 4.4.2 Temporary and Transient Copying

Article 5(1) InfoSoc Directive contains a mandatory limitation to the right of reproduction in Article 2. Together with the exemptions for services of mere conduit, caching, and hosting in Articles 12–14 E-Commerce Directive, these rules regulate the liability of service providers for copyright-relevant acts in networked environments.\(^\text{1121}\) Thus, only if there is a copyright violation pursuant to Articles 2 and 5(1) InfoSoc Directive, will the E-Commerce Directive’s safe-harbours apply to determine liability of service providers.\(^\text{1122}\)

Article 5(1) was included in the InfoSoc Directive in the wake of discussions on the scope of the reproduction right dating back to the 1996 WIPO Diplomatic Conference. Those discussions focused on whether the right should extend to temporary copies of works occurring during technological processes, such as random access memory (or “RAM”) copies in computers, web browsing, and copies resulting from the use of routers and proxy servers.\(^\text{1123}\) The limitation is relevant to this study as it applies to on-screen and cached copies made during acts of web browsing and reception of streams by end-users.

This limitation exempts from copyright protection any temporary reproductions of works and related subject matter that meet certain conditions regarding their characteristics and purpose.

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\(^{1119}\) See \textit{supra} the discussion at 3.3.4.2.  
\(^{1120}\) For example, where a legal licence ACS overlaps with existing limitations it might prove sensible to propose reform by extending existing mechanisms and considering these for the definition of remuneration.  
\(^{1121}\) Recital 16 InfoSoc Directive.  
\(^{1122}\) Bechtold, 2006, p. 371.  
Similar exemptions are included in the Software and Database Directives.\footnote{Art. 5(1) Software Directive and 6(1) Database Directive.} To qualify for the limitation, a reproduction must meet four conditions:

- It must be temporary, in the sense that it is either transient or incidental;
- It must form “an integral and essential part of a technological process”;
- It must be for the sole purpose of (1) enabling Internet transmissions \textit{or} (2) lawful uses; and
- It must have no “independent economic significance”.

In \textit{Meltwater}, the “temporary” condition was examined independently. The CJEU concluded that on-screen and cached copies made during browsing meet this condition. First, on-screen copies are “deleted when the internet user moves away from the website viewed”; second, cached copies are usually replaced automatically by different content “after a certain time, which depends on the capacity of the cache and on the extent and frequency of internet usage by the internet user concerned”.\footnote{CJEU, \textit{Meltwater}, ¶¶25–27.}

It is notable that commentators tend to examine “temporary” in opposition to permanent. In that sense, the term is manifested in two alternative requirements: that a copy is “transient”, i.e. that it lasts for a short period of time, or “incidental”, meaning that it has no particular relevance for copyright purposes.\footnote{Bechtold, 2006, p. 371; von Lewinski & Walter, 2010, pp. 1024–1025. See also Depreeuw & Hubin, 2014, p. 46 (“The transient copy is an ephemeral act of reproduction.”)}

Examples of transient copies are those occurring in a caching process or in the RAM, which are erased at the end of a session. Transient copies also occur during browsing. In fact, the CJEU has clarified that a temporary and transient copy “is intended to enable the completion of a technological process of which it forms an integral and essential part”; as such, it “must not exceed what is necessary for the proper completion of that technological process”.\footnote{CJEU, \textit{Infopaq I}, ¶61.} Furthermore, the process in question “must be automated so that it deletes that act automatically, without human intervention, once its function of enabling the completion of such a process has come to an end”.\footnote{CJEU, \textit{Infopaq I}, ¶64; CJEU, \textit{Meltwater}, ¶40.}

Because browsing, by definition, requires the automatic creation and deletion of copies without human intervention, it follows that on-screen copies made during browsing are transient copies, and therefore exempted.\footnote{Recital 33 InfoSoc Directive, See: CJEU, \textit{Infopaq I}, ¶63; CJEU, \textit{Meltwater}, ¶46.} The requirement of automatic deletion does not prevent the same result being achieved by human intervention. In browsing, for example, it is permissible for the Internet user to activate and terminate the session without the temporary copies losing their transient nature.\footnote{CJEU, \textit{Meltwater}, ¶¶32, 41–42.}

Temporary copies that exist for too long to qualify as transient—such as those on a proxy or cache server—may nonetheless qualify as “incidental” to the main use. This could be the case,
for example, for a use privileged under a different limitation, like digital private copying.\footnote{Bechtold, 2006, p. 371; von Lewinski & Walter, 2010, p. 1025.} Hence, for a copy to be incidental its \textit{existence} and \textit{purpose} must be dependent on the technological process it integrates.\footnote{CJEU, \textit{Meltwater}, ¶43.} In this light, the CJEU has found cached copies to be incidental to the technological process of browsing.\footnote{Ibid., ¶¶48–50.}

A temporary (transient or incidental) reproduction is “integral and essential to a technological process” when it fulfills two criteria. First, it is not technically severable from and is “carried out entirely in the context of the implementation of a technological process”; second, it is required for the proper functioning of the process.\footnote{CJEU, \textit{Meltwater}, ¶28; CJEU, \textit{Infopaq I}, ¶61; CJEU, \textit{Infopaq II}, ¶30.} The copy must be a predetermined technical necessity, as occurs in the context of Internet transmissions.\footnote{Bechtold, 2006, p. 372, arguing that this feature results in an implementation of the three-step test. See also von Lewinski & Walter, 2010, p. 1025.} The CJEU considers that on-screen and cached copies meet this condition because the reproductions can be made at any stage of the process, in no small part because “without those copies, the internet would be unable to cope with current volumes of data transmitted online.”\footnote{CJEU, \textit{Meltwater}, ¶¶28, 33–38.}

The third condition of this limitation is that the temporary reproductions are made to enable Internet transmissions or, alternatively, to allow lawful use. \textit{A contrario}, the limitation excludes copies made for additional or different purposes.\footnote{von Lewinski & Walter, 2010, p. 1025.}

In the wording of Article 5(1)(a) InfoSoc Directive, the first purpose is for a “transmission in a network between third parties by an intermediary”.\footnote{Art. 5(1)(a) InfoSoc Directive.} This privilege extends to intermediaries like access and service providers that enable Internet transmissions, so long as they do not “modify the information transmitted” or “interfere with the lawful use of technology”.\footnote{Recital 33 InfoSoc Directive. See also Bechtold, 2006, p. 372; von Lewinski & Walter, 2010, p. 1025. In CJEU, \textit{LSG}, ¶46, the Court clarified that “access providers which merely provide users with Internet access, without offering other services such as email, FTP or file sharing services or exercising any control, whether de iure or de facto, over the services which users make use of, must be regarded as ‘intermediaries’ within the meaning of Art. 8(3) of Directive 2001/29”.}

The second purpose is for a lawful use, meaning a use “authorised by the rightholder or not restricted by law”.\footnote{Recital 33 InfoSoc Directive. See also: CJEU, \textit{Murphy}, ¶¶167–173; CJEU, \textit{Infopaq II}, ¶¶42–43.} An “authorised” use includes both express and implied licences. Hence, when a work is made available online without restrictions on browsing, the copies made by the end-user during that process are excluded from the scope of the exclusive right.\footnote{Bechtold, 2006, p. 372; von Lewinski & Walter, 2010, p. 1025.} A use “not restricted by law” refers to temporary copies made in the process of enabling use permitted by the limitations in Article 5(2) and (3) InfoSoc Directive.\footnote{Art. 5(1)(a) InfoSoc Directive.}

Finally, the limitation applies solely if the temporary reproduction is devoid of “independent economic significance”. This condition—seen by some as an application of the three-step test—
allows only those reproductions having “no separate economic value on their own”, i.e. technically necessary and economically insignificant copies, which do not affect the economic potential of the reproduction right.\textsuperscript{1143}

In \textit{Murphy}, when analysing temporary copies created within the memory of the satellite decoder and on the television screen, the CJEU clarified that, for the limitation to have meaning,

That [economic] significance must also be independent in the sense that it goes beyond the economic advantage derived from mere reception of a broadcast containing protected works, that is to say, beyond the advantage derived from the mere picking up of the broadcast and its visual display.\textsuperscript{1144}

The CJEU considered the acts in question to constitute “an inseparable and non-autonomous part of the process of reception of the broadcasts transmitted containing the works”, which were “performed without influence, or even awareness, on the part of the persons thereby having access to the protected works”. These acts were not capable of generating an “additional economic advantage” and, therefore, did not have independent economic significance. This conclusion was considered consistent with the limitation’s objective of ensuring “the development and operation of new technologies”.\textsuperscript{1145}

In light of the above, it is possible to draw the following conclusions regarding downstream copies by end-users. First, “mixed forms” of copying that are not permanent but go beyond the concept of temporary, such as music playlists available offline for the subscription period or movies made available for a period of time subject to TPMs, do not satisfy the requirements of this limitation.\textsuperscript{1146}

Second, copies created during browsing by Internet users are within the scope of the limitation. They constitute temporary and transient (or even incidental, depending on duration) copies, which are an integral and essential part of the technological process of using the Internet, whose sole purpose is a lawful use (access to works available online), and have no independent economic significance.\textsuperscript{1147}

Third, copies made during the reception of streams are likely temporary (transient or incidental), and an integral and essential part of the technological process of streaming content. However, unless authorised by the rights holder directly or indirectly (via, e.g. an online service provider like Spotify), or made in the exercise of a different limitation (such as private use), they will probably be infringing.\textsuperscript{1148} This is because outside those scenarios it is difficult to argue that the copies (1) are made for a “lawful use” and (2) have no independent economic importance, as they affect the economic potential of the reproduction right and likely generate an additional economic advantage for users.


\textsuperscript{1144} CJEU, \textit{Murphy}, ¶175.

\textsuperscript{1145} CJEU, \textit{Murphy}, ¶¶176–179 (cit. ¶176).

\textsuperscript{1146} Depreeuw & Hubin, 2014, p. 77.

\textsuperscript{1147} von Lewinski & Walter, 2010, p. 1027. This conclusion is anticipated in recital 33 InfoSoc Directive.

\textsuperscript{1148} Depreeuw & Hubin, 2014, p. 73, concluding similarly.
Admittedly, the last conclusion is normatively debatable and legally uncertain. Contrary to the *ACI Adam* decision on the application of the private copying limitation to downloads, the CJEU has not ruled on the lawfulness of the source of streams in connection with Article 5(1) InfoSoc Directive. Absent technical restrictions, an Internet user receiving a stream is accessing a website and displaying it on screen. From that perspective, there are few differences from the on-screen copies made during browsing. However, due to the CJEU’s interpretation of the reproduction right, it is possible that mere reception of streams would not meet all the conditions of Article 5(1), read in light of the three-step test in Article 5(5).

In that respect, *Meltwater* emphasises that rights holders’ previous authorisation of the making available of the content online is essential to the finding that their legitimate interests were not affected, and that browsing did not constitute a conflict with the normal exploitation of their works.\(^\text{1149}\) In the case of stream reception from unauthorised sources, that authorisation does not exist. *ACI Adam* and its progeny seem to go in this general direction when excluding copies of works from unauthorised sources from the scope of the private copying limitation to prevent a violation of the second and third conditions of the three-step test.\(^\text{1150}\)

If the CJEU found this requirement of source in the private copying limitation in the absence of any wording to that effect, it is not a stretch to consider it would find a similar requirement where Article 5(1) InfoSoc Directive mentions “lawful use”. (On this point, it is noted that where the lawful use requirement is tied to the application of the private copying limitation, *ACI Adam* indirectly reduces the scope of the temporary and transient copying limitation.\(^\text{1151}\)) Furthermore, given the emergence of access-based online business models relying on streaming technology, it is possible to foreshadow a conflict with the normal exploitation, in violation of the second step of the test. On balance, a cautious interpretation suggests that the reception of streaming content by end-users is likely excluded from the scope of Article 5(1), despite the harshness of this outcome.

Importantly, if an ACS for non-commercial use is put in place, any temporary *downstream copies* made in the context of browsing or stream reception will be ancillary to lawful use and have no independent economic significance (as the system entails remuneration).

Finally, Depreeuw and Hubin argue that certain upstream copies transmitted to user devices might be exempted under this limitation. This would occur if the copies are temporary and incidental to the principal act of exploitation of a work—the communication to the public of streams “as catchup service or services of download”—, as the copies would be an essential and integral part of the technological process of transmission. Of course, this presupposes these acts are authorised by rights holders (and thus “lawful”) and that their economic significance derives from the main exploitation act of making available.\(^\text{1152}\) However, as the authors admit, that conclusion is limited to specific technology configurations; these, it is added, seldom occur for non-commercial acts by end-users.


\(^{1150}\) See infra 4.4.3.6.

\(^{1151}\) Depreeuw & Hubin, 2014, p. 73.

\(^{1152}\) Depreeuw & Hubin, 2014, pp. 71–72.
4.4.3 Private Copying

To the extent the right of reproduction applies to downloading, stream capture and uploading, private copying is the most relevant limitation under analysis here. In fact, many legal licence ACS rely on an extended version of this limitation.\(^{1153}\) Article 5(2)(b) InfoSoc Directive applies to reproductions made on all technologies and media, whether analogue or digital.\(^{1154}\) It covers acts of reproduction of all subject matter, with the exclusion of software and databases.\(^{1155}\)

The provision is subject to a number of cumulative requirements, which have been the object of a rich body of CJEU case law in Padawan, Stichting de Thuiskopie, Luksan, VG Wort, Amazon.com, ACI Adam, Copydan, Reprobel, Austro-Mechana, and EGEDA II.\(^{1156}\) Due to the complexities of this case law and the importance of the limitation for the study of ACS, this section examines in detail its scope and requirements with a view to clarifying which online activities are privileged by the limitation.

4.4.3.1 Private Use\(^{1157}\)

First, the limitation can only apply for private use, an expression left undefined in the InfoSoc Directive. There is a consensus that “private” requires beneficiaries of the provision to be natural persons making reproductions for their personal purposes and within their private sphere, which may include a broader or narrower circle of family and friends.\(^{1158}\)

This excludes wider concepts in national law, such as “personal use” and “own use”, which may include professional and commercial use.\(^{1159}\) Consequently, acts carried out by natural persons on behalf of legal persons are not exempted.\(^{1160}\) However, copies made on behalf of individuals and/or for their private use may fall in the private use category.\(^{1161}\)

Less clear is the case of third party copying by a legal person acting as a commercial provider that facilitates private copying by a natural person for private purposes. Here, it seems that Member States must regulate the effect of the intervention of intermediaries and service providers in the act of reproduction.\(^{1162}\) Undeniably, such differences have led to divergent

\(^{1153}\) Cf. supra 3.3.5.2.


\(^{1155}\) Art. 1(2)(a) and (e) InfoSoc Directive. This is despite recital 38 solely mentioning audio, visual and audio-visual material. See also: Eechoud et al., 2009, p. 117; and von Lewinski & Walter, 2010, p. 1031, for an explanation of the historical background of this provision and the articulation of the recital with lit. (b). On the latter point, see also supra 2.3.

\(^{1156}\) At the time of writing, the following cases are pending: CJEU, Reference for Preliminary Ruling, Case C-110/15, Nokia Italia; CJEU, Reference for Preliminary Ruling, Case C-265/16, VCAST Limited v R.T.I. SpA.

\(^{1157}\) This paragraph relies on and develops my analysis in Poort & Quintais, 2013, pp. 207–208.

\(^{1158}\) See Poort & Quintais, 2013, p. 207, and von Lewinski & Walter, 2010, p. 1032, noting that the term “private use” is present elsewhere in the acquis and international copyright law, namely in Art. 15(1)(a) Rental Right Directive and Art. 6(2)(a) and 9(a) Database Directive. See also Depreeuw & Hubin, 2014, p. 54.


national implementation.\textsuperscript{1163} The CJEU tackled the issue in \textit{Copydan}, as explained below (see \textit{infra} 4.4.3.7).

This brief sketch suffices to highlight the legal certainty challenges facing national courts in fixing the meaning of “private”, especially in light of its potential application in the digital environment (e.g. within social networking platforms) and against a dynamic concept of “public” in the \textit{acquis}.\textsuperscript{1164} For instance, is uploading a copy of a work to a cloud locker accessible only to a number of close friends and family a “private” use? How big does that group have to be before the act loses its privileged nature?

\subsection*{4.4.3.2 Non-Commercial\textsuperscript{1165}}

A second requirement to qualify under the limitation is that the reproduction must not be for directly or indirectly commercial ends. The expression is not defined by the directive and is further confused by the fact that, whilst private acts are usually non-commercial, non-commercial acts can fail to qualify as private.\textsuperscript{1166}

As noted throughout this dissertation, the term “commercial” includes a wide range of meanings, from “economic” to “for profit”. Furthermore, the scope of non-commerciality is complex to define, especially in connection with online use.\textsuperscript{1167} At the very least, it was argued, commercial should not be a synonym for economic, as a private copying limitation excluding all use with economic significance is devoid of meaning and application.\textsuperscript{1168} Such a limitation would therefore likely contravene the principle of effectiveness.

National legislators and courts have attempted to define this term by setting forth subjective and objective criteria, namely the infringing intent of the copier—meaning actual or constructive knowledge, linked to a profit-making aim—and the definition of a specific number of admissible private copies.\textsuperscript{1169} However, it is challenging to apply these criteria to define indirect commerciality in digital private copying.\textsuperscript{1170} This complexity also exists in the context of ACS, as mentioned in the previous chapter.\textsuperscript{1171}

\begin{footnotes}
\footnotetext[1163]{Karapapa, 2012, pp. 53–59, with an overview.}
\footnotetext[1164]{Poort & Quintais, 2013, p. 208. See also Karapapa, 2012, pp. 49–78, with a detailed analysis. Karapapa proposes a test for the determination of the private character of the copyright use, which aims at assessing the relationship between the copier and the audience, the perception of the latter by the right holder vis-à-vis the commercial exploitation of the work, and the (private) nature of the place where the use is made. For the concept of “public” in the \textit{acquis}, see \textit{supra} 4.3.2.1.2.}
\footnotetext[1165]{This paragraph relies on and develops my analysis in Poort & Quintais, 2013, p. 208.}
\footnotetext[1167]{See \textit{supra} 1.2 and 3.4.2. See also Poort & Quintais, 2013, p. 208.}
\footnotetext[1168]{See \textit{supra} 3.4.2.}
\footnotetext[1169]{Poort & Quintais, 2013, p. 208. See also Karapapa, 2012, p. 91, noting that the examination of the copier’s intent of commercial exploitation means that the judicial test for non-commerciality is not the exact counterpart of the definition of commerciality. N.B. Art. 6(4), second subparagraph InfoSoc Directive allows rights holders to take “adequate measures regarding the number of reproductions in accordance with these provisions” (Arts 5(2)(b) and 5(5)).}
\footnotetext[1170]{Poort & Quintais, 2013, p. 208. For attempts in legal scholarship, see Depreeuw & Hubin, 2014, p. 55; Karapapa, 2012, p. 98.}
\footnotetext[1171]{See \textit{supra} 3.4.2.}
\end{footnotes}
In this respect, it is difficult to clarify the commercial nature of the many types of online use that qualify as copyright reproductions. The exclusive right extends, for example, to making copies of TV broadcasts for time-shifting, cloning copies of compact discs or digital versatile/video discs for playback or to share with family and friends, making backup copies of works, and downloading and storing works from authorised and unauthorised Internet sources, as well as making subsequent copies thereof.\footnote{Poort & Quintais, 2013, p. 216.}

Furthermore, it is unclear the extent to which the intervention of online service providers (e.g. vis-à-vis online “personal video recorders” or virtual storage space) enabling end-user copies but acting as commercial intermediaries—by charging subscription fees or generating advertisement revenues—affects the “non-commercial” nature of the act of reproduction and, consequently, the application of the limitation.\footnote{Depreeuw & Hubin, 2014, p. 55. See infra the discussion at 4.4.3.7.}

4.4.3.3 Fair Compensation

If the limitation is implemented by the Member State, it must be accompanied by fair compensation. According to recital 35 InfoSoc Directive, the “form, detailed arrangements and possible level” of the compensation depend on the “circumstances of each case”; one significant criterion to determine these circumstances is “the possible harm... resulting from the act in question”. Furthermore, if rights holders have already received payment for the use (e.g. through licence fees), it is possible that no additional (or double) payment is due.\footnote{Recital 35 InfoSoc Directive.}

Therefore, the criterion of harm forms the basis of the concept of fair compensation.\footnote{CJEU, \textit{Padawan}, ¶¶38–42. See also Poort & Quintais, 2013, p. 208, noting the difference from the concept of equitable remuneration in Art. 8(2) Rental Right Directive. See also supra 2.2.4.} This is a corollary of the fact that fair compensation is a “recompense for the harm suffered by the author” for the introduction of the limitation.\footnote{CJEU, \textit{Padawan}, ¶¶40, 42; CJEU, \textit{Stichting de Thuiskopie}, ¶24; CJEU, \textit{Reprobel}, ¶36.}

As a rule, the recompense should focus on the “actual harm” suffered. Only if that proves impossible, for example because the harm remains unknown at the moment the tariff is set, can the calculation use as a reference point the “potential harm”.\footnote{CJEU, \textit{Reprobel}, ¶¶69–71, 82.} Nevertheless, the final amount of compensation must be adjusted to reflect the actual harm (e.g. through reimbursement mechanisms), avoiding scenarios of overcompensation contrary to the objective of fair balance between rights holders and users set forth in recital 31 InfoSoc Directive.\footnote{\textit{Ibid.}, ¶¶84–88.}

As noted, the limitation interfaces with the regulation of TPMs. Article 5(2)(b) InfoSoc Directive requires that the method for calculation of the “level” of fair compensation takes into consideration the application of TPMs in Article 6 of the directive.\footnote{Recital 35 InfoSoc Directive.}

In “certain situations where the prejudice to the rightholder would be minimal”, no obligation to pay fair compensation may arise.\footnote{Member states have a wide margin of discretion in setting}
the threshold for when the prejudice caused to rights holders is to be considered minimal, provided the definition of that \textit{de minimis} threshold is consistent with, \textit{inter alia}, the principle of equal treatment in Article 20 Charter.\textsuperscript{1181}

Fair compensation is an autonomous concept of EU law, subject to uniform interpretation in countries that have implemented the provision.\textsuperscript{1182} According to the CJEU, this qualification is required by the InfoSoc Directive’s objectives of establishing a high level of protection, ensuring a functioning internal market, and balancing the rights and interests of rights holders and users.\textsuperscript{1183}

In light of these objectives and the fact that the directive imposes on Member States an obligation of result regarding the actual recovery of fair compensation, the respective right not only vests in the individual rights holder, but must also be qualified as unwaivable.\textsuperscript{1184}

Importantly, fair compensation is only due to the holders of the exclusive reproduction right in Article 2 InfoSoc Directive: authors, performers, phonogram producers, film producers, and broadcasting organisations. Only they can suffer harm requiring compensation and not subsequent exploiters, such as publishers.\textsuperscript{1185}

Member States are left with some discretion regarding the determination of the compensation system, which is however limited by recitals 35 and 38 InfoSoc Directive, the three-step test, and the principle of effectiveness.\textsuperscript{1186}

\textbf{4.4.3.4 Rights Holders’ Authorisation}\textsuperscript{1187}

One of the complex issues in determining the scope of private copying relates to the effect of the explicit or implicit authorisation of rights holders on fair compensation. On this topic, the main CJEU judgments are \textit{VG Wort} and Copydan.\textsuperscript{1188}

In \textit{VG Wort}, the Court states that if the acts of copying by end-users fall within the scope of a limitation, any authorisation of the same by rights holders is irrelevant for the application or calculation of fair compensation.\textsuperscript{1189} If Member States implement the limitation, the respective fair compensation must be based on the harm caused to rights holders by unauthorised reproductions.\textsuperscript{1190} Activities covered by the limitation are permissible regardless of rights holders’ authorisation, which is “devoid of legal effects”; therefore, that authorisation does not

\textsuperscript{1180} \textit{Ibid}. See Poort & Quintais, 2013, p. 208, and Bechtold, 2006, p. 374, noting that both time and space-shifting might be covered by such \textit{de minimis} cases.


\textsuperscript{1185} CJEU, \textit{Reprobel}, ¶¶44–49.


\textsuperscript{1187} This paragraph relies on and develops my analysis in Poort & Quintais, 2013, pp. 210–211; Quintais, 2015a.


affect the potential harm caused by the copying activities and cannot be considered in the calculation of the compensation.\textsuperscript{1191}

When \textit{Copydan} came around, the AG Opinion in that case departed somewhat from \textit{VG Wort} and considered that the CJEU left open the question of whether levies are due if rights holders have made available a work online subject to payment that includes fair compensation (e.g. a licence fee for the download of a song from an authorised platform). In light of the principle of fair compensation and the directive’s objective of fair balance, the AG posited that no levy should be due where the authorised content had already been subject to “a payment or other form of fair compensation”, as that would lead to an unjustified double payment by users.\textsuperscript{1192}

That conclusion echoes the recommendation of Mediator Vitorino on the topic.\textsuperscript{1193} It also opened the door for what Peukert called a “two-tier system”, where levies would be charged mostly for works lawfully made available online for no fee and unrestricted by TPMs. Interestingly, this would mean a significant change of direction for CMOs in the field, who would now be responsible for fostering a “sharing culture”.\textsuperscript{1194}

The \textit{Copydan} judgment disagreed with the AG and re-stated the \textit{VG Wort} doctrine, clarifying that it also applies where a work is made available subject to payment.\textsuperscript{1195} However, because the authorisation in question is devoid of legal effects, the rights holder should not be entitled to any additional remuneration for that act:

\begin{quote}
Since, in circumstances such as those set out in paragraph 65 above, such authorisation is devoid of legal effects, it cannot, of itself, give rise to an obligation to pay remuneration of any kind in respect of the reproduction, for private use, by the user of the files concerned to the rightholder who authorised such use.\textsuperscript{1196}
\end{quote}

The “circumstances” mentioned in the citation relate to the optional nature of the limitation, meaning the choice by Member States to implement the limitation. The most straightforward interpretation of this statement is that Member States choosing to implement the limitation exclude from its material scope any authorisation from rights holders for acts of private copying. No “two-tier system” is possible and the positions of Mr. Vitorino and the AG are rejected. Also, one might add, the possibility of contractual disposition of the limitation outside the cases expressly allowed in the InfoSoc Directive becomes difficult to accept. This seems to be the CJEU’s method of avoiding the problem of double payments.\textsuperscript{1197}

However, it is likely that rights holders will price into the purchase of content the possibility of private copies, causing consumers to pay twice for private copies. This outcome contradicts the principle of \textit{de minimis} harm. If rights holders have already received payment for private copies

\begin{footnotes}
\item[1192] \textit{Opinion AG in Copydan}, ¶¶57–68. See also Quintais, 2015a.
\item[1193] Vitorino, 2013, pp. 6–8.
\item[1194] Quintais, 2014, pp. 6–8, 2015a, 2015b, pp. 78–79.
\item[1195] CJEU, \textit{Copydan}, ¶65, citing CJEU, \textit{VG Wort}, ¶37.
\item[1196] CJEU, \textit{Copydan}, ¶66. See also Quintais, 2015a.
\item[1197] Quintais, 2015a.
\end{footnotes}
they suffer no further (or only negligible) harm. Therefore, Member States should be free to exempt such use from levies.\textsuperscript{1198}

To avoid double payments, Member States could consider that, because rights holders price private copying acts into the purchase of content, paid authorised use causes only \textit{de minimis} harm, meaning that no fair compensation is due. If properly defined, this solution would be within their margin of discretion and respect the principle of equal treatment (Article 20 Charter), while achieving a fair balance between the interests of rights holders and users.\textsuperscript{1199}

\subsection*{4.4.3.5 Application of Technological Protection Measures\textsuperscript{1200}}

The relationship of the private copying limitation with TPMs was introduced above.\textsuperscript{1201} The CJEU has addressed the issue in \textit{VG Wort}, \textit{ACI Adam}, and \textit{Copydan}.\textsuperscript{1202} In the Court’s view, TPMs allow rights holders to restrict unauthorised acts and help define the scope of the private copying limitation. The limitation is a legislative permission from Member States, who must therefore ensure its proper application. This includes preventing acts that rights holders do not authorise.\textsuperscript{1203}

Because TPMs are voluntary, even where they are available but not applied, the condition of fair compensation remains applicable.\textsuperscript{1204} However, Member States may decide that application of such measures has an impact on the level (i.e. calculation and amount) of fair compensation so that “rightholders are encouraged to make use of them and thereby voluntarily contribute to the proper application of the private copying exception”\textsuperscript{1205}

Here, it is important to remember that the \textit{Nintendo} Court stated that legal protection of TPMs must respect the principle of proportionality: their application by rights holders should be suitable to achieve the goal of preventing unauthorised acts and not go beyond what is required for that purpose.\textsuperscript{1206}

The emphasis on fair compensation as a means to encourage voluntary adoption of technological measures and proper delimitation of the limitation introduces the possibility that TPM-ed works are subject to higher levies than unrestricted works. This odd outcome seems prejudicial to end-users and the InfoSoc Directive’s fair balancing aim.\textsuperscript{1207}

Instead, it would be logical for application of these measures to result in lower or even no levies. This is because the possibility of engaging in private copying is reduced, making the prejudice to

\begin{itemize}
\item \textsuperscript{1198} A less obvious interpretation is that it is up to national law to exclude from its material scope any authorisation from rights holders for those acts. Where it does not make this exclusion, the authorisation of rights holders is not devoid of legal effects and it is possible to set aside fair compensation, triggering a two-tier system in those countries. See Quintais, 2015a.
\item \textsuperscript{1199} Quintais, 2015a.
\item \textsuperscript{1200} This paragraph relies on and develops my analysis in Quintais, 2015a.
\item \textsuperscript{1201} See supra 4.4.1.2.
\item \textsuperscript{1202} CJEU, \textit{VG Wort}, ¶¶52–57; CJEU, \textit{ACI Adam}, ¶¶43–44; CJEU, \textit{Copydan}, ¶¶68–73.
\item \textsuperscript{1203} CJEU, \textit{VG Wort}, ¶¶48–52. See also Quintais, 2015a.
\item \textsuperscript{1204} CJEU, \textit{VG Wort}, ¶¶48–57. See also: \textit{Opinion AG in VG Wort}, ¶104; CJEU, \textit{ACI Adam}, ¶¶43–44; Poort & Quintais, 2013, p. 211; Quintais, 2015a.
\item \textsuperscript{1205} \textit{Opinion AG in Copydan}, ¶¶69–80; CJEU, \textit{Copydan}, ¶¶68–73; CJEU, \textit{VG Wort}, ¶58. See also Quintais, 2015a.
\item \textsuperscript{1206} CJEU, \textit{Nintendo}, ¶¶29–31. See also Quintais, 2015a.
\item \textsuperscript{1207} Quintais, 2015a.
\end{itemize}
rights holders minimal. Here, again, application of the *de minimis* criterion may provide an escape valve to prevent unwarranted payments by consumers.\textsuperscript{1208}

### 4.4.3.6 Lawfulness of Source\textsuperscript{1209}

In *ACI Adam*, the CJEU ruled that the private copying limitation, when interpreted in light of the three-step test, can only privilege reproductions made from lawful sources. This interpretation was later confirmed in *Copydan* and *Reprobel*.\textsuperscript{1210}

These judgments are important because they qualify multiple daily acts of end-users—such as downloading and streaming entertainment content from unlicensed Internet sites—as clearly infringing, thereby extending the scope of the exclusive right of reproduction. Furthermore, the decisions impact the calculation of levies and interpretation of the three-step test.

A preliminary question to address here is what constitutes an unlawful source. In a survey of twenty-seven Member States prior to *ACI Adam*, a WIPO report stated that most laws prohibited reproduction from unlawful sources, which it identified as including “peer-to-peer network, newsgroups, torrent sites and the like, where music and films have been uploaded without consent from the rights holders”.\textsuperscript{1211}

A comparison of the survey with commentaries on national laws leads to a different conclusion. In fact, only a small number of Member States’ laws expressly and unequivocally excluded copies from unlawful sources from the limitation’s scope. How that is made effective in practice is not clear. In all other cases, the condition is either absent or derived by certain stakeholders from ambiguous requirements, such as “lawful publication” (which seems to be related to the right of disclosure instead).\textsuperscript{1212}

For example, in Germany, the scope of the limitation is restricted to private copies that have not “obviously been produced or made publicly available illegally”; what exactly constitutes “obvious” remains to be clarified by case law.\textsuperscript{1213}

Similarly, since 2006, Spanish copyright law has limited the scope of private copying to copies “obtained from works that have been lawfully accessed”, a language Xalabarder deems “directly intended to rule out P2P downloading” but that does not entail the requirement of ownership of the copy.\textsuperscript{1214} In a 2014 amendment, the scope of the limitation was further reduced to solely cover reproductions made “from copies of works ‘acquired by commercial purchase’ or received by radio or tv broadcast”.\textsuperscript{1215}

\textsuperscript{1208} Quintais, 2015a.
\textsuperscript{1209} This paragraph relies on and develops the analysis in Quintais, 2015b.
\textsuperscript{1211} WIPO, 2014, p. 4.
\textsuperscript{1212} See Quintais, 2015b, pp. 79–82, for a detailed analysis.
\textsuperscript{1213} See Art. 53(1) German Copyright Act. See also Dreier & Specht, 2012, p. 445; WIPO, 2014, p. 63; WIPO & Stichting de Thuiskopie, 2016, p. 81.
\textsuperscript{1214} See Xalabarder, 2012, p. 941 (n.42), 949, 952. See also WIPO & Stichting de Thuiskopie, 2016, pp. 150–151.
\textsuperscript{1215} See Xalabarder, 2014.
In France, a 2011 amendment added the requirement of lawful access to a protected work for the application of the private copying limitation (“copies ou reproductions réalisées à partir d’une source licite”).

Denmark and Sweden amended their copyright acts in the 2000s to the effect that the limitation does not extend to copies made “on the basis of an unlawful representation of a work or an illegal circumvention of a technological measure”, an amendment claimed to result from the three-step test. The Danish Copyright Act further prohibits digital private copying “on the basis of a copy that has been lent or hired” without the consent of the author.

For its part, Italian law only allows private copying reproductions to be made by the natural person who has acquired the lawful possession of copies of the work/subject matter (“acquisito possesso legittimo di esemplari dell'opera o del materiale protetto”) or had “lawful access” to it (“accesso legittimo”).

In light of these different national implementations, the mechanism of preliminary reference provided the CJEU with an opportunity to offer decisive guidance on this key aspect of the limitation’s scope, starting with ACI Adam. Examining the Court’s jurisprudence in this area, it is noteworthy that unlawful sources are not defined beyond the scenario of works made available to the public without the consent of rights holders. In fact, when asked to address unlawful sources “by some other means” the Copydan Court found the question inadmissible because it “failed to provide sufficient information relating to the nature of the reproductions to which the question submitted relates”, thereby preventing the Court from giving a useful answer.

On the issue of whether unauthorised sources are included in the scope of the limitation, both Copydan and Reprobel closely track ACI Adam. In the latter judgment, the CJEU’s analysis departed from recital 44 InfoSoc Directive and its reference to the possibility of reducing the scope of limitations in connection with “certain new uses” of copyright content; contrariwise, nothing in the directive mentions the possibility of extending the scope of limitations. Furthermore, recital 22 InfoSoc Directive indicates that the objective of support for the dissemination of culture should not be achieved by “sacrificing strict protection of rights or by tolerating illegal forms of distribution of counterfeited or pirated works”.

On that basis, and despite the directive’s silence on the issue, the Court applied the doctrine of strict interpretation to its reading of the three-step test. The conclusion from this analysis was that reproductions from unlawful sources may infringe the second and third steps of the test.

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1220 CJEU, Copydan, ¶74, 79.

1221 Ibid., ¶92–95.

1222 CJEU, ACI Adam, ¶25–27.

1223 Ibid., ¶36; CJEU, Reprobel, ¶59.

1224 CJEU, ACI Adam, ¶31, 38. CJEU, Copydan, ¶76; CJEU, Reprobel, ¶59.
On the second step, the Court states that allowing reproductions from unlawful sources encourages piracy, which will “inevitably” reduce revenues from lawful sources and conflict with the normal exploitation of works.\(^\text{1225}\) Put differently, there would be a substitution effect between reproductions made from lawful versus unlawful sources. That assertion, which seems essential to the ruling and must rely at least partially on factual analysis, is not further explained.

Regarding the third step, the Court argues that the inclusion of unlawful sources in the scope of the limitation would force rights holders to tolerate infringements accompanying the making of private copies, thereby unreasonably prejudicing their legitimate interests.\(^\text{1226}\) There is some circularity to this argument, which relies on strict interpretation but ignores the historic role of the remuneration element (here: fair compensation) in satisfying the third step condition.\(^\text{1227}\) On this basis, it is concluded that Article 5(2)(b) InfoSoc Directive cannot cover private copies made from unlawful sources.\(^\text{1228}\)

Following that rationale, national laws that do not exclude reproductions from unlawful sources cannot ensure the proper application of the limitation. Such a conclusion, the CJEU posits, is independent of, and remains unaffected by, the non-availability of effective TPMs to prevent unauthorised reproductions.\(^\text{1229}\)

Furthermore, when interpreting the condition of fair compensation in light of previous case law and recital 31 InfoSoc Directive, a levy system which does not distinguish between the source of copies fails to respect the fair balance between the rights and interests of authors and users that the InfoSoc Directive intends to safeguard.\(^\text{1230}\) That is because under such a system the “harm” on the basis of which fair compensation is calculated includes “an additional, non-negligible cost” for reproductions made from unlawful sources. That cost is ultimately passed on to consumers purchasing levied goods. As a result, those consumers are “indirectly penalised”, as they will contribute towards compensating for harm caused by reproductions not allowed under the directive.\(^\text{1231}\)

In sum, the joint reading of the private copying limitation and three-step test provisions led the CJEU to conclude that national laws that do not distinguish between lawful and unlawful sources for the act of reproduction are not in conformity with EU law.\(^\text{1232}\) Still, it remains unclear whether copies made from legally uncertain sources can be subject to fair compensation.\(^\text{1233}\)

\(^{1225}\) CJEU, *ACI Adam*, ¶39.


\(^{1227}\) On this role, see *supra* 2.3.

\(^{1228}\) CJEU, *ACI Adam*, ¶41; CJEU, *Reprobel*, ¶57.

\(^{1229}\) CJEU, *ACI Adam*, ¶¶45–46.

\(^{1230}\) *Ibid.*, ¶¶47–54, 57. Recital 31 InfoSoc Directive mentions the need to adjust the degree of harmonisation of exceptions and limitations in light of cross-border exploitation of works and the new electronic environment in light of the objectives of ensuring “the proper functioning of the internal market” and achieving a “fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users”.


\(^{1232}\) CJEU, *ACI Adam*, ¶58. See also CJEU, *Copydan*, ¶75.

\(^{1233}\) The AG in Copydan seems to think they should not. Cf. Opinion AG in *Copydan*, ¶¶84–85.
4.4.3.7 Third Party Devices Used for Copying

Another relevant issue relates to how the private copying limitation deals with copies made by an individual by or with the aid of a device belonging to a third party. In Copydan, the referring national court exemplified such use as copies made by an individual from a third party’s DVD, CD, MP3 player, computer or other device. In theory, this third party can be a friend, acquaintance, or colleague, as well as a service provider. Moreover, the content in question can be acquired with or without the authorisation of the rights holder.

Copydan’s approach to this issue is not clear. The Court notes that Article 5(2)(b) InfoSoc Directive makes no reference to “the legal nature of the connection, such as the right to property” between the individual that benefits from it and the device used to make copies. In other words, nothing is said about use of third party devices to make copies.

In that light, following the principle of strict interpretation and taking into account that the directive aims at partial harmonisation, the use of third party devices for private copying is outside the scope of the provision. One could legitimately ask: is it strict interpretation when you allow third party devices for private copying, therefore extending the possibilities available for making copies?

The response is that the Court argues for a different meaning for strict interpretation, interpreting ACI Adam and Melzer (a non-copyright case) by analogy, and stating that a limitation “cannot give rise to an interpretation going beyond the cases expressly envisaged”. Why the same understanding was not applied to the un/lawful nature of the source remains unclear.

Consequently, says the Court, Article 5(2)(b) should not be read in light of the three-step test in Article 5(5). This is because the test “is not intended either to affect the substantive content of provisions falling within the scope of Article 5(2) of that directive or, inter alia, to extend the scope of the different exceptions and limitations provided for therein”. Put differently, the test does not apply to use of third party devices because that topic is outside the harmonised scope of the limitation, and it is in relation to this scope that the test operates.

The result is that national legislation that imposes a levy on third party devices used for private copying is compatible with the InfoSoc Directive. This is because the choice to levy these

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1234 This paragraph relies on and develops my analysis in Quintais, 2015a.
1235 CJEU, Copydan, ¶16. For the arguments of the AG, see Opinion AG in Copydan, ¶¶86–96. See also Quintais, 2015a.
1236 CJEU, Copydan, ¶¶80–86.
1237 Quintais, 2015a.
1238 CJEU, Copydan, ¶¶87–88.
1239 Quintais, 2015a.
1240 CJEU, Copydan, ¶87. N.B. Melzer relates to judicial cooperation in civil matters and already applies this reading by analogy to the Court’s judgement in Zuid-Chemie.
1241 Quintais, 2015a.
1242 CJEU, Copydan, ¶90.
1243 Quintais, 2015a.
1244 CJEU, Copydan, ¶91.
devices is outside the scope of the directive and, thus, within the margin of discretion of Member States.\textsuperscript{1245}

If a levy is applied, the use of such devices cannot be qualified as copyright infringement. This has some interesting consequences. If a user copies songs from a friend’s laptop but those songs were downloaded from The Pirate Bay, the copies come from an unlawful source and are not covered by the limitation. However, the device is subject to a levy and those copies may thereby be exempted, which seems incongruous. It is up to national laws to regulate this intersection between unlawful source and copying from third party devices. In doing so, however, it is difficult to imagine that end-users will not end up paying levies for copies made from unlawful sources, i.e. for private copies they are not allowed to make.\textsuperscript{1246}

Also, \textit{Copydan} is bound to have an effect on intermediary or secondary liability for the provision of such devices or related services. An individual setting up a service for “do-it-yourself” copies is providing a third party device for the user to make private copies. Unless national law prohibits it, such service should not give rise to liability. However, it is easy to imagine that Member States will envisage different solutions to this problem, with potential negative effects on the internal market for the provision of these services.\textsuperscript{1247}

The issue is of particular complexity in relation to “do-it-yourself” copies in the digital environment, namely cloud services that provide technical means for users to make or request their own copies, such as virtual storage spaces and online “personal video recorders”. Member States’ laws already qualify copies made by third parties differently; furthermore, the identification of the copier in the context of personal video recorder services has been subject to contrasting decisions in France and Germany.\textsuperscript{1248} In this respect, \textit{Copydan} leaves the status quo untouched, with the abovementioned negative effects.\textsuperscript{1249}

This uncertainty extends to the possibility of levying cloud services for making private copies (the upload copies) covered by the limitation, a topic already broached in a 2014 resolution by the European parliament.\textsuperscript{1250} If realised, the resulting regime would approximate private copying to an ACS for non-commercial digital reproductions by end-users.

\textbf{4.4.3.8 Application to Activities of Internet Users}

For the purposes of this dissertation, private copying is the most relevant limitation in the InfoSoc Directive. It can apply to certain acts of downloading, (down) streaming, stream capture/ripping and uploading by end-users. Furthermore, some of its conditions are susceptible of transplant to non-voluntary ACS, namely the non-commercial purpose or character of the use and fair compensation.

\textsuperscript{1245} Quintais, 2015a.
\textsuperscript{1246} Quintais, 2015a.
\textsuperscript{1247} Quintais, 2015a.
\textsuperscript{1248} Depreeuw & Hubin, 2014, pp. 53–54.
\textsuperscript{1249} Quintais, 2015a.
\textsuperscript{1250} EP Resolution Private Copying Levies 2014, ¶30. N.B. the issue of compatibility with EU law of a compulsory licensing system for cloud services for the remote video recording of private copies of copyright works is the subject of a preliminary reference to the CJEU. See CJEU, Reference for Preliminary Ruling, Case C-265/16, \textit{VCAST Limited v R.T.I. SpA}.  

However, the interpretation of the limitation by the CJEU results in a reduced space for the copying activities of Internet users. This is so because the limitation does not apply to copies made from unauthorised sources and is restricted in the context of works made available online on agreed contractual terms subject to TPMs.

Thus, digital reproductions of works made through downloading and stream capture are covered by the private copying limitation only if originating from an authorised source. That will be the case when online service providers expressly authorise the reproduction. Authorised online streaming and downloading platforms, it is noted, typically make works available subject to agreed contractual terms and TPMs, which triggers the absolute circumvention prohibition in Article 6(4) InfoSoc Directive. 1251 (In this case, there is also a high risk of double payments by end-users, which are subject to the licence fee and the levy.)

That authorisation is usually clear to a subscriber of streaming services (e.g. Spotify and Netflix) through the user interface and its technical restrictions. The same does not apply to downloading platforms (e.g. Apple’s iTunes Store and Amazon Music), where the user enjoys an “ownership” experience, but is typically subject to contractual restrictions on the subsequent use of the download copy in the form of a “license to use”. 1252 In both cases, reproduction by the end-user is limited by technology and contract, which together help define the scope of the limitation and applicable fair compensation. Copies made by that same user outside those boundaries are unauthorised and, after _ACI Adam_, appear to be outside the limitation’s scope, even if that prohibition is impossible to enforce.

Outside those cases, the limitation also applies when the work is made available online without technical restrictions, for download or streaming with the express authorisation of the rights holder, for example on the author’s homepage, or under a Creative Commons licence. In these cases, because the TPM regime does not apply and the source of the reproduction is lawful, it is arguable that _VG Wort_ and _Copydan_ leave no room for contractual restrictions on private copying, provided fair compensation is paid. 1253

However, absent express authorisation from the rights holder or their representative—or application of national doctrines of implied consent—end-users face legal uncertainty. After _ACI Adam_ and its progeny, many online reproductions by Internet users probably originate from unauthorised sources, a term that may include all content not lawfully acquired, accessed or made available by the rights holder. As for the unauthorised source of an act of communication to the public, it will be nearly impossible for individuals to ascertain the legal status of the source of reproduction. 1254

Consequently, initial and subsequent reproductions (downloads) made in the context of most torrent file sharing networks, newsgroups, social networks or cyberlockers, will likely not qualify as private copies. The same holds true for most acts of stream capture, which will in

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1251 See Jutte, 2015, pp. 7–11, for an analysis of terms of use and restrictions in online music stores and streaming services.
1252 See Jutte, 2015, pp. 4–6.
1253 See _supra_ 4.4.3.4. See also Jutte, 2015, p. 12.
1254 See _supra_ 4.3.2., on unauthorised sources and the right of communication to the public.
addition risk violating the prohibition on circumvention of TPMs. Hence, such acts will frequently infringe the right of reproduction.\textsuperscript{1255}

Finally, uploading copies of works to a cloud storage locker can theoretically constitute private copying, subject to the following conditions. First, access to the locker cannot be public. Second, under the applicable law, the copier must be the individual and not the third party service provider; alternatively, that third party may be authorised to make the copy on behalf of a natural person without prejudicing the application of the limitation.\textsuperscript{1256} Third, the copy in question is from an authorised source and does not result from circumvention of TPMs.\textsuperscript{1257}

If these requirements are met, Internet users should not be infringing. It will then be incumbent upon Member States to define whether their levy systems already provide fair compensation for such copies (e.g. by levying the media/equipment used therefor) or if it is justified to levy cloud services, which does not currently happen. Failing these requirements, the upload activities probably infringe the reproduction right or, if the upload copy is accessible to the public, the right of communication to the public.\textsuperscript{1258}

\textbf{4.4.4 Limitations Susceptible of Application to Digital Adaptations}

As noted above (at 4.2.7), digital adaptations are part of Internet users’ daily online activities. Although this dissertation does not focus on the non-harmonised right of adaptation, digital adaptations can trigger the application of certain harmonised exclusive rights and limitations in the InfoSoc Directive.\textsuperscript{1259} It is therefore important to address these acts in the context of a potential ACS, even if in practice they are not valued by Internet users as much as the remaining forms of online use examined in this chapter.\textsuperscript{1260}

Digital adaptations can involve three exclusive rights: reproduction of the pre-existing work, communication to the public of the pre-existing and derivative works, and adaptation \textit{per se}.\textsuperscript{1261} Reproduction and adaptation are not synonyms and can be distinguished as follows:

\begin{quote}
while reproduction concerns the copying of the particular shape of a work determined by the author, the adaptation right covers changes to the underlying corpus mysticum…to the intellectual substance of work.
\end{quote}

\textsuperscript{1255} Depreeuw & Hubin, 2014, pp. 28–29; von Lewinski, 2005, pp. 7–8. Arguing that extending the limitation to stream-ripping would contravene the three-step test, see Jutte, 2015, pp. 14–18. See also Goldstein & Hugenholtz, 2013, pp. 370–373, questioning whether private copying levies should also compensate for unlawful use (e.g. P2P), and whether such levies and corresponding exemptions should survive in a DRM controlled digital environment.

\textsuperscript{1256} See Depreeuw & Hubin, 2014, p. 71, discussing German case-law on online personal video recorders.

\textsuperscript{1257} N.B. some national laws allow circumvention for purposes of private copying. See supra 4.4.1.2.

\textsuperscript{1258} See supra 4.3.2.2.

\textsuperscript{1259} On the exclusion from the scope of analysis of the adaptation right, see supra Cf. supra 1.3.

\textsuperscript{1260} See Handke et al., 2015, Appendix 2, with results from a survey of a representative sample of the Dutch population on different configurations of an ACS. These results show that individuals do not value significantly the inclusion of a right to create digital adaptations in an ACS. For the perspective of creators on digital adaptations, see Noll et al., 2012, pp. 53–54, reporting on survey data from the Netherlands. This data shows that creators “express little appreciation for adaptation/remixing, more appreciation for stronger copyright control”, and that “30 to 60 percent of Dutch creators feels financially threatened by adaptation/remixing.”

\textsuperscript{1261} Triaille et al., 2013, p. 459.

This distinction finds support in international law. The BC’s broad and technology neutral formulation of the reproduction right does not include reproductions in a “transformed manner” and is distinct from specific exclusive rights to make transformative uses. Such rights include translations in Article 8, adaptations (arrangements and other alterations) in Article 12, and cinematographic adaptations in Article 14(1). These rights are in turn distinct from the protection of the translation or adaptation as a protected work.

EU law does not harmonise the exclusive right of adaptation. However, all EU Member States are part of the BC, as well as WCT and TRIPS, which incorporate by reference BC provisions on adaptation. As a result, the right is part of all Member States’ laws as either a standalone provision or part of the reproduction right. Hence, the copyright regulation of transformative uses in the EU partly takes place at national level. This includes the definition of the exact contours of the adjacent rights of reproduction and adaptation, and the protection of independent works.

The *acquis* allows some flexibility in the regulation of digital adaptations, partly resulting from legislative omission. The copyright directives contain a right of translation/adaptation only in respect of computer programs and databases, although it is debatable whether the BC protects such types of work. On the other hand, limitations in Article 5 InfoSoc Directive do not apply to the adaptation right but merely to reproduction and communication to the public. This leads some authors to consider that the *acquis* leaves “ample unregulated space with regard to the right of adaptation”, to be shaped for example through determination of infringement criteria.

Some Member States use this flexibility to enable free non-commercial online transformative uses. German law, for instance, recognises a free adaptation/use rule (“Freie Benutzung”). In the Netherlands, the “new work” exemption provides a carve-out from the right of adaptation. Outside Europe, Canadian law has implemented a new limitation for UGC. Another approach for maximising this flexibility is through a broad application of the limitations to harmonised rights susceptible of privileging adaptations, namely quotation, incidental inclusion, and

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1264 Dreier, 2006; von Lewinski, 2008. On translations and adaptations as protected works, see Art. 2(3) BC. Article 12 BC grants authors the “exclusive right of authorizing adaptations, arrangements and other alterations of their work”. In essence, the right covers transformative uses (excluding translations and cinematographic adaptations of works under Arts 8 and 14 BC) where the pre-existing work is perceptible, but not merely reproduced. This use goes beyond literal reproduction and influences the work’s *corpus mysticum*.

1265 Borgne-Bachschmidt et al., 2008, p. 188; Dreier, 2006, pp. 40, 56; Eechoud et al., 2009, pp. 83–84.


1269 Eechoud et al., 2009, pp. 83–84, 100. See *infra* 4.4.4.

1270 P. Bernt Hugenholtz & Okediji, 2008, pp. 14–15; P. Bernt Hugenholtz & Senftleben, 2011, pp. 2, 26. See also Eechoud et al., 2009, pp. 83–84, justifying this lack of harmonisation on the close connection of the issue with moral rights and the need to first harmonise the concept of work of authorship, as applied to derivative works.

1271 See Art. 29.21 Canadian Copyright Act on “Non-commercial User-generated Content” (introduced in 2012 through the Bill C-11 – “Copyright Modernization Act”). For critical comments, see Zicior, 2012a, arguing that such limitation is in violation of international treaty obligations under the BC (minimum right of adaptation and moral right of integrity) and the WCT (right of making available), as well as the three-step test.
parody.\textsuperscript{1272} The adoption of either approach in the \textit{acquis}, or their combination, would probably require legal reform.\textsuperscript{1273}

In theory, a non-harmonised exclusive right of adaptation could cover all digital adaptations that effect a change to a work’s \textit{corpus mysticum}, including most types of UGC. However, there is legal uncertainty on the amplitude of such a right, due to variation in national implementation and the broad scope of the harmonised rights of reproduction and distribution, especially after \textit{Infopaq I} and \textit{Art & Allposters}.\textsuperscript{1274}

In \textit{Infopaq I}, for instance, the Court considered the copying of eleven words in the title of a newspaper article to be a “reproduction in part”.\textsuperscript{1275} This has led some authors to argue that there will always be a reproduction in part in UGC content, given the derivative works’ reliance on the pre-existing work.\textsuperscript{1276} If a reproduction is found, any subsequent unrestricted online dissemination of the derivative work will likewise trigger the right of communication to the public in respect of the reproduced part of the pre-existing work.\textsuperscript{1277} The broad interpretation of the right of distribution in \textit{Art & Allposters} further delimits the potential scope of a right of adaptation.\textsuperscript{1278}

In short, adaptations by Internet users that are not \textit{de minimis} or covered by contractual arrangements will constitute copyright infringement unless expressly exempted under national law or an EU level limitation susceptible of application to transformative uses, namely quotation, incidental use, or parody.\textsuperscript{1279} Therefore, the following paragraphs examine the potential application of these limitations in the InfoSoc Directive to digital adaptations.

4.4.4.1 Quotations

Article 5(3)(d) InfoSoc Directive contains a limitation to the rights of reproduction and communication to the public regarding quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author’s name, is indicated,

\begin{footnotesize}
\begin{itemize}
  \item P. Bernt Hugenholtz & Senftleben, 2011, pp. 26–27, making reference to Art. 24 German Copyright Act, and Arts 13 and 18b (for parody) Dutch Copyright Act. Senftleben, 2013b, p. 89, also makes reference to the exemption for “independent new works” that result from an adaptation provided in Art. 5(2) Austrian Copyright Act. Regarding this option, the most common suggestion is the broadening of the quotation limitation to include transformative uses typical in UGC. See: in France, Lescure, 2013; in the Netherlands, Commissie Auteursrecht, 2012 (the latter a report from the Dutch Copyright Commission). Both examples are discussed in Triaille et al., 2013, pp. 522–525.
  \item Triaille et al., 2013, p. 460.
  \item Eleonora Rosati, 2015a. The intricacy in defining the scope of an adaptation right is illustrated by the fact that this is not even typically subject to collective rights management on a voluntary basis. See Gervais, 2009, pp. 848–849.
  \item CJEU, \textit{Infopaq I}, ¶¶48, 51.
  \item Triaille et al., 2013, p. 460, following Ficsor, 2012a, p. 2.
  \item Triaille et al., 2013, p. 460.
  \item Eleonora Rosati, 2015a.
  \item Borgne-Bachscheidt et al., 2008, p. 188; Triaille et al., 2013, pp. 501–504, 522–525. N.B. the agreements mentioned are between rights holders and online platforms, and aim at filtering uploaded content within a notice-and-takedown system (e.g. YouTube’s Content ID system). The agreements include revenue-sharing contracts between owners of pre-existing works and UGC platforms.
\end{itemize}
\end{footnotesize}
and that their use is in accordance with fair practice, and to the extent required by the specific purpose.

The wording closely follows Article 10 BC on “certain free uses of works”, namely its paragraphs 1 (on quotations) and 3 (on indication of source and author). Limitations in the acquis, of course, are to be interpreted in light of the applicable rules in the BC.\footnote{CJEU, \textit{Painer}, ¶126 (and case law cited therein).}

At national level, Member States have implemented the quotation limitation to varying degrees. While most countries accept the contractual disposition of the limitation, many only allow reproduction of relatively small parts of the pre-existing work, some require that the “intellectual legacy” of said work is respected, while a few bar quotation for commercial purposes or where it affects the quoted work’s commercial exploitation.\footnote{Triaille \textit{et al.}, 2013, pp. 472–473.}

The directive’s provision is broad in relation to its purpose: criticism, review or similar. That broad scope, indicated by the phrase “such as”, linked to a context requirement, is reduced by a series of cumulative conditions.\footnote{P. Bernt Hugenholtz & Senftleben, 2011, pp. 14–18; Triaille \textit{et al.}, 2013, p. 464.}

First, the quoted work must have been “lawfully made available to the public”, i.e. with the rights holder’s consent,\footnote{Bechtold, 2006, p. 379; von Lewinski & Walter, 2010, p. 1049. Art. 3(3) BC refers to the narrower concept of “lawfully published”.} or under a legal licence.\footnote{Dreier, 2006, p. 44, with reference to the identical requirement in Art. 10(1) BC.} This aligns with the CJEU’s approach in \textit{Painer}, where it understood the requirement as meaning the act of making that work available to the public under Article 3(2) InfoSoc Directive.\footnote{CJEU, \textit{Painer}, ¶¶124–128.}

Second, there must be an indication of source, including the author or performer’s name, unless identification of either proves impossible.\footnote{\textit{Ibid.}, ¶¶138–149.}

Third, the quotation must be according to “fair practice”. This requirement is derived from Article 10(1) BC, and has prompted scholarly discussion on whether to apply the three-step test in this context.\footnote{Ricketson & Ginsburg, 2006, pp. 785–787. \textit{Contra} application of the test in this context, see Bentley, 2016 [paper forthcoming].} In the absence of further guidance in the directive or by the CJEU, Member States have significant flexibility in the implementation of this requirement.\footnote{von Lewinski & Walter, 2010, pp. 1049–1050. On national implementations of this requirement, see P. Bernt Hugenholtz & Senftleben, 2011, p. 7.}

For Dreier, fair practice in the BC does not refer to a “prior existing practice”, but rather to an objective criterion of fairness: “the practice must be fair, in and of itself, according to an objective appreciation”. This includes quotations made in support of and having a connection with the views and ideas of the person making them, and that go beyond providing a substitute for the quoted work.\footnote{Dreier, 2006, pp. 44–45.}
Fourth, the limitation is subject to a “context” requirement: a quotation is allowed only to the extent required by the specific purpose for which it is made, which must be criticism, review or similar.\footnote{This condition is derived from the requirement in Art. 10(1) BC that the extent of the quotation does not exceed what is justified by the purpose. See: P. Bernt Hugenholtz & Senftleben, 2011, pp. 15–16; von Lewinski & Walter, 2010, p. 1050.} It follows that the quoted work (whatever the extent of use necessary) should be ancillary to the subsequent work, and to the proposition the latter intends to illustrate or prove.\footnote{von Lewinski & Walter, 2010, p. 1050.} However, the limitation is worded as a prototype and allows quotation for purposes comparable to (“such as”) criticism or review. That is to say, it enables some flexibility in national laws, including, in the view of Hugenholtz and Senftleben, “ample room for the courts to arrive at fair solutions”.\footnote{P. Bernt Hugenholtz & Senftleben, 2011, p. 15}

How then does this limitation apply to online digital adaptations, such as UGC? Despite referring to quotation of pre-existing works in press reports, the CJEU’s findings in \textit{Painer} provide guidance.\footnote{Triaille et al., 2013, p. 473.} The case marks the first explicit consideration of the impact of fundamental rights on the interpretation of limitations.\footnote{Leistner, 2014, p. 585.} It identifies the objective of the quotation exemption as striking a fair balance between the rights holder’s right of reproduction in the pre-existing work and the freedom of expression of subsequent users of the same.\footnote{CJEU, \textit{Painer}, ¶134.}

If the conditions for quotation are met, the fundamental right of freedom of expression can prevail over the exclusive right, irrespective of the copyright-protected nature of the “quoting content”.\footnote{Ibid., ¶¶135–137.} For digital adaptations, this means that even if a UGC object quoting a pre-existing work does not itself qualify as a derivative work, it can benefit from this limitation.\footnote{Triaille et al., 2013, p. 474.}

This consideration of freedom of expression and information, coupled with the non-harmonisation of the adaptation right, could open the door for a broad understanding of quotation. Yet, it would be difficult to place within this limitation’s scope the broad swathe of acts included in digital adaptation. Regardless, some authors argue that if national laws fully use the flexibility provided by the directive’s prototype, this limitation could privilege a significant amount of use.\footnote{P. Bernt Hugenholtz & Senftleben, 2011, pp. 14–18, exemplifying with Art. 15a Dutch Copyright Act. For a broad interpretation of the quotation limitation in Art. 10 BC, see Bentley, 2016 [paper forthcoming].}

The application of this conclusion to digital adaptations is debatable. First, not all digital adaptations are for purposes of criticism, review or similar. Many constitute forms of creative self-expression with different goals (e.g. artistic, entertainment, informational), which would be difficult to reconcile with the limitation.

Furthermore, the requirement that the pre-existing work has been lawfully made available to the public likely disqualifies the use of pre-existing works from unauthorised sources. This includes,
for example, copying parts of a work accessed via P2P systems or unauthorised cyberlockers, as well as works stripped of TPMs.1299

In addition, many non-commercial digital adaptations fail to meet the requirement of indication of source. This may be rooted in ignorance of the law by end-users, coupled with insufficient or inadequate availability and application of RMI by rights holders.1300 Nevertheless, both the InfoSoc Directive and Painer clarify that only impossibility (not inconvenience) justifies the failure to meet this requirement.1301 While for some UGC indication of source and name is impossible, in other cases it is merely inopportune, in which case the limitation cannot apply.

Finally, guidance is required as to what constitutes fair practice in the context of UGC. Without a doubt, in the field of amateur creativity, many digital adaptations would struggle to comply with a high criterion of objective fairness, thereby setting aside the privilege of the limitation.

In sum, the quotation limitation provides a flexible prototype to exempt certain transformative uses from authorisation. In that sense, it also functions as a limitation to the (non-harmonised) adaptation right. Flexibility is inherent to its “context requirement”, allowing acts comparable to criticism and review. After Painer—which recognised a fundamental rights justification for quotation—acts meeting the requirements of Article 5(3)(d) InfoSoc Directive deserve additional consideration, and should weight significantly in favour of users and against application of exclusivity. However, when transposed to the online environment, the joint application of the limitation’s requirements and its inherent (limited) scope will fail to exempt a large number of digital adaptations, while creating legal uncertainty for other types of use, where doubts subsist on the meaning of each requirement.

4.4.4.2 Incidental Inclusion

Article 5(3)(i) InfoSoc Directive allows Member States to introduce a limitation to the rights of reproduction and communication to the public for the “incidental inclusion of a work or other subject-matter in other material”. No identical parent provision exists in international treaties and the CJEU is yet to rule on the provision.1302 As with parody, this limitation is subject to the three-step test.

To qualify for the limitation, the pre-existing work must be “included” in the subsequent work, becoming part of it.1303 The term “incidental” refers to taking that is accidental or unintentional,

1299 See supra 4.4.3.6, on the challenges of qualifying what is an “unlawful source” for private copying,
1300 Triaille et al., 2013, pp. 474–475.
1301 CJEU, Painer, ¶¶139–148.
1302 N.B. Art. 10bis(2) BC allows union countries to determine the conditions under which, for the purpose of reporting current events, works seen or heard in the course of said events may be reproduced and made available to the public. Hence, this provision may be used to exempt certain incidental inclusions of works. See P. Bernt Hugenholtz & Okediji, 2008, p. 52: “the provision attempts to balance the need of reporters to provide ample coverage of current events by taking pictures or recording such events, and the interests of authors whose works may be captured incidentally by such recording”. On the conditions of application of the provision, see Ricketson, 2003, pp. 18–19.
as opposed to significant or merely in the background; this is therefore a *de minimis* limitation.  

To distinguish an incidental from a significant inclusion, commentators focus on factors like the portion used and the intent of the subsequent user. To distinguish an incidental from a significant inclusion, commentators focus on factors like the portion used and the intent of the subsequent user. In a recent study for the EU commission, for example, it is said that the limitation applies to situations in which the purpose of the user was not to capture the sounds or the images at stake but where such capture happened at the occasion of the recording of another element which was the real subject matter of the recording/creation by the user.  

A typical example in the field of UGC is that of a recording and subsequent online dissemination of a private or semi-public event (e.g. birthday party, wedding) where in the background it is possible to hear a protected sound recording.

In theory, this optional limitation could provide some coverage for a subset of UGC activities, as exemplified above. Yet, the absence of implementation in many Member States, and its limited implementation in others—by circumscribing it to certain types of work or purpose (e.g. reporting on current events)—leads instead to legal uncertainty for end-users and complex challenges for pan-EU solutions on this basis. It would conceivably be possible to address this challenge by placing *de minimis* use, such as most incidental inclusion, outside the scope of copyright. However, that was not the normative choice of the EU legislature.

### 4.4.4.3 Caricature, Parody and Pastiche

Article 5(3)(k) InfoSoc Directive contains a limitation to the rights of reproduction and communication to the public in respect of use “for the purpose of caricature, parody or pastiche”. The terms are not defined in the directive, leaving Member States with some flexibility for implementation, subject to the three-step test.

The dictionary definition of these terms clarifies their ordinary meaning. A caricature is a “[g]rotesque or ludicrous representation of persons or things by exaggeration of their most characteristic and striking features.” The key element for copyright purposes is the exaggeration of certain features of the adapted work (e.g. painting or photograph). A parody refers to

A literary composition modelled on and imitating another work, esp. a composition in which the characteristic style and themes of a particular author or genre are satirized by being applied to inappropriate or unlikely subjects, or are otherwise exaggerated for comic effect.
The treatment of the reproduced or adapted work or its features in an ironic, satiric or comical way is the central feature of parodies. A pastiche is usually perceived as an “imitation of style” but its definition includes any work incorporating several different styles, or made up of parts drawn from a variety of sources…

A work, esp. of literature, created in the style of someone or something else; a work that humorously exaggerates or parodies a particular style.

It is clear that some overlap exists between the definitional meanings of caricature, parody or pastiche. No international treaty contains a provision identical to Article 5(3)(k) InfoSoc Directive, although it has been argued that the use of parts of works for criticism or review purposes constitutes a form of quotation falling under Article 10(1) BC. Most Member States have not expressly incorporated the limitation in their copyright legislation, although in a number of them a similar effect is achieved by application of the constitutional right of freedom of expression or general principles of law. Furthermore, in certain countries, some acts of parody are subsumed within the quotation limitation.

In Deckmyn, the CJEU clarified important aspects of how the provision applies to cases of parody. It stated that “parody” is an autonomous concept of EU law which has two essential characteristics: evoking an “existing work while being noticeably different from it”; and, “to constitute an expression of humour or mockery”. Beyond those characteristics, it does not have to possess “original character of its own” or fulfil any additional conditions that do not derive from the usual meaning of the term or from the wording of the directive.

Furthermore, the Court recognised that parody is justified on the basis of freedom of expression. As a result, application of the limitation must balance that fundamental freedom of users with the interests and rights of affected rights holders, which in this case may include legitimate interests in objecting to a discriminatory parody.

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1317 Triaille et al., 2013, p. 482.
1318 For commentaries to the case, see European Copyright Society, 2014b; Eleonora Rosati, 2015b.
1319 CJEU, Deckmyn, ¶¶14–17, 20. In contrast, the AG contended that the concept of parody possesses two basic features: “structural”, as the parody is a copy and a creation (i.e. a derivative work); and “functional”, as parodies have a subject (an earlier work or a different reference point), a (humorous) effect and content (which may trigger the application of fundamental rights). See Opinion AG in Deckmyn, ¶¶46–48, 65–67, 80–85.
1320 CJEU, Deckmyn, ¶¶21–24, 33.
1321 Ibid., ¶¶25–27, 32–34. In light of the parody in question in the particular case, the Court noted the potential application of the principle of non-discrimination based on race, colour and ethnic origin, as confirmed, inter alia, by Art. 21(1) Charter, in which case copyright owners “have, in principle, a legitimate interest in ensuring that the work protected by copyright is not associated with such a message.” CJEU, Deckmyn, ¶¶30–31.
As regards online use, the patchwork national landscape resulting from different implementations of the limitation is a driver for legal uncertainty. Despite the encouraging ruling in Deckmyn, only a subset of non-commercial UGC would likely qualify under the parody limitation (or under an extended version of the quotation limitation). Furthermore, there is a risk that many parodies made available online will constitute copyright infringement in certain Member States, even if exempted in others.

### 4.4.4.4 Interim Conclusions

There are three limitations to the reproduction right in the InfoSoc Directive susceptible of application to non-commercial digital adaptations: quotation, incidental inclusion, and caricature, parody and pastiche. The analysis shows these limitations to be insufficient *per se* to insulate Internet users from a significant number of infringement claims in the context of UGC.1322

Even the combination of a broad interpretation of the three limitations would probably fail to exempt such activities from authorisation, or to tangibly improve legal certainty in this field.1323 Instead, the more likely outcome is that users and platforms adapt their online behaviour to the most restrictive interpretation available for each limitation as a common denominator. This would lead to an overall *de facto* reduction of available exempted space.1324

For some scholars, the harmonisation of the three limitations and their broad interpretation could cover the majority of UGC use, or at least the “most valuable” use from the viewpoint of freedom of expression and development of culture. However, even these scholars recognise the need for legislative change to the limitations, including making them mandatory, unwaivable, and for the sole benefit of their creators.1325

Thus, if the objective is to exempt the majority of digital adaptations, copyright reform is necessary. Absent harmonisation of the right of adaptation at EU level, Member States have some margin of discretion to recognise free uses or comparable limitations for non-commercial digital adaptations or subsets thereof.1326 Yet, that margin is narrow. This is so, first, as a result

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1322 For some commentators, other approaches could achieve the objective of allowing UGC. These include fundamental rights (freedom of expression and freedom to conduct a business), the proper consideration of the *ratio legis* or purpose of a limitation, and theories of implied consent and misuse/abuse of copyright. See Triaille et al., 2013, pp. 504–510, 522. On implied licences and tolerated use, see Gervais, 2009, pp. 868–870 (discussing enforcement issues in the UGC context), and Wu, 2007 (introducing the concept of “tolerated use”).

1323 *But see* Triaille et al., 2013, p. 519, arguing that “none of the exceptions taken separately could cover the great majority of UGC works; only by considering several exceptions does one cover, in our view, the majority of UGC.” In the same study, the authors conduct a detailed analysis at EU and Member State level and reach this conclusion. Cf. Triaille et al., 2013, pp. 464–510.


1325 Triaille et al., 2013, pp. 524, 534–541. The authors would combine this with making the relevant limitations mandatory and at least quotation and parody unwaivable by contract, they would further make clear that only the individual creators would benefit from the limitations, as opposed to UGC platforms.

1326 Borgne-Bachsmitid et al., 2008, pp. 188–189, noting that “[a]bsent harmonization of the adaptation right, Member States remain autonomous and may elect to codify exceptions or limitations to this right to permit certain non-commercial transformative uses.” See P. Bernt Hugenholtz, 2012, p. 55: “Member states remain free to provide for limitations and exceptions to the right of adaptation at their own discretion, subject only to the ‘three-step test.’”. See also Triaille et al., 2013, p. 504.
of national provisions on moral rights, namely attribution and integrity. Second, a potential limitation for transformative uses would be subject to the three-step test as regards its impact on the adaptation right (at national level) and, especially, the harmonised right of reproduction. The CJEU’s broad interpretation of such a right (e.g. in Infopaq I and Murphy), and strict reading of limitations (e.g. in ACI Adam and OSA), further hinders that flexibility.

4.5 Conclusions

The online activities of Internet users can be categorised into different types of act: browsing, downloading, streaming, stream capture/ripping, uploading, linking, and digital adaptation. These acts are subject to the harmonised exclusive rights of reproduction and communication to the public in Articles 2 and 3 InfoSoc Directive. Digital adaptation is also subject to the non-harmonised right of adaptation, a BC minimum right, partially recognised in the Software and Database Directives.

The determination of which rights apply to which use is challenging in the online environment, largely due to the possibilities for fragmentation and overlap of rights. For example, acts of uploading may involve restricted reproduction and making available of works, whereas UGC can involve partial reproduction of the pre-existing work, its adaptation, and communication to the public. Moreover, these rights may be held by different rights holders across different territories.

The chapter focuses on harmonised rights. It shows that these rights are interpreted broadly by the CJEU, in a combination of technical and economic approaches, which safeguard for rights holders most new technological avenues of exploitation with commercial significance. A by-product of this approach is the increased risk of infringement and legal uncertainty for individuals in their online activities.

On the one hand, the prevailing understanding of the reproduction right qualifies copies in the technical sense as legally relevant. In this way, the right is extended to most digital reproductions of works, as these are technically required for online consumption, manipulation, and dissemination of content.

On the other hand, the application of the right of communication to the public to digital networks by the CJEU has seen the development of criteria—public, new public, specific technical means, profit-making nature—in a sometimes inconsistent way. The Court’s case law at times extends and at times contracts the scope of the right, creating legal uncertainty in its interpretation.

1327 Borgne-Bachschimidt et al., 2008, pp. 188–189; Triaille et al., 2013, pp. 462–464. The latter study states “that the condition of acknowledgement of the source constitutes, as a matter of fact, a uniform implementation of the right of attribution in the field of these exceptions” (illustration of teaching and scientific research, reproduction by the press, quotation, and use of political speeches).

1328 P. Bernt Hugenholtz & Senftleben, 2011, pp. 26–28, arguing that the regulation of the right of adaptation, understood as the “corpus mysticum of a … work – is left to national law making”, being that the InfoSoc Directive only applies to “literal reproduction”. See also Green Paper Copyright in the Knowledge Economy 2008, p. 20: “Under the Berne convention, a transformative use would be prima facie covered by the reproduction right and the right of adaptation. An exception to these rights would have to pass the three-step test. In particular, it would have to be more precise and refer to a specific policy justification or types of justified use. It would also have to be limited to short takings (short passages, excluding particularly distinctive takings), therefore not infringing the right of adaptation”.
Furthermore, the online scope of the right is influenced by the application of contractual and technical restrictions imposed by rights holders.

For example, the exclusive right does not cover hyperlinking if the work was previously accessible online without access restrictions (e.g. subscription pay-walls). However, if the work was subject to such restrictions, any type of link circumventing them is a prohibited communication to the public, as it makes the work available to a new public, irrespective of the prohibition on circumventing TPMs. This is particularly problematic for end-users where the access restriction is placed on the work after an initial period of free accessibility.

Furthermore, it is currently unclear whether linking to a freely available but unauthorised source is making the work available to a new public, and therefore infringing. Partly due to the extension of the right to linking activities and the relevance of the communication source, a pending case before the CJEU will decide whether the activities of a website operator through a system that allows users to trace and up/download works (like The Pirate Bay) is an act of communication to the public. It is also not clear whether an upload or upstream transmission of a work to a restricted group (e.g. within a group on a social sharing website) amounts to a communication to the “public” or, instead, a non-public reproduction.

The result of this legal framework is twofold. First, due to the mixed technical and economic design of the rights, the majority of individuals’ non-commercial online activities are subject to exclusive rights. The reproduction right applies theoretically to browsing, downloading, “consumption” of streams, stream capture, certain uploads, and the making of digital adaptations. The right of communication to the public applies to the Internet transmission of streams, certain uploads, and all types of hyperlinking, with the exception of links to freely accessible works. Second, due to the inconsistent design of the rights (mainly their technological dependency and complex criteria) multiple online activities of Internet users are subject to legal uncertainty.

Where exclusive rights apply, it is possible that the non-commercial activities of users are exempted from authorisation by the application of limitations in the InfoSoc Directive. However, the directive restricts the scope of limitations and gives rise to additional uncertainty.

Limitations in the InfoSoc Directive do not apply to software and databases, and the respective sectorial directives leave little room for online use. Most limitations are optional, leading to different levels of implementation and interpretation. Only some limitations are subject to fair compensation, notably private copying. Also, although the relationship between limitations and contract law is unregulated, contractual disposition of limitations is generally possible. Finally, TPM application supersedes the exercise of most limitations for online use, severely hindering digital private copying.

In spite of this, examination of the directive’s objectives leads to the conclusion that limitations are essential for promotion of access to and dissemination of knowledge and culture, as well as for balancing exclusivity with the public interest and fundamental rights. The CJEU recognises

1329 This issue is at the core of the following pending cases: CJEU, Reference for Preliminary Ruling, Case C-160/15, GS Media; and CJEU, Reference for Preliminary Ruling, Case C-527/15, Filmspeler.

1330 This issue is at the core of the pending case CJEU, Reference for Preliminary Ruling, Case C-610/15, Stichting Brein v Ziggo.
this normative function and its role in shaping the scope of (at least some) limitations. Two opposing forces are noticeable in this regard. On one side, the Court applies the strict interpretation doctrine and three-step test to narrow the scope of limitations. On the other, it recognises the need for flexible interpretation of limitations due to the prototypical nature of their wording, the requirements of effectiveness and purposive interpretation, the need for a balancing of interests, and the (external and internal) operation of fundamental rights. In both cases, the principle of autonomous interpretation is used to further the argument.

On balance, the analysis shows that the Court employs the highlighted arguments to mitigate the effects of strict interpretation where a limitation is justified on fundamental rights. (The most relevant deviation from this trend is found in the private copying case law.) This trend should be welcomed, as it is consistent with the InfoSoc Directive’s objective of harmonising limitations and fair balance; it is also not contrary to the directive’s objective of ensuring a high level of protection, if this is understood as an “optimal” level of protection for rights holders.

In addition, as explored in Chapter 5, this tendency is also consistent with a view that the three-step test is not primarily a restricting clause. Rather, it can be construed as an enabling provision that leaves space for a flexible and functional interpretation of limitations, especially in light of their fundamental rights’ justification. Mitigation of the strict interpretation doctrine and a more flexible interpretation of the test allow limitations to strike a balance in copyright law and better achieve the internal market objective.

However, it is undeniable that the design of the directive, together with the Court’s interpretation of exclusive rights and limitations—especially when focusing on strict interpretation and the “high level of protection” mantra—skew the legal framework towards the preservation of exclusivity online and loss of legal certainty. Therefore, as a descriptive matter, limitations in the acquis are constrained, even if we read them in a flexible way.

The point is illustrated by the examination of how limitations in the InfoSoc Directive apply to the online activities of individuals. The mandatory limitation for temporary copies in Article 5(1) InfoSoc Directive, as interpreted by the Court, exempts browsing copies from the scope of the reproduction right. Still, its application to copies made when (down) streaming content is uncertain. It seems that absent authorisation from the rights holder, this activity fails to meet the requirements of “lawful use” and absence of “independent economic importance”.

The private copying limitation in Article 5(2)(b) InfoSoc Directive is susceptible of application to acts of downloading, (down) streaming, stream capture and uploading. The limitation is equally relevant because some of its conditions (non-commercial, fair compensation, and the design of levy systems) are candidates for transplant to legal licence ACS. As interpreted by the CJEU, the limitation does not privilege up/downstream copies made from unauthorised sources. Therefore, the limitation excludes or casts doubt on the legality of a large set of non-commercial online reproductions made by end-users. Uncertainty remains in relation to copies made using cloud services (including private online video recorders), and the possibility of imposing a levy on the respective providers.

Digital adaptations, including transformative uses, have an intricate regulation. On the one hand, due to legislative omission in the acquis, these uses may be in part covered by the non-harmonised right of adaptation at national level, separately from the right of reproduction. On the other hand, some of these uses are privileged by limitations to harmonised rights, namely
quotation, incidental inclusion and parody in Article 5(3)(d), (i) and (k) InfoSoc Directive. However, these apparent flexibilities are limited in relation to non-commercial online use.

First, due to the broad interpretation of harmonised exclusive rights by the CJEU, a viable adaptation right would require that the scope of the right of reproduction is delimited to literal reproductions. Second, the scope of the applicable limitations does not necessarily encompass most digital adaptations. Even if the limitations are interpreted broadly and considered jointly, it is doubtful that they are sufficient to privilege a large portion of non-commercial digital adaptations, or seriously reduce legal uncertainty for UGC.

The quotation limitation offers a flexible prototype to privilege certain transformative uses comparable to criticism and review. After Painer, the fundamental rights pedigree of the privilege may broaden its scope. Still, its application to online use is constrained by the requirements of context, lawful availability of quoted work, source indication, and fairness.

The incidental inclusion limitation is either not implemented or only partially so in domestic laws. Hence, reliance thereon to exempt even a small subset of (quasi) de minimis digital adaptations is doubtful.

The limitation for caricature, pastiche and parody is also implemented unevenly. The CJEU has interpreted the provision in relation to parody, which Deckmyn qualified as an autonomous concept of EU law, justified by the fundamental right of freedom of expression. Still, only a portion of non-commercial UGC will qualify as a parody or be covered by an extended version of the quotation privilege. Furthermore, there is a risk that many online parodies are infringing in some Member States, but not others.

In sum, a significant portion of non-commercial online use is subject to exclusive rights and not privileged by limitations in the acquis. In many cases, there is appreciable uncertainty in the application of the right or limitation to a use. It seems, however, that the tendency is to extend exclusivity to activities of personal enjoyment and expression—irrespective of their non-commercial purpose—that would functionally not appear to be within the realm of copyright (e.g. linking). Furthermore, the legal framework affords priority to “private choice” contractual and technological measures in shaping the scope of the exclusive right and applicable limitations.

This was already a feature of the relationship between limitations, and contract and TPMs in the design of the InfoSoc Directive. It is reinforced by the CJEU in the relevance afforded to the “authorised source” of the online communication to the public or private copy, as well as the “freely accessible” / “access restrictions” binomial inherent in the new public criterion. Countervailing forces seem to be the purposive interpretation of limitations in light of their fundamental rights justification, and the reinforced nature of fair compensation vis-à-vis contractual dispositions (absent TPM application).

From a normative perspective, at least two insights emerge from this chapter’s analysis. The first is that the current system is at least partly inconsistent with key objectives of the InfoSoc Directive. These include a fair balance of the interests of rights holders and users (and the public interest), enhancing legal certainty, the smooth functioning of the internal market (through the coherent application of exclusive rights and limitations), promoting the development of the information society (and that of new technologies), and fostering the circulation of culture. As noted previously, it is also arguable whether the technically based expansion of exclusive rights and contraction of limitations, at the expense of the aforementioned objectives and without
achieving an “appropriate reward”, adequately meets the goal of providing a “high level of protection” to rights holders, understood as “adequate” or “optimal” protection.\(^{1331}\)

The second insight relates to the complexity of substantive and territorial fragmentation of overlapping exclusive rights as they apply to mass online use of copyright works. The analysis provided is a snapshot of a volatile moving target, subject to the interpretative winds of the CJEU. If legal reform through ACS is to be effective, its best hope is to rely on models capable of aggregation of rights and enhancing legal certainty. ACS relying on legal licences or mandatory collective management are the best options available in this regard.

If a non-voluntary ACS is the way forward, its admissibility hinges on passing the three-step test, at least for a statutory licence system. As noted in Chapter 3, it is debatable whether the test applies to mandatory collective management, which appears to affect only the exercise of copyright. Regardless, due to the contentious nature of the topic, the policy legitimacy of an ACS based on mandatory collective management would benefit from its compliance with the test. For this purpose, it is possible to use the more restrictive option of statutory licensing as an analytical proxy. That is to say, if such a licence is compliant with the test, a maiore ad minus, so will be the less restrictive model of mandatory collective management.\(^{1332}\) In this light, the following chapter examines the consistency of a legal licence ACS with EU copyright law.

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\(^{1331}\) The connection between a “high level of protection” with creative incentives and “adequate remuneration” for rights holders is patent in recitals 9 and 10 InfoSoc Directive. For the use of “fair balance” and “adequate protection” by the CJEU as teleological arguments to limit a broad interpretation of rights in the copyright acquis, see Marcella Favale et al., 2015, pp. 65–68. See also infra 5.5.3.

\(^{1332}\) See supra 3.5.
5 Copyright Reform: Admissibility of Legalisation under the Three-step Test and the Objectives of EU Copyright Law

5.1 Introduction

It is now clear that copyright law significantly restricts the online use of works by individuals. Strict enforcement of this use is often impossible, costly, or simply undesirable. Moreover, both enforcement and criminalisation of non-commercial use alienate end-users and contribute to diminishing the respect and legitimacy of copyright law. Yet, empirical research shows that individuals are willing to participate in, and pay for, alternative models of access to and use of copyright works, like ACS. Despite facing lower legal hurdles, voluntary ACS are exposed to the risks of substantive and territorial fragmentation of copyright, and are dependent on the participation of rights holders. As a result, they will likely fail to provide a satisfactory all-encompassing legalisation scheme. Conversely, a system based on a compensated limitation and statutory licensing has the potential to enable large-scale non-commercial online use in the EU.

It is therefore crucial to inquire whether such a system is admissible under EU copyright law and consistent with its objectives. This chapter is divided into two parts, each examining one of the following research questions. While the first question is predominantly doctrinal, the second is normative:

Whether and to what extent is a statutory licence ACS for non-commercial online use of works by individuals admissible under EU copyright law, namely the three-step test?

Whether and to what extent is a model of access and remuneration, such as an ACS, consistent with the general aims of copyright and the objectives of EU copyright law?

The first part builds on the previous analysis by assuming that a statutory licence ACS is the best model to regulate mass individual non-commercial online use. A statutory licence has the advantage of dealing with most high-level challenges associated with territorial and substantive fragmentation, representing a comparative advantage in relation to voluntary licences. However, as demonstrated in the previous chapter, exclusive rights of reproduction and communication to the public in the acquis cover many types of online use. Thus, a statutory licence ACS entails an expansion of existing limitations to those rights.

The main obstacle to such expansion is the three-step test, which regulates the introduction of use privileges by national laws. This chapter views the international and EU versions of the test as normative benchmarks for copyright limitations. Because EU law must be interpreted in light of international law, the international provisions in relation to the three-step test feature prominently in the analysis.

The second and more normative part of the chapter examines the consistency of a legalisation model enabling remunerated online access to and use of works with the aims of copyright (i.e. its

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133 See supra 1.1, making these points, and the analysis in Chapter 4, regarding the reach of exclusive rights to online use. See also Geiger, 2014c, p. 127-
1334 As noted supra at 4.5 the statutory licence ACS is used here as an analytical proxy for mandatory collective management assuming, arguendo, that an ACS based on such a model would be subject to the three-step test.
prevailing rationale) and the objectives of the EU acquis. To carry out this examination, this part looks into the dominant theories of copyright in the European legal tradition—natural rights and utilitarianism—, the access and remuneration dimensions of copyright, and the objectives of copyright law, as derived from the recitals of different directives and CJEU case law.

The chapter proceeds as follows. The first part contains the doctrinal analysis of ACS under the three-step test, spanning sections 5.2 to 5.4. Section 5.2 develops an analytical framework for the test: it clarifies the different variants of the test in international and EU law, elucidates its addressees and functions, and maps its potential interpretations. Section 5.3 examines the three-step test to discover the space available for a limitation-based ACS. It analyses the test sequentially but considers it as a whole aimed at balancing competing interests through the principle of proportionality. The analysis is innovative in that it includes normative elements in all steps of the test, and integrates fundamental rights in the assessment of the third step. This balancing exercise identifies a potential conflict with the normal exploitation of works as the main obstacle to ACS. In that light, section 5.4 explores whether certain mechanisms advanced in legalisation proposals—embargo periods and opt-out systems—assist in overcoming such conflict in a way consistent with international law and the acquis. The second part of the chapter (section 5.5) examines the legalisation of non-commercial online use as a normative choice between exclusivity and remunerated access. It assesses the consistency of ACS with the rationale of copyright, its access and remuneration dimensions, and the objectives of EU copyright law. Section 5.6 offers a summary and the conclusions of the chapter.

5.2 Analytical Framework of the Three-Step Test

A statutory licence for non-commercial online use requires a limitation to the exclusive rights of reproduction and communication to the public. The introduction of a limitation in the acquis is subject to the three-step test in international law, in which light Article 5(5) InfoSoc Directive must be interpreted. That makes it important to understand the web of international rules on the test, its addressees, and possible readings. For that purpose, this section develops an analytical framework for the test, which first clarifies its different variants in international and EU law, and their relationship to each other (5.2.1). This is followed by a discussion of the spectrum of interpretations of the test (5.2.2).

5.2.1 Variants and Interpretation

The test is a set of three conditions that regulate the imposition and permissible scope of limitations to copyright. According to it, copyright limitations must:

(1) Be certain special cases,

(2) Not conflict with the normal exploitation of the work,

(3) Not unreasonably prejudice the legitimate interests of the author or rights holder.
The three-step test was originally suggested by the British delegation at the Stockholm revision conference of the BC. This origin makes it appropriate to analyse the test with reference to its English language versions found in different treaties.  

In international intellectual property law, there are eight variations of the test in four conventions currently in force: Article 9(2) BC; Articles 10(1) and (2) WCT; Article 16(2) WPPT; and Articles 13, 17, 26(2) and 30 TRIPS. Articles 17, 26(2) and 30 TRIPS do not refer to copyright but to trademarks, designs and patents. They differ from their copyright counterparts insofar as they explicitly mention “limited exceptions” instead of “certain special cases” (in the first step), and the need to take into account the legitimate interests of “third parties” (in the third step). The trademark test, furthermore, omits the second condition, making it in fact a two-step test. In the absence of an explanation in the drafting history of TRIPS, these differences should be resolved through legal interpretation.  

In the acquis, the main embodiment of the test is Article 5(5) InfoSoc Directive. However, the Software, Database and Rental Right Directives contain substantially similar (if partial) versions of it. 

The myriad tests have different wordings with slightly varying purpose and operation. Still, the copyright versions share a common structure and content in relation to the three criteria. They also share an intentionally general and abstract formulation, intended to enable BC members to accommodate existing national limitations, and afford them discretion on how to give effect to the test. The same lack of specificity makes the test a challenging standard for interpretation, especially in the dynamic context of new technologies. 

The interpretation of the international law versions of the test should be made in accordance with Articles 31–33 VCLT. As noted in Chapter 1, these rules favour a literal approach, mitigated by systematic (“context”) and teleological (“object and purpose”) interpretation of treaty provisions. The “context” comprises the text of the treaty, including preamble and annexes, together with related agreements and instruments made or accepted by all the parties in relation

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1335 Pursuant to Art. 37(1) BC the French version prevails in the event of conflict with the English version. The only such linguistic discrepancy is found in the second step, when contrasting the English and French translation of “unreasonable prejudice”. Still, it is possible to reconcile the meaning of both versions. See Peukert, 2005, pp. 29–30; Senftleben, 2004, p. 114.
1336 Christie & Wright, 2014, with a comparative analysis of the three-step tests in international treaties. The test is also included in Art. 11 WIPO Beijing Treaty and Art. 11 WIPO Marrakesh Treaty.
1337 Kur, 2008, pp. 19–20; Senftleben, 2006, pp. 412, 421–422. N.B. Art. 17 TRIPS does not refer to a conflict with the normal exploitation of trademarks (but rather provides an example: “fair use of descriptive terms”), as their primary function is distinguishing goods and services in the course of trade. Cf. EC-Trademarks I, ¶7.664. Kur, 2008, p. 20, notes that the WTO panel reports on the different tests are to be read as not overstating the differences in formulation. For a detailed breakdown of the discrete elements of all tests, see Christie & Wright, 2014.
1339 Christie & Wright, 2014.
to the treaty. These documents include the majority of Agreed Statements to different provisions of the WIPO Treaties. The “object and purpose” of a treaty relies on elements like preambles.

In certain circumstances, Article 32 VCLT allows recourse to extrinsic elements to the treaty’s text. Express reference is made to preparatory works of the treaty, and the circumstances of its conclusion. Admissible supplementary materials also include national court decisions, authoritative scholarship, and a wide range of materials. Amongst supplementary sources, particular attention should be given to preparatory works in international conventions and reports of panels appointed in the course of procedures of the WTO Dispute Settlement Body.

Preparatory works include published documents typically identified as “Actes”, “Documents”, or “Records” of diplomatic conferences preceding and resulting in the conclusion of a treaty or convention. They should also include the “uncontested statements” made during the course of preparatory works, which would thus not qualify as “context”. This is the case for Professor Ulmer’s statements as Chairman of the Main Committee I of the Stockholm Conference, often relied upon for strict interpretation of the three-step test in Article 9(2) BC.

The WTO Panel reports are relevant for the interpretation of the three-step test of Article 13 TRIPS. Despite their limited binding force, the influential nature of the reports in scholarship makes them unavoidable, even when examining Article 5(5) InfoSoc Directive.

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1344 Art. 31(2) VCLT.
1345 Iuliano, 2011, p. 473; Sinclair, 1984, p. 119. Finally, Art. 31(4) VCLT reads: “A special meaning shall be given to a term if it is established that the parties so intended.”
1348 Recourse to supplementary materials is allowed to confirm the meaning resulting from the application of Art. 31 VCLT or to determine the meaning of a provision when Art. 31 leads to an interpretation that is unclear or “manifestly absurd or unreasonable.” See Bouthillier, 2011, p. 843; Christie & Wright, 2014, pp. 411–416; Ricketson & Ginsburg, 2006, pp. 197–198; Senftleben, 2004, p. 103; Sinclair, 1984, p. 116.
1349 “Circumstances of the treaty’s conclusion” are not particularly relevant for this study. They include the “historical background against which the treaty was negotiated, and the individual characteristics and attitudes of the contracting parties.” See Ricketson, 2003, pp. 8–9; Ricketson & Ginsburg, 2006, pp. 197–208. See also Bouthillier, 2011, pp. 859–861.
1351 Sorel & Eveno, 2011, pp. 820–821, noting that the Dispute Settlement Body refers almost automatically to the VCLT rules in the interpretation of TRIPS.
1352 Ricketson, 2003, pp. 7–8.
1353 Bouthillier, 2011, p. 852; Ricketson, 2003, pp. 7–8; Ricketson & Ginsburg, 2006, p. 198; Sinclair, 1984, p. 130. See also Sinclair, 1984, p. 130, finding this the better interpretation and stating that the importance of these elements may be enhanced “by the authority of the person making the statement”.
1354 Ricketson & Ginsburg, 2006, pp. 190–192, with further analysis.
1355 Kur, 2008, pp. 32–33, arguing that WTO panel decisions do not qualify as definitive interpretations, subsequent agreements or practices, even after adoption by the Dispute Settlement Body. See also Geiger et al., 2014, pp. 600–601 (WTO Panel Reports are not binding interpretations of the TRIPS test for all members of the agreement or for future WTO panels examining the test), and Shabalala, 2010, p. 149 (WTO Panel Reports bind only the parties to the dispute and concern the debated provisions in its specific context, object and scope).
The following paragraphs examine the different versions of the copyright three-step test at international level, starting with the BC (5.2.1.1) and moving on to the WIPO Treaties (5.2.1.2) and TRIPS (5.2.1.3). Subsequently, the investigation turns to Article 5(5) InfoSoc Directive and the extent to which its interpretation should reflect the international tests (5.2.1.4).

5.2.1.1 The Berne Convention and its Relationship to Other Treaties

There is no authoritative interpretation of Article 9(2) BC.1356 The original version of this provision was introduced in the 1967 Stockholm revision conference.1357 It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

The provision applies to the reproduction right and mentions the interests of authors. The analysis of the private copying precedent in Chapter 2 clarifies the mixed nature of the test in Article 9(2) BC. On the one hand, the test is a limiting clause, to be read in a sequential and cumulative manner.1358 On the other hand, due to the abstract nature of the criteria and its compromise nature, the test is flexible enough to accommodate diverse national limitations on the right of reproduction with social, cultural and economic motivations.1359

As copyright law evolved so did the three-step test, both within the international framework and in regional and national laws. Westkamp aptly describes the evolution as more of a “contemporaneous compromise” than “a rigid obstacle to creating new limitations”.1360 From a relatively moderate scope at inception, the test currently extends (with different wordings) to all rights and rights holders, by virtue of TRIPS and the WIPO Treaties.1361 In addition, as these treaties incorporate Article 9(2) BC by reference, the context of the BC provides common ground for analysis of the subsequent tests.1362

When considering these “interwoven contexts”, it must be remembered that the object and purpose of the later treaties is more complex, especially due to their reference to notions of

1356 A definitive interpretation can only be given by the International Court of Justice (Art. 33 BC) but no case has ever been brought before this Court, as dispute resolution procedures under the BC are not deemed effective. Cf. P. Bernt Hugenholtz & Okediji, 2008, p. 21; Iuliano, 2011, p. 471.

1357 For historical background, see Ficsor, 2002b, p. 115ff.; Kur, 2008, pp. 17–18; Senftleben, 2004, pp. 43–82. See also supra 2.3.2.

1358 Ficsor, 2002b, pp. 125–127. See supra 2.3.2.1, referring to the reported statements of Professor Eugen Ulmer, chairman of Main Committee I at the 1967 Stockholm Conference. Cf. Records BC Stockholm 1967, 885. But see Geiger, Gervais, & Senftleben, 2014, pp. 609–611, noting that “…one cannot derive the entire interpretation from these statements”.


1360 Westkamp, 2008b, p. 11.

1361 Arts 13 TRIPS, 10 WCT (and its Agreed Statements), and 16(2) WPPT, including the Agreed Statements to the latter treaties.

balance and public interest.\textsuperscript{1363} For example, the WCT Preamble introduces considerations of competing interests to those of authors and “the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention.”\textsuperscript{1364}

The mention of the BC highlights a “balance” dimension not immediately apparent in the text of that convention, but nevertheless unanimously recognised and adhered to by the WCT parties. Ricketson and Ginsburg find the reference meaningful and indicative of “the need to interpret Berne provisions in a qualified way”.\textsuperscript{1365} It is also consistent with the aforementioned diplomatic compromise nature of the BC.\textsuperscript{1366}

Like the BC, TRIPS affords a central role to “balance”, namely when dealing with the objectives and principles of the treaty in its preamble and Articles 7 and 8. These provisions consider intellectual property rights as functional tools for the promotion of trade, technological development, and economic and social purposes, to be balanced with competing and often rival interests of users.\textsuperscript{1367} The emphasis on public interest, some scholars argue, increases the space for limitations.\textsuperscript{1368}

This brief excursion shows that the three-step tests in TRIPS and the WIPO Treaties can be interpreted in a more flexible way than the BC test, if read in light of the object and purpose of the respective treaties.\textsuperscript{1369} The point is reinforced for online limitations, due to temporal issues on interpretation. Article 31(1) VCLT mandates that interpretation of the ordinary meaning of a provision is fixed at the date of conclusion of the treaty text.\textsuperscript{1370} In the BC, that date significantly precedes the digital age and refers to a substantially different technological and economic context, where the definition of “primary” exploitation markets was more transparent and stable.\textsuperscript{1371} Accordingly, the more up to date tests in TRIPS and the WIPO Treaties are of greater

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\bibitem{} The attention to the object and purpose of the treaty is fully consistent with the rules of the VCLT. Cf. Geiger et al., 2014, p. 597-.
\bibitem{} The preamble to the WPPT contains similar wording but omits the reference to the BC and replaces “authors” with “performers and producers of phonograms”. In the analysis the position is taken that the ordinary meaning of the terms “rights” (of authors) and “interests” (of the general public) do not translate into different hierarchical value (e.g. of rule vs exception), but rather their different technical nature: rights are specifically regulated, whereas the notion of interests is broader. Cf. Kur, 2008, pp. 46–47.
\bibitem{} Ricketson & Ginsburg, 2006, p. 213. The position is shared by other scholars. See, e.g., P. Bernt Hugenholtz & Okediji, 2008, p. 16.
\bibitem{} Geiger, 2007b, p. 3; Koelman, 2006.
\bibitem{} Geiger & Schönherr, 2014b, pp. 442–444 & n.130. N.B. some authors argue that the benchmark for assessing the minimum safeguards for intellectual property rights is not a “property-biased approach” but rather one focused on competition and the prevention of international market failure. See Kur, 2008, pp. 36–39, arguing for a greater interpretative relevance of Arts 7 and 8 following the Doha Declaration (2001). See also Geiger et al., 2014, p. 597-Ricketson, 2003, p. 7; Ricketson & Ginsburg, 2006, pp. 208–209. The conclusion is not affected by the “special agreement” nature of the WIPO Treaties under Art. 20 BC, which means they should not derogate from existing obligations under the BC and comply with the incorporated substantive provisions. It is likewise not contrary to the similar non-derogation provision in Art. 2(2) TRIPS. \textit{But see} Ricketson & Ginsburg, 2006, pp. 210–211, with an apparently different view.
\bibitem{} See, e.g., Sinclair, 1984, pp. 124–126.
\bibitem{} Cf. Westkamp, 2008b, pp. 7–8. For example, in the music sector, the primary market is characterised by single authors (writers, lyricists, composers) directly contracting with music publishers or the record company, whilst the
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relevance to assessment of limitations in the digital age. At the very least, they warrant exploring a flexible interpretation of the test.

5.2.1.2 The WIPO Treaties and the Agreed Statements

The three-step test in the WCT applies only to authors, like the test in the BC. Unlike the BC version, the WCT test extends beyond the reproduction right, including limitations to all WCT-rights (paragraph 1) and “when applying the Berne Convention” (paragraph 2). The latter reference fulfils an “additional safeguard function” regarding exclusive rights in the BC. For its part, the WPPT test benefits performers and producers of phonograms.

The tests in the WIPO Treaties are accompanied by near identical Agreed Statements. The Agreed Statement on Article 10 WCT, adopted mutatis mutandis for Article 16 WPPT, states:

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

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

This statement is between all parties to the WCT, which makes it “context" for interpretation of the treaty. That status means, first, that it ranks higher than supplementary sources (e.g. most statements in preparatory works) and, second, that it must be read in direct relation to the treaty text.

One of the implications is that the Agreed Statements should be interpreted in light of the preambles of the WIPO Treaties. As noted, these preambles accentuate the need for balance between authors/rights holders and the public interest. In this way, the Agreed Statements open the door for a flexible interpretation of the test, taking into account policy considerations and relevant societal values in assessing digital limitations.

secondary market is characterised by “use of products of the primary market (for example, public performance of phonograms or DVDs, lending books or broadcasting)” for which individual management is generally not feasible. Cf. R. Hilty & Nérisson, 2013, p. 3.

1372 See Ricketson & Ginsburg, 2006, p. 218, for temporal issues in interpretation of international law.
1373 Kur, 2008, p. 35.
1374 Art. 10(1) WCT applies to the newly granted rights in Arts 6, 7 and 8 WCT. See Christie & Wright, 2014, pp. 418–419, with a view that the wording in this paragraph allows countries to go beyond “certain special cases” based on a textual interpretation.
1376 Art. 31(2)(a) VCLT. See Ricketson & Ginsburg, 2006, p. 870.

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This interpretation is, on the one hand, supported by the drafting history of the WCT—which is populated with references to balancing concerns—and, on the other hand, consistent with the test’s technology neutral character, as it allows it to adjust to an evolving landscape of copyright use. With a view to a good faith interpretation, the Agreed Statements and preamble could even “retroactively infuse meaning into the norms of the BC as incorporated into TRIPS and the three-step test”.

Without a doubt, the Agreed Statements are difficult to reconcile with rigid sequential interpretation of the test that prevents extension of limitations to the digital environment. A more defensible interpretation views them as guidelines for: (1) the adaptation and extension of existing limitations to BC rights to the digital environment, including reproduction and certain forms of communication to the public; and (2) the creation of new limitations for digital use, which go beyond the scope of those already in existence, such as making available online.

On guideline (1), it is noteworthy that the Agreed Statement’s second paragraph allows retention of existing limitations valid under the BC but theoretically in violation of the WCT test. The result is to neutralise restrictive readings of Article 10(2) WCT, avoiding automatic rejection of online limitations. In this context, the main flexibility tool that the test provides for national policy makers is the payment of remuneration as a means to prevent unreasonable prejudice (or, for some commentators, to avoid conflicts with normal exploitation).

Regarding guideline (2), on new limitations for digital use, the Agreed Statement opens the door for a flexible interpretation of the test and properly justified deviations from the principle of exclusivity in the online realm. This is relevant for a statutory licence ACS, which partially relies on pre-WCT limitations extended to the digital environment and, at least regarding the making available right, on a new limitation.

5.2.1.3 The Agreement on Trade-Related Aspects of Intellectual Property Law

The three-step test in TRIPS is a compromise “grandfathering-clause”. The inclusion of the test in TRIPS gave rise to fears that a norm of international copyright law would be transformed into a norm of international trade law, degrading its normative content and further hindering the balance between access and exclusivity. This version of the test replaces “authors” with “the

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1379 Geiger et al., 2014, pp. 589–591; Senftleben, 2013c, pp. 17–18, referring to the basic proposal for the WCT and the Minutes of Main Committee I, which clearly reflect the different balancing concerns of national delegations.
1380 Mihály Ficsor, 2012, p. 6, emphasising the technology-neutral nature of the test.
1382 Geiger et al., 2014, p. 610.
1383 Geiger et al., 2014, pp. 591, 617, 625–626; Senftleben, 2013c, pp. 17–19. See also Christie & Wright, 2014, pp. 418–419, arguing on the basis of the wording of Art. 10(1) WCT and the Agreed Statement that member states are not restricted to implementing exceptions in the digital environment only in certain special cases or in those permitted in the BC.
1384 P. Bernt Hugenholtz & Okediji, 2008, p. 20; Ricketson & Ginsburg, 2006, pp. 871–872. To be clear, this does not mean that the test does not apply to limitations to BC rights as transposed to the digital environment. Cf. Peukert, 2005, pp. 44–45.
1385 See, e.g., Senftleben, 2014, pp. 6–7. See infra 5.3.2.3, 5.3.3.1, and 5.3.3.3.
right holder”, broadening the scope of the provision to derivative rights holders.\footnote{It is noteworthy that TRIPS contains slightly different versions of the test in the fields of trademarks (Art. 17), designs and models (Art. 26(2)) and patents (Art. 30).} It also extends the test to new rights provided for in TRIPS.\footnote{This includes rental of computer programs and cinematographic works. See Art. 11 TRIPS.}

WTO Panels interpreted the TRIPS tests on four occasions: \textit{US–Copyright} (in 2000); \textit{Canada–Patent} (in 2000); and \textit{EC–Trademarks I and II} (in 2005).\footnote{Because the trademark reports concern parallel complaints with identical texts, the following analysis makes reference only to the most comprehensive report, namely WTO, \textit{EC–Trademarks I}. Cf. Senftleben, 2006, p. 407 & n.3.} Only \textit{US–Copyright} interprets Article 13 TRIPS, making its findings of greater importance to this dissertation. As supplementary means of interpretation\footnote{Pursuant to Art. 32 VCLT. See supra 5.2.1. Cf. Ricketon & Ginsburg, 2006, pp. 200–201.} these panel reports may assist in defining the scope of the TRIPS and BC tests and, to an indirect extent, the WCT test.\footnote{Senftleben, 2004, pp. 107–110.} Their importance is qualified by the fact that they are taken in the context of international trade, not copyright. This makes them less sensitive to public interest arguments, despite the objectives of TRIPS requiring such interests to be balanced in the protection and enforcement of intellectual property rights.\footnote{P. Bernt Hugenholtz & Okediji, 2008, pp. 17–, with further references. The author criticises the excessive length of the reports, their repetitive reasoning and little substance, as well as the political nature of the surrounding process. See also P. Bernt Hugenholtz & Okediji, 2008, pp. 21–22.} The main value of the reports lies in the provision of a roadmap to apply the test.\footnote{Kur, 2008, p. 17–, with further references.} It is in this capacity they are used in the following analysis, without forgetting the significant criticism to which they have been subject.\footnote{For persuasive criticism of the panel reports, see Geiger et al., 2014, pp. 592–611; Griffiths, 2009, p. 10; P. Bernt Hugenholtz & Okediji, 2008, p. 24; Iuliano, 2011, pp. 489–490; M. Kennedy, 2014; Kur, 2008, pp. 30–31; Shabalala, 2010. However, it is undeniable that the absence of new panel reports on Art. 13 TRIPS has permitted \textit{US–Copyright} “to become the de facto yardstick against which proposals to further restrict copyright protection have been made”, especially in legal scholarship. Cf. Shabalala, 2010, p. 188.} Finally, it is noted that the panel reports have less weight than the aforementioned Agreed Statements in the interpretation of the three-step tests in the WIPO Treaties and the InfoSoc Directive. As previously mentioned, the directive implements the WIPO Treaties and should be read in their light.\footnote{N.B. no CJEU decision on limitations mentions the WTO Panel Reports, although WTO, \textit{US–Copyright} is mentioned in \textit{Opinion AG in VG Wort}, ¶9, and \textit{Opinion AG in ACI Adam}, ¶55.} This is important because strict readings of the three-step test often rely primarily on \textit{US–Copyright}, to the detriment of the Agreed Statements.\footnote{See infra 5.2.2, 5.3.1.2 and 5.3.2.1. See, e.g., the criticism of Iuliano, 2011, p. 468, to the analysis of Peukert, 2005. Senftleben, 2013c, pp. 14–15.}

\section{EU Copyright Law and its Relationship to International Law}

The drafting history of Article 5(5) InfoSoc Directive shows the inception of a restrictive view of the three-step test in EU law.\footnote{Senftleben, 2013c, pp. 14–15.} The directive’s version of the test originates from the 1995 Green Paper on Copyright and Related Rights in the Information Society. The document is
critical of Article 9(2) BC for being detrimental to the effectiveness of the reproduction right and causing divergent national limitations for reprography and private copying.\textsuperscript{1399} The criticism is again patent in a 1996 follow-up paper, where the Commission adopts a “rights-holder centric” approach to what it views as an “economic prejudice test”.\textsuperscript{1400} However, with the adoption of the WIPO Treaties in 1996 (which the EU later joined as a member), the Commission was forced to adjust its view. This adjustment is patent in the 1997 proposal for a new directive.\textsuperscript{1401}

The InfoSoc Directive’s explanatory memorandum expresses the Commission’s concern that obligations arising from the WIPO Treaties’ tests could cause different interpretations, thereby posing a risk to the establishment of an internal market for online services.\textsuperscript{1402} The memorandum stresses the need to interpret those provisions in light of the \textit{acquis}, namely the similar tests in the Software and Database Directives.\textsuperscript{1403} It therefore advances a draft wording closer to that of existing directives than that of international treaties.\textsuperscript{1404} During the legislative process, the wording was tweaked and the possibility of an open-norm rejected. Ultimately, even the desire to follow the \textit{acquis} was abandoned by the Council Working Group, which realigned the draft provision with its international counterparts.\textsuperscript{1405}

Against this background, Article 5(5) InfoSoc Directive states that the limitations provided in the same article:

\begin{quote}
shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.\textsuperscript{1406}
\end{quote}

This test became the “benchmark for all copyright limitations” in the EU.\textsuperscript{1407} The wording is similar to that of international treaties and provides the reference point for the subsequent analysis in this chapter. The main function of this test is to control the application of limitations to the directive’s exclusive rights. For national legislators, this means that limitations must comply with the conditions set forth in the exhaustive list of Article 5(1) to (4) and the three-step test in paragraph (5). This design means the EU test has a similar additional safeguard function to Article 10(2) WCT.

The EU test deviates from its international predecessors by stating that limitations “shall only be applied in certain special cases”. The references to the modal verb “shall” and to \textit{application} in

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{1399} Green Paper on Copyright and Related Rights in the Information Society 1995, pp. 50–51.
\item\textsuperscript{1400} See Senftleben, 2004, pp. 246–247, and Follow-up to Green Paper 1996.
\item\textsuperscript{1401} Proposal InfoSoc Directive, COM(97) 628 final – 97/0359 (COD).
\item\textsuperscript{1402} \textit{Ibid.}, pp. 16, 19, 20–21, 23, 28–29.
\item\textsuperscript{1404} For example, by switching the last two criteria (mentioning certain “specific” cases and conflict with “the” normal exploitation) and assessing a limitation with reference to its “interpretation”.
\item\textsuperscript{1405} Senftleben, 2004, p. 250, describing the adoption process. See also Common Position (EC) No 48/2000, reflecting the new text.
\item\textsuperscript{1406} Art. 5(5) InfoSoc Directive.
\item\textsuperscript{1407} Green Paper Copyright in the Knowledge Economy 2008, p. 5.
\end{enumerate}
\end{footnotesize}
the article (and also in recital 44 InfoSoc Directive) raise the question of whether the test doubles as a substantive norm for national judges to decide on specific instances of liability.\textsuperscript{1408}

The topic is debated in scholarship and has not been settled by the CJEU. Whereas the Court does not consider the test to affect the substantive content of limitations, it likewise holds that where certain acts of a defendant fall within their scope, the requirements of Article 5(5) must be met.\textsuperscript{1409} In addition, the Court has stated on several occasions that limitations must be construed in light of Article 5(5).\textsuperscript{1410} On this basis, some authors and AGs consider that the test is also addressed to national courts.\textsuperscript{1411}

Beyond this aspect, the relationship of Article 5(5) with the aims of the InfoSoc Directive and international obligations is often at the centre of interpretations on the scope and flexibility of the test. As noted in the previous chapter, among the main objectives of the directive are increased legal certainty, a high level of protection, and a functioning internal market: to achieve them it is crucial to harmonise copyright and its limitations, while giving respect to fundamental rights.\textsuperscript{1412} The harmonisation goal intersects with the adaptation of EU law to international standards, in particular the WIPO Treaties, as expressly stated in recital 15.\textsuperscript{1413} Furthermore, recital 44 states that limitations “should be exercised in accordance with international obligations”. The EU, of course, is a member of TRIPS and the WIPO Treaties, making the treaties binding on its institutions and Member States.\textsuperscript{1414}

For some authors, the reference to “international obligations” in the InfoSoc Directive relates specifically to Article 10 WCT and its Agreed Statement.\textsuperscript{1415} Thus, if the EU three-step test is interpreted in light of this set of WCT materials (including its Preamble), these authors argue, it should be interpreted as a flexible norm that allows for the adaptation or creation of limitations in the digital environment.\textsuperscript{1416} Although this interpretation is persuasive, it should be noted that different readings are possible. For example, recital 44 InfoSoc Directive offers support for the view that the scope of future limitations for online use of works ought to be reduced due to their potential for “increased economic impact” on the revenues of rights holders.\textsuperscript{1417}

\begin{footnotesize}
\begin{enumerate}
\item[1409] CJEU, Murphy, ¶181; CJEU, Meltwater, ¶53; CJEU, ACI Adam, ¶25–26; CJEU, Cupp Dun, ¶90; CJEU, Ulmer, ¶56. CJEU, Infopaq I, ¶58; CJEU, OSA, ¶40; CJEU, Ulmer, ¶47. See also CJEU, PPI, ¶¶75–76, in connection with Art. 10(3) Rental Right Directive. Cf. Arnold & Rosati, 2015, pp. 8–9.
\item[1410] See: Arnold & Rosati, 2015; Opinion AG in Stichting de Thuiskopie, ¶42 (“...though being primarily a norm addressed to the legislature, the three-step test must also be applied by the national courts in order to ensure that the practical application of the exception to Article 2 of Directive 2001/29 provided by national legislation remains within the limits allowed by Article 5 of that directive” [sic]); Opinion AG in ACI Adam, ¶48.
\item[1411] See supra 4.4.1.3.
\item[1413] Cf. Art. 216 TFEU. On the need to interpret the acquis in light of international law, see supra 1.3. See also Geiger & Schönherr, 2014a, p. 135 & n.102, 2014b, p. 443, citing CJEU jurisprudence in support of this principle regarding “mixed agreements”, such as TRIPS and the WCT. N.B. the WIPO Treaties were approved on behalf of the European Community by Council Decision 2000/278/EC.
\item[1415] Geiger & Schönherr, 2014a, p. 121.
\item[1416] The final sentences of recital 44 InfoSoc Directive mention the possibility that limitations may have an increased economic impact in the digital environment. Hence, their scope “may have to be even more limited when it comes to
\end{enumerate}
\end{footnotesize}
5.2.2 Spectrum of Readings

The analytical framework presented influences the range of potential readings of the test, demarcated by two opposing views: strict versus flexible interpretation. The following paragraphs explain both views, providing background for the subsequent analysis of a limitation-based ACS.

5.2.2.1 Strict Interpretation

On one side of the spectrum, the three-step test can be interpreted as a restricting clause. This understanding derives from the doctrine of strict interpretation, which departs from the principle of exclusivity and construes derogations thereto as exceptional.\(^{1418}\) It posits that the test can only have a narrow sphere of operation, imposing “limits on limitations”.\(^{1419}\)

The approach can be synthesised as follows. The three conditions have a conjunctive structure: they are cumulative and successive “steps” instead of factors.\(^{1420}\) The initial steps have priority. Analysis starts from the first condition and works its way up. If along the way a condition is not met, the limitation fails the test.

The first and second conditions are designed to impose quantitative thresholds and economic standards that restrict the qualification of what constitutes a “certain special case”, and broaden the concept of “normal exploitation”. The reference point for the first condition is reduced to a subset of exclusive rights instead of the area of exclusivity affected by the limitation. The second condition is deemed to include not only current but also potential new forms of exploitation of works in relation to each type of right affected, the foreseeability of which is not necessarily required. Through this approach, the strict interpretation doctrine eschews normative considerations that could temper the quantitative elements.

The result is an analytical framework in which most limitations for online use, even if narrow in scope, likely conflict with a broad notion of normal exploitation. Moreover, this method disallows the introduction of equitable remuneration to cure potential conflicts in the second step, while only admitting a balancing of rights and interests in the third step.

It is possible to find this approach at international, regional and national levels. First, the strict interpretation method is pervasive in the WTO panel reports on different TRIPS tests.\(^{1421}\) In the influential US–Copyright, for instance, the panel posits that Article 13 TRIPS can only have a narrow or limited operation, and that the conditions are to be applied cumulatively and successively, in a hierarchy of analysis.\(^{1422}\) The remaining tests are similarly understood as allowing only a “small diminution of the rights”.\(^{1423}\) Although all panel reports recognise certain new uses of copyright works and other subject-matter”. The recital anchors a restrictive interpretation of limitations in ACI Adam. On its basis the Court argues that the scope of limitations can only be reduced but not extended, as such a possibility is not expressly envisaged in the InfoSoc Directive. See CJEU, ACI Adam, ¶27; Opinion AG in ACI Adam, ¶49. For criticism, see Quintais, 2015b.

\(^{1418}\) See supra 4.4.1.4 and 4.4.3.6.

\(^{1419}\) Cf. Senftleben, 2006, p. 413, describing the WTO Panel approaches to the test.

\(^{1420}\) See, e.g., He, 2009, pp. 277–278; Rietjens, 2006, p. 326.


\(^{1423}\) WTO, Canada–Patents, ¶7.30; WTO, EC–Trademarks I, ¶7.650.
elements of flexibility in the test, usually by identifying normative considerations in each condition, the strict interpretation lens favours a restrictive economic reading over policy considerations.

At EU level, both the AGs and the CJEU have followed this doctrine in a number of cases, including the method of cumulative and successive reading. Likewise, it is possible to identify interpretations of the test as a restrictive standard by national courts across Europe. The strict interpretation method is problematic because the initial conditions of the three-step test exclude flexibility and a balancing exercise, facilitating the rejection of limitations at an early stage. This pre-empts normative analysis and transforms the test into a tool to perpetuate exclusivity, solely (or predominantly) allowing copyright limitations for de minimis use of works. From this perspective, the focal point of the test is to safeguard the normal exploitation of works, relegating the consideration of prejudice to the legitimate interests of the authors to a secondary role. This interpretation is in no small part inspired by a historical approach, as it closely follows Ulmer’s position reported in the BC preparatory works.

5.2.2.2 Flexible Interpretation

In contrast, more flexible constructions are advocated which tend to see the test as an enabling clause, allowing consideration of different interests at national level and the adequate balancing of rights and limitations.

To achieve a flexible reading, scholars have advanced different (and often conceptually overlapping) approaches. First, inspired by the US fair use doctrine, it is suggested that the different steps are not cumulative or successive conditions. Rather, the provision is a multi-factor test subject to a “comprehensive overall assessment” and teleological interpretation, balancing competing interests on equal grounds. A different approach is to read the test in reverse,
incorporating normative considerations at the beginning of the analysis. A third method emphasises fair balance and proportionality, either suggesting their consideration at the second step or by favouring the third step, where balancing traditionally takes place. Yet another suggestion is to take into account compensation in the analysis of the second step as a means to counteract conflicts with the normal exploitation. Finally, some authors advocate a narrow definition of “normal exploitation” of works, either by rejecting a purely economic view of the concept and focusing on the justification of limitations, or by not taking into account the potential harm dimension of the concept advanced in US–Copyright.

In this line, Hugenholtz and Senftleben examine the acquis and argue that the InfoSoc Directive’s exhaustive list of limitations consists in many cases of “categorically worded prototypes rather than precisely circumscribed exceptions, thus leaving the Member States broad margins of implementation”. In combination with the three-step test, this interpretation “would effectively lead to a semi-open norm almost as flexible as the fair use rule of the United States”.

The authors, along with other scholars, support their position on a systematic reading of the InfoSoc Directive, noting the link in recitals 15 and 44 to compliance with international obligations. Recognising the historic compromise nature of the provision and the inherent flexibility required by the WCT, they interpret the directive’s test in light of international law as an enabling clause for digital limitations.

This position has parallels with a recent shift in CJEU case law towards a more balanced view of the test—what Chapter 4 terms “restricted flexibility”. The key feature in this shift lies with the normative justifications of a limitation. The Court attempts to secure the effectiveness of limitations by interpreting them in light of their objective and purpose, the principle of proportionality, and the overall objectives of the InfoSoc Directive. The result seems to be greater flexibility in the interpretation of limitations that are justified on fundamental rights or that facilitate the development and operation of new technologies. An illustration of this approach is visible in Meltwater and Ulmer, where the Court reads the test in a non-sequential

preparatory works. See also Westkamp, 2008b, pp. 42–43, arguing for a more liberal balancing of interests, modelled on the US fair use clause. Regarding Art. 30 TRIPS, see a similar position in Lamping, 2014, pp. 688–689, 693.

See, e.g., Gervais, 2005, proposing a reverse reading of the test based on the US fair use doctrine, which would transform it into an “effects based norm”. See also Geiger, 2007b; P. Bernt Hugenholtz & Okediji, 2008, p. 21.


Geiger et al., 2008, p. 711.

Geiger, 2007b; Senftleben, 2006. See also He, 2009, proposing an “adapted fair use test” for this effect.

P. Bernt Hugenholtz & Senftleben, 2011, p. 2. It is noted that the possibility that such a reading would support interpretation of the test to create new limitations to Arts 2 and 3 is denied by the Court in OSA, in line with the exhaustive nature of the list of limitations in Art. 5. See CJEU, OSA, ¶¶37–41. Cf. the position of Nérisson, 2015a.


Cf. supra 4.4.1.4. See CJEU, Deckmyn, ¶¶19–23; CJEU, Murphy, ¶¶162–164; CJEU, Meltwater, ¶24; CJEU, Painer, ¶¶132–134. See also European Copyright Society, 2014b, pp. 4–5.
manner to achieve a balanced interpretation. In sync with this shift by the Court, a growing body of national decisions recognises the three-step test as a flexible and enabling standard.

Of course, different interpretations of the test lead to its inconsistent application. For some authors, the distance between the strict and flexible views is symptomatic of the test’s inadequacy for regulation of competing interests. While it is possible to view the test in a restrictive way, it is submitted that its conditions can and in certain cases should be read as “open-ended factors” enabling the “introduction and broadening of limitations” in light of their objective and purpose. This is especially true for limitations justified on fundamental rights and freedoms. Any restriction imposed on these by the competing fundamental right of copyright (in Article 17(2) Charter) must strike a fair balance and be proportional, necessary and, under certain circumstances, exceptional. Due to the challenges and costs of imposing exclusivity for non-commercial online use, it is justifiable to explore whether a flexible interpretation of the test leaves space for a limitation-based ACS.

5.3 The Space for an Alternative Compensation System in the Three-Step Test

This section examines the three-step test in the InfoSoc Directive to assess whether it allows for a limitation-based statutory licence ACS. CJEU judgments on the test are sparse. For that reason and the need to interpret EU law in light of international law, legal scholars often rely on the analysis of US–Copyright as a baseline. Consequently, and despite its shortcomings, this section pays particular attention to that WTO panel report.

To prevent redundancy and provide a structured analysis, this section adopts a sequential study of the test, considering each step separately. However, it is noted that the steps overlap and are not separate tests in themselves. Rather, the three-step test is “one single analytical whole and serves the ultimate goal to strike an appropriate balance”, requiring a multi-factor approach to ensure consideration of the social policy benefits of a limitation. This section first looks at what requirements a limitation-based ACS must meet to qualify as a certain special case (5.3.1).

1440 Geiger & Schönherr, 2014b, p. 444, concluding similarly, Contra, Nérisson, 2015b, p. 391, basing her position on OSA, ¶¶37–41 (although the author recognises the CJEU’s broad purposive interpretation of limitations in some cases).
1441 Art. 52(1) Charter. Cf. Geiger & Schönherr, 2014b, pp. 450–454, which highlight the consideration of copyright as a derogation to the principle of freedom of expression in ECtHR, Ashby Donald. See supra 4.4.1.4, 4.4.4.1, and 4.4.4.3, discussing the shift away from strict interpretation of limitations justified by fundamental rights in CJEU jurisprudence. See also Senftleben, 2013c, pp. 23–24.
1443 Geiger et al., 2014, pp. 585, 610–611.
1444 R. Wright, 2009, pp. 609, 617.
It then examines whether such an ACS conflicts with the normal exploitation of works (5.3.2), and if it causes unreasonable prejudice to the legitimate interests of rights holders (5.3.3). The section concludes with a summary of findings for each step and an assessment of the margin the test allows for the legalisation of non-commercial online use in the *acquis* through a statutory licence (5.3.4).

### 5.3.1 Certain Special Cases

The CJEU provides little guidance on the first step of the test. Its jurisprudence suggests that the step is met if an act falls clearly within the scope of a limitation.\(^{1445}\) For that reason, it is assumed that all limitations in Article 5 InfoSoc Directive constitute a certain special case.\(^{1446}\) Against this background, the following paragraphs analyse in sequence the meaning of “certain” cases (5.3.1.1) and “special” cases (5.3.1.2).

#### 5.3.1.1 Certain Cases

A “case” is an occurrence, circumstance, event or fact. In relation to copyright limitations, a case can have different meanings. *US–Copyright* described it “in terms of beneficiaries of the exceptions, equipment used, types of works or by other factors”.\(^{1447}\) To be a “certain” case, it added, domestic limitations must be “clearly defined”, which does not require privileged uses to be listed or enumerated, but merely that the provision’s scope is “known and particularized”, thereby assuring “a sufficient degree of legal certainty”.\(^{1448}\)

Not all scholars share this view. Some argue that in the BC preparatory works “certain” refers to “some” and not to “clearly specified” cases.\(^{1449}\) Others note that the “less strict and rigid” analysis in *Canada–Patent* does not contain a requirement of legal certainty at this stage.\(^{1450}\) Whichever the view, a good faith interpretation of the first step seems to imply that a certain case entails a foreseeability requirement, aimed at forbidding unspecified and indeterminate limitations.\(^{1451}\)

The legislative technique of Article 5 InfoSoc Directive—an exhaustive list of limitations—seems more aligned with a foreseeability condition than open-ended norms.\(^{1452}\) If that is true, a limitation that approximates the *acquis* model should be more consistent with the test than, for example, the US fair use clause, even considering the extensive case law applying it. Nevertheless, the latter is not only internationally accepted, but also considered compliant with the first step requirement of certainty by a majority of scholars.\(^{1453}\) Hence, if the scope of a


\(^{1447}\) WTO, *US–Copyright*, ¶6.110.

\(^{1448}\) Ibid., ¶6.108.


\(^{1450}\) Senftleben, 2006, p. 418.


\(^{1452}\) Geiger, 2007a, pp. 4–5.

statutory licence ACS is sufficiently concrete as regards subject matter, permitted uses and remaining criteria, it is likely to comply with the first step, even if this is subject to a strict interpretation.  

5.3.1.2 Special Cases: Qualitative and Quantitative Considerations

A certain case can be “special” from the qualitative and quantitative viewpoints. The first viewpoint refers to quantifiable restrictions on allowed uses. The second viewpoint pertains to the function of a limitation, namely its justification and public interest dimension.  

US–Copyright exemplifies a predominantly quantitative approach. It initially recognises both viewpoints by stating that to be a “special” case a limitation should have “an individual or limited application or purpose”, “be narrow in quantitative as well as a qualitative sense”, and have an “exceptional or distinctive objective” (as opposed to “normal”). In essence, an exception must be narrow in “scope and reach”.  

Narrowness refers to the types of exempted use (a subset of exclusive rights), categories of works, and the number of potential beneficiaries (users). The benchmark for examination of this scope is the current state of technology.

One issue with this approach is that it does not follow from a limitation being “limited in its field of application” that it must be qualitatively and quantitatively narrow. Other approaches are conceivable. For example, the quantitative reference point in Canada–Patent and EC–Trademarks I was not the impact of the limitation on specific rights or subsets thereof but rather on broader exclusive rights granted in relation to patented inventions and trademarks.

But the analysis in US–Copyright poses another problem. Despite drawing the distinction between quantitative and qualitative, the report eschews the qualitative assessment. Based on previous Appellate Body decisions, the report states that the first step does not require
assessment of the “subjective aim or objective pursued by national legislation”. This results from a strict interpretation method, motivated by a desire to analyse each step separately and deal with policy considerations at a later stage. The main risk, noted before, is the rejection of limitations without assessing their policy underpinnings.

Rietjens’ analysis of broadband levies is a good illustration of the dangers of this approach vis-à-vis ACS. The author compares the number of broadband users with the total number of households in the Netherlands, and concludes that the number of potential beneficiaries of the limitation does not qualify as quantitatively narrow. He further argues that a P2P licence would be broader (as it relates to works covered) than the home-style exception rejected in US–Copyright and, therefore, would not pass the quantitative first step.

In response, one could point out the importance of examining factors delimiting the licence’s scope, which may lead to a different conclusion. These factors include subject matter exclusions, articulation with other limitations, the non-commercial purpose of use, the exclusion of legal persons as beneficiaries, or the application to works after first publication or making available.

Furthermore, a purely quantitative interpretation conflates the scope of a limitation with its effect on the exploitation of the right, while rejecting its justifications. Indeed, full adoption of a cumulative approach could turn the test into a “one-step inquiry”, invalidating even existing limitations in the InfoSoc Directive, such as digital private copying. Of course, this would not be a satisfactory outcome.

Consequently, it is important to consider the qualitative viewpoint, pursuant to which a case is “special” if it serves an objective of public policy, cultural interests or “some other exceptional circumstance”. In fact, considering these elements is consistent with the context and history of the BC.

For Gervais, for example, the first condition of the test was historically designed as a last filter to the two subsequent “operational” conditions. In that sense, it is of little relevance beyond the recognition that the term “special” requires limitations to have a “sound policy justification”.

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1464 WTO, US–Copyright, ¶6.111–6.112. Critically, see Ficsor, 2002b, pp. 223–229. See also Gervais, 2005, p. 15, noting that following this position Member States would not have a burden of proof regarding the limitation’s justification.

1465 Kur, 2008, pp. 23–24, identifying this undesirable outcome regarding the stockpiling exception in Canada–Patent. See also Iuliano, 2011, pp. 477–478, noting critically that a shifting qualitative standard without a policy rationale check opens the possibility for the inadmissible outcome that legislatures “frame categories in order to pass laws that would otherwise be invalid”.

1466 Peukert, 2005, p. 32. See also: WTO, Canada–Patent, ¶7.49, stating that the first step “is neither designed nor intended to address the issue of economic impact directly”; and Senftleben, 2006, p. 436, noting that “quantitative considerations… should not be overestimated” and arguing for a conceptual approach to this step, where the same would confine limitations solely to a “specific kind of use”.

1467 Rietjens, 2006, p. 329. See also: WTO, Canada–Patent, ¶7.49, stating that the first step “is neither designed nor intended to address the issue of economic impact directly”; and Senftleben, 2006, p. 436, noting that “quantitative considerations… should not be overestimated” and arguing for a conceptual approach to this step, where the same would confine limitations solely to a “specific kind of use”.

1468 Iuliano, 2011, pp. 479–480, making the general argument for the importance of incorporating public policy into the first step.


1471 Gervais, 2005, pp. 15–16, citing the Records BC Stockholm 1967, p. 1145. See also Opinion AG Infopaq I, ¶135 (“…limitations must be clearly defined and must be based on specified particular objectives”).
Besides, the qualitative lens enables respect for international and EU law, as it ensures consideration of a limitation’s function, a key aspect when the same derives from fundamental rights recognised in legal instruments to which states are bound.\(^{1472}\) Such a view aligns with the CJEU’s interpretation of fundamental rights-based limitations, the aims of the test, and the more general goals of the InfoSoc Directive, interpreted in light of international law.\(^{1473}\)

However, we must be cautious when taking into account quantitative and qualitative connotations. Considered cumulatively, they turn a special case into a “maximum requirement of narrowness” precluding most limitations from application online.\(^{1474}\) Conversely, meshing both viewpoints avoids a mechanical sequential analysis and allows subsequent consideration of the wider social benefits of a limitation.\(^{1475}\)

In sum, a “special” case ought to be a mixed quantitative and qualitative standard. This standard should clarify the limitation’s justification and scope, while setting the stage for the analysis of the remaining steps to answer the decisive question of “whether the exception is limited enough in view of its purpose and potential impact”.\(^{1476}\) Quantitatively, “special” requires an assessment of the extent to which a limitation curtails exclusive rights.\(^{1477}\) Quantitative restrictions should be considered as delimiting the limitation’s scope, but are not determinative, as they merely offer a “rough estimate” of the threshold beyond which the viability of the exclusive right is affected—i.e. whether the scope of the limitation is reasonably foreseeable.\(^{1478}\) Qualitatively, the limitation should have a policy justification that operates as a check and balance to prevent overly restrictive quantitative standards. In that role, it would avert the premature rejection or phasing out of online limitations that serve fundamental social welfare aims on grounds of potential (or actual) technological control of uses.\(^{1479}\)

5.3.2 Conflict with the Normal Exploitation of Works

This subsection discusses the second step of the test and whether a statutory licence ACS poses a conflict with the normal exploitation of works. This step is usually considered the most restrictive of the three and the major challenge to the adoption of a legalisation system.\(^{1480}\) The concept of “normal exploitation” of works is a legal fiction with no clear meaning and undeniable circularity: exploitation occurs in markets to which exclusive rights extend, whereas

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\(^{1472}\) Geiger, 2007b, p. 5.

\(^{1473}\) On which, see *supra* 1.3, 4.4.1.3, and 4.4.1.4.


\(^{1475}\) Senftleben, 2006, pp. 418–419, identifying this as the approach in *Canada–Patent*. See also R. Wright, 2009, pp. 617–618.

\(^{1476}\) Kur, 2008, p. 24. The proposed approach attempts to merge the common principles derived from the WTO panel reports on the test, enunciated for example in Senftleben, 2006, pp. 420–421.

\(^{1477}\) See He, 2009, p. 290, although the author distinguishes his point of reference from that of the “overall commercialization of works”. See *infra* 5.3.2.3, on the point of reference for analysis of the second step.

\(^{1478}\) Geier et al., 2008, p. 711; He, 2009, p. 290. Examples of quantitative restrictions are those “on specific technical equipment, a specific administrative process or specific forms of use”. See Senftleben, 2006, p. 420.

\(^{1479}\) He, 2009, pp. 291–292.

privileged uses are by definition outside those markets. Hence, the analysis should avoid turning the step into a “self-validating” mechanism for limitations, while rejecting a construction of the concept so broad that it prevents all but de minimis use. Within this range lies the appropriate definition of normal exploitation.

The examination starts by considering the traditional view of normal exploitation, rooted in US–Copyright, and its application to ACS (5.3.2.1). It then raises some objections to the traditional view, which justify a more flexible interpretation (5.3.2.2). For that reason, the subsequent analysis proposes a flexible reading of the concept to assess whether an ACS complies with the second step of the test (5.3.2.3).

5.3.2.1 The Traditional View of Normal Exploitation

“Exploitation” refers to the economic value extracted from rights through the commercialisation of works. An ACS privileges use by individuals that is “non-commercial”. As a result, its effects on the normal (commercial) exploitation of works are mostly indirect.

The definition of “normal” in relation to exploitation is challenging. To address the challenge legal scholars commonly seek guidance from the WTO panel reports on the test. The broadest—and likely most influential—view of “normal” exploitation is contained in US–Copyright. Most commentators that reject the legal admissibility of statutory licence ACS proposals rely to some extent on this report. Accordingly, we should reflect on its reasoning and potential application, together with the remaining panel reports.

“Normal” exploitation has empirical and normative dimensions, the contours of which are sometimes unclear. The first dimension reflects the degree of market displacement caused by a limitation as measured by different standards, including lost profits, reasonably expected licensing fees, or actual and potential effects. There is some confusion as to the normative dimension, which is ascribed different meanings, ranging from the effect of a limitation on potential markets (in US–Copyright) to the policy justifications of exclusive rights (in the remaining WTO panel reports).

In US–Copyright, normal exploitation involves the assessment of the actual and potential impact on the market of a limitation. The actual or “empirical” aspect reflects the effect of the limitation on forms of exploitation that “currently generate significant or tangible revenue”. This effect is measured in relation to markets that rights holders would expect to exploit if not for the limitation, and the reference point for analysis is the exclusive right or category of right

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1484 Peukert, 2005, p. 33.
affected. If this were the sole test, normal exploitation would exclude uses for which there is no expectation of compensation.

In contrast, the potential or “normative” aspect in US–Copyright relates to forms of exploitation that “with a certain degree of likelihood and plausibility, could acquire considerable economic or practical importance”. In other words, the emphasis is on the potential effect of a limitation on the market.

To give meaning to this normative dimension, the copyright panel relied on the Swedish/BIRPI Study Group report of 1964. According to this, “normal” includes current and future forms of exploiting a work of “considerable economic or practical importance in potential future markets”. The reliance on this document, without scrutinising its status, has been qualified as a “significant misapplication of normal practice under the Vienna Convention”.

The consequences are far-reaching. Infused with this meaning, “normal” exploitation includes “potential, permissible or desirable” forms of exploitation, including new technological modes of exploitation not presently “common or normal in an empirical sense”. It covers potential sources of income for every individual right, irrespective of their importance in the overall commercialisation of works.

Because the potential impact is based on unknown and uncertain factors, the reference point for analysis is the current and “near future” commercial and technological conditions. Yet, the copyright panel rejects treating the non-exercise of rights as indicative that a use is outside normal exploitation. Hence, it does not exclude from the concept of normal exploitation uses for which rights holders are unwilling or unable to exercise their rights. Read in this way, the second step is an economic test deprived of policy considerations.

Thus, according to this view, a conflict with the normal exploitation of works arises when newly exempted uses enter into “economic competition with the ways that right holders normally extract economic value” from the exclusive right affected, depriving them of “significant or tangible commercial gains.” As the hypothetical economic loss caused by the limitation is

1487 Ibid., ¶6.172–173. The report adds that a rights holder is entitled “to exploit each of the rights for which a treaty, and the national legislation implementing that treaty, provides.” Ibid., ¶6.175. See also Kur, 2008, p. 25.


1489 WTO, US–Copyright, ¶6.177.

1490 Ibid., ¶6.180.

1491 See BIRPI, 1965, discussed supra at 2.3.2.1. This study group was composed of representatives of the Swedish Government and the United International Bureaux for the Protection of Intellectual Property (BIRPI), which was set up to prepare for the 1967 Stockholm revision conference. The report in question was adopted in 1965.

1492 WTO, US–Copyright, ¶179.


1494 Gervais, 2005, p. 16.


1497 Ibid., ¶6.188. The examples provided are those of “current licensing practices” and cases “where, due to lack of effective or affordable means of enforcement, right holders may not find it worthwhile or practical to exercise their rights”.


compared to the **actual and potential** full exploitation of the right, most limitations whose scope goes beyond **de minimis** use are outlawed.\(^{1500}\)

It is possible to find this type of strict interpretation in CJEU case law. In *ACI Adam*, for example, the Court states that allowing reproductions from unlawful sources encourages piracy, “inevitably” reducing revenues from lawful sources and conflicting with the normal exploitation of works.\(^{1501}\) That is to say, the Court believes there is a substitution effect between reproductions made from lawful sources and those made from unlawful sources. Still, the judgment does not provide evidence for this claim or address the limitation’s justification, anchored on the fundamental right of privacy.\(^ {1502}\) As noted in the previous chapter, this interpretation was restated in *Copydan* and *Reprobel*.\(^ {1503}\)

In reaching this conclusion, the CJEU and the AG in *ACI Adam* rejected an alternative reading. During oral observations, several stakeholders made the argument that a literal, systematic and teleological interpretation of the InfoSoc Directive would not exclude from the scope of the private copying limitation copies made from unlawful sources. Because such copies could not be prevented by technological means, the private copying levy was the sole means to effectively deal with mass unauthorised use, and should therefore qualify as a normal exploitation of works for the type of use in question.\(^ {1504}\)

The application of the traditional view of normal exploitation, supported in *US–Copyright* or *ACI Adam* and its progeny, probably prevents the adoption of a statutory licence ACS. The basic argument for rejecting such a legalisation proposal could be structured as follows. A limitation for non-commercial online use of works by individuals privileges acts of downloading, streaming, uploading, and other forms of online dissemination of copyright works. It is irrelevant whether such use is susceptible of monetisation or enforcement; what matters is that it enters into economic competition with current and potential forms of exploitation of works. The limitation-based ACS has a negative impact on offline sales of protected content (e.g. CDs), and legal access channels online, including business models such as pay-per-use, pay-per-download, subscription, content streaming and content renting.\(^ {1505}\) It results in a substitution effect for existing paid channels for the dissemination of the same content, and has a detrimental effect on potential markets. Both actual and potential markets are included in the concept of “normal exploitation”, with which the statutory licence conflicts. Because this condition is cumulative, the ACS does not comply with the three-step test.\(^ {1506}\)

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\(^{1500}\) Kur, 2008, pp. 26–27; Senftleben, 2006, pp. 426, 429. See also Kur, 2008, p. 26 & n.98, noting that the lack of reference to reasonableness in Art. 13 TRIPS enables black-letter interpretations to bar limitations under the second step.


\(^{1502}\) For a critical assessment, see Quintais, 2015b.

\(^{1503}\) See **supra** 4.4.3.6.

\(^{1504}\) **See Opinion AG in ACI Adam**, ¶¶35–36, 72–79, and Quintais, 2015b, p. 73.

\(^{1505}\) Examples of business models are taken from Samartzi, 2012, p. 67.

\(^{1506}\) Peukert, 2005, p. 34; Rietjens, 2006, pp. 331–332. Both authors anchor their analysis on the reasoning of *US–Copyright* and reject a normative approach to normal exploitation. See also Colin, 2011a, p. 58; 2011b, p. 4, arguing that a non-voluntary licence removes the possibility of exclusive control of exploitation and is probably “in direct competition with the offers of legal downloads”.
5.3.2.2 Objections to the Traditional View of Normal Exploitation

The legal analysis of the second step in US–Copyright and the traditional view of normal exploitation are not without problems. Beyond adhering to a strict interpretation doctrine, the report seems to rely on an “idealized” notion of normal exploitation, which includes unlicensed, non-monetised and unenforced uses.

In the digital environment, the traditional view risks limitations being crystallised in time. For existing privileges, it disallows uses included in its spirit but not apparent from its letter. For new limitations, the mere possibility that technological development creates new avenues of exploitation for previously uncontrollable uses will raise an insurmountable legal obstacle. At the extreme, if an online use is susceptible of technological control it will form part of the normal exploitation of works. The result, as noted by Westkamp, is a chilling effect on domestic legislative freedom in the field of online copyright limitations and, more generally, communication and information law.

A statutory licence ACS is aimed at restricted uses that are largely insusceptible of control or monetisation. For those uses, the conflict with normal exploitation does not result from the imposition of a limitation, but rather from difficulties with licensing or enforcement. The conflict is a by-product of the fragmentation of exclusive rights.

In this scenario, normal exploitation should not correspond to the use covered by the limitation if (fictionally) controlled by rights holders. Rather, the conflict should refer to the extent to which a limitation “crowds out the normal markets controlled by copyright owners”, taking into consideration the relative positions of individual creators (authors and performers) and “exploiters”, i.e. corporate, subsequent or derivative rights holders, mainly legal persons.

In that light, as with other compensated limitations and mandatory collective management, if an ACS includes a mandatory compensation claim for creators, it might improve their position as compared to the existing or prospective market exploitation in an exclusive rights regime. If that is true, an ACS can contribute to achieving a fair balance of interests by enabling rights holders, especially creators, to obtain fair remuneration in the digital environment.

Critics of the traditional view also object to its disregard for the policy underpinnings of limitations. As noted, a strict reading of the test is sequential and isolates policy

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1507 Shabalala, 2010, p. 174, calling this the “the weakest part of a generally weak legal analysis”.
1509 Geiger et al., 2014, p. 594.
1511 Westkamp, 2008b, pp. 9–10, calling this proposition unacceptable.
1513 Geiger et al., 2008, pp. 708–710, 712. This is a conceptual simplification; under some national laws and for certain categories of works it is possible that a legal person technically qualifies as the “original” rights holder. Also, a producer may be an individual person and an original rights holder.
1514 This point is typically analysed when considering different legitimate interests in the third step. See infra 5.3.3.3.
considerations in the third step. If we follow that interpretation, few limitations survive to the second step. The result is to foreclose analysis of the public interest dimension of limitations that should ultimately justify the restriction on the exclusive right.

For its proponents, the advantage of normative analysis of the second step is to allow consideration of the social function of copyright and technological developments. The approach, which has historical pedigree, is not as radical as it may seem. Indeed, the BC recognises not only several public interest limitations but also the grandfathering of existing domestic exceptions. For Ricketson, the “omnibus” nature of Article 9(2) BC and the wider context of the convention lead to the “logical” conclusion that the three-step test includes “non-economic normative considerations”, namely whether a “particular kind of use is one that the copyright owner should control”.

Canada–Patent follows a similar reasoning, considering a form of exploitation to be normal if it is “essential to the achievement of the goals of patent policy”. Some commentators believe this interpretation is due solely to the policy-infused wording of Article 30 TRIPS, which mentions an “unreasonable” conflict. However, influential scholarship considers variation in the wording of Articles 13 and 30 TRIPS to be insufficient to justify different treatment between intellectual property regimes, and deems it desirable to extend a similar approach to copyright law.

If we accept this last interpretation, the question arises as to how to infuse normative content into the second step? One possibility is to make normal exploitation responsive to social norms in the online environment, for example by allowing limitations for private digital use and non-commercial transformative use. Other approaches include approximating the second step to the fourth factor of the US fair use test, taking into account reasonableness and proportionality in the analysis, requiring that the application of exclusive rights to exempted

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1517 An alleged benefit of US–Copyright’s approach is to avoid redundancy in the examination of different steps. See Griffiths, 2009, p. 16; Ricketson & Ginsburg, 2006, pp. 767–773.
1523 Geiger et al., 2014, p. 600.
1526 The fourth factor of the fair use doctrine, listed in Section 107 US Copyright Act, is “the effect of the use upon the potential market for or value of the copyrighted work”. See Koelman, 2006, pp. 411–412, and He, 2009, pp. 285–286, 294–300 (proposing an “adapted fair use test”).
forms of use be justified on policy grounds\textsuperscript{1528}, or incorporating competing considerations within the definition of normal exploitation.\textsuperscript{1529}

The common theme of these approaches seems to be the consideration of a limitation’s motivations in the balancing exercise. The motivations can be economic or non-economic. In the context of the InfoSoc Directive, where contractual and technical restrictions appear to predominate over limitations, economic market failure motivations for a limitation are inherently weaker.\textsuperscript{1530} As a result, to justify a restriction on exclusivity, a limitation-based statutory licence ACS should also be motivated by non-economic arguments.\textsuperscript{1531}

As noted, beyond addressing a failure of the market in the regulation of non-commercial online use of works by individuals, an ACS aims at providing legal certainty for end-users, improving access to works and the circulation of culture over the Internet, promoting technological development, ensuring fair remuneration of creators, and facilitating the respect for fundamental rights.

If international and EU copyright law indeed aim at striking a fair balance between competing rights and interests, the policy justifications for a limitation can be considered at either the second or third step. The crucial aspect is that they are considered before making a decision on the admissibility of a limitation under, in this case, EU copyright law. To avoid redundancy and for clarity reasons, this chapter conducts such a balancing exercise in the third step.

In sum, the combination of objections against the traditional view of the second step suggests that a more flexible interpretation of what constitutes a conflict with the normal exploitation deserves exploration. The remainder of this section takes up that challenge and applies a flexible lens to assess the legal admissibility of an ACS.

\subsection{A Flexible Interpretation of Normal Exploitation}

In a flexible reading of the second step, the reference point to measure conflicts with the normal exploitation is the effect of a limitation on the overall commercialisation of works, including the associated bundle of exclusive rights.\textsuperscript{1532} The range of actual and potential forms of exploitation is limited to typical major sources of rights revenue from the commercialisation of works. As a
result, a conflict only arises when the proposed limitation causes substantial market impairment to those revenue sources.\(^{1533}\)

This flexible approach entails economic analysis for different types of work in order to estimate the impact of the limitation in areas where authors extract the most royalties.\(^{1534}\) The focus is on the economic core of copyright, rather than the imperfect legal construction of exclusive rights, which reflects the technical characterisation of digital use of works.\(^{1535}\)

There is a conflict with the normal exploitation if a limitation demonstrably deprives rights holders of substantive, reasonably expected and foreseeable sources of income under normal commercial circumstances.\(^{1536}\) These circumstances include the licensing of commercial or end-users for the use of works, ranging from making the content available, to pay-per-use, pay-per-download, subscription, content streaming and content renting. Streaming revenues are of particular importance, as this technology appears to be replacing digital downloads as the new model of normal exploitation. This shift is initially occurring in the online music sector but will presumably extend to other sectors.\(^{1537}\)

The following paragraphs assess, from a legal perspective, the effect of an ACS on the normal online markets controlled by rights holders. An attempt is made to couch the arguments with empirical research, especially the studies mentioned in Chapter 1 on the economic potential of ACS and users’ willingness to pay for such systems.\(^{1538}\) However, because an ACS is an “unknown quantity” with no directly comparable mechanisms in the market, such studies should be treated with caution. On the one hand, we should not put too much stock in empirical research that is not based on real life experiments. On the other hand, we should not assume that a limitation-based ACS has negative effects based on incomplete or non-existent evidence.

5.3.2.3.1 Normal Exploitation and Non-Commercial Use of Works

A statutory licence ACS privileges non-commercial online use of works by individuals. It targets activities that mirror the personal enjoyment of works over digital network platforms, which since the advent of the Internet have become part of the everyday life of users. Examples are the non-commercial sharing of images, as well as the accidental or transformative use of works on those platforms. Regarding the latter, Dreier makes the case for a new limitation clearly:

The sociological function of image-sharing in particular is more like a gesture of pointing at an image made by another, which as such was always unrestricted under copyright law. The fact that such a gesture of pointing is not performed physically in the age of Facebook, WhatsApp, tablets and smartphones, but requires more or less accidental reproduction

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\(^{1534}\) This argument is based on Senftleben, 2004, pp. 184–193.

\(^{1535}\) Parts of this argument derive from Depreeuw, 2014; Senftleben, 2004, pp. 184–193.

\(^{1536}\) Severine Dusollier, 2005, p. 220; Geiger et al., 2014, pp. 603–604; Gervais, 2005; Griffiths, 2009, p. 457; Lucas, 2010, p. 277. See also P. Bernt Hugenholtz & Okediji, 2008, pp. 23–24, stating that this is the correct reading of US Copyright in light of historic elements. The authors conclude: “there is a conflict with the second step if the exempted use would rob the right holder of a real or potential source of income that is substantive”.

\(^{1537}\) IFPI, 2015; Karp, 2014; Vallbé et al., 2015, p. 3.

\(^{1538}\) See supra 1.1.
processes devoid of any independent commercial value, should not play a role where aspects of copyright are considered in a purposeful manner. Of course, as the same author points out, where the commercial threshold for the exploitation of works is passed, the situation changes and the use should not be privileged. An example is where the use of another’s image generates a share of the advertising revenues of the platform provider for the user making it available online.

In this respect, the statutory licence ACS does not privilege online use of works against profit and direct financial consideration, or use by institutions or legal persons (even if non-commercial). Compared to commercial platforms, the direct licensing of non-commercial use by individuals does not seem to be a major form of exploitation of works online that generates significant rights revenue.

Instead, an ACS aims to license and monetise a significant share of non-commercial online use of works that is currently uncompensated. In many cases, these online activities are unenforceable or too costly to enforce. In other instances, copyright owners choose not exercise their rights for this type of use, due for example to licensing practices or strategic choices, overlap between exclusive rights, and legal uncertainty on the status of the use. In an additional set of cases, the non-commercial use may be subject to gratis open access-type licences.

In this context, it is legitimate to ask: if a use is not susceptible of exercise or monetisation, or it is not foreseeable that it will in future constitute a major source of revenue, should it be considered part of the normal exploitation of works? In this scenario and for this type of use, exclusivity does not seem the only (or best) means to yield remuneration. A system of remunerated access, on the other hand, could provide a more efficient legalisation and monetisation mechanism. If this is the case, what prevents the consideration of an ACS as a normal form of exploitation for a subset of non-commercial online use?

This approach is not a radical departure from the EU copyright tradition. A compensated limitation coupled with a legal licence already constitutes a normal exploitation of works for certain types of non-commercial use in the acquis. Relevant examples are the payment of fair compensation for digital private copying for non-commercial purposes, reprography, specific acts of reproduction by social institutions, and certain permitted uses of orphan works, like digitisation and making available (provided the rights holder triggers that mechanism).

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1539 Dreier, 2015, p. 8.
1540 Dreier, 2015, p. 8.
1542 Roßnagel et al., 2009, p. 25, arguing that there is no conflict with normal exploitation due the high cost or impossibility of enforcing these uses. See also Eckersley, 2004, p. 156, arguing that the pervasiveness of P2P file sharing, the ineffectiveness of TPMs, and the paucity of legal offers might qualify a blanket licence as a “normal exploitation” of the work. On this point, see Geiger & Schönherr, 2014a, p. 136, and Geiger, 2015b, p. 16 (“…it could be argued that the ‘normal’ exploitation in some cases can also be achieved by limitation-based remuneration rights…”).
1543 The private copying limitation in Art. 5(2)(b) InfoSoc Directive is limited to use for non-commercial purposes. The limitation for permitted use of orphan works is restricted to public interest aims of the beneficiary organisations, which are allowed to generate revenue in relation thereto “for the exclusive purpose of covering their costs of digitising orphan works and making them available to the public”. See Art. 6(2) Orphan Works Directive.
case of private copying, the privileged acts are similar to those in an ACS (but limited to the right of reproduction) insofar as they solely benefit end-users and cover non-commercial digital use.

If an ACS ensures compensation for non-commercial online uses that are not exercised or monetised, it is difficult to argue that it causes a direct conflict with the normal exploitation of works. This is because no major foreseeable source of income is affected; instead, the ACS creates new rights revenue. A different conclusion would imply that the test prevents a profitable market from replacing an inefficient one, which appears unreasonable and inconsistent with the objective of protecting and remunerating rights holders.

5.3.2.3.2 Indirect Effect on Commercial Exploitation

The main problem with a statutory licence ACS relates to its potential effects on commercial exploitation models on the Internet. The system would allow end-users to make and distribute perfect copies of digital works to other users. In doing so, it may indirectly affect existing models of online content dissemination by depreciating their value for rights holders. In other words, by regulating a “secondary” form of exploitation—non-commercial use by individuals—an ACS may affect the “primary” markets reserved to exclusivity.

A similar concern was expressed by the CJEU in ACI Adam, Copydan and Reprobel, eventually leading to the exclusion of reproductions from unauthorised sources from the scope of the private copying limitation. In the Court’s view, allowing these reproductions would force copyright holders “to tolerate infringements of their rights which may accompany the making of copies for private use”. Hence, permitting such copies would be tantamount to indirectly enabling the mass distribution of works through unlawful sources.

The Court was concerned with the effects on the market of indirectly fostering online dissemination of works. Reprobel makes the point clearly:

> to accept that such reproductions may be made from an unlawful source would encourage the circulation of counterfeited or pirated works, thus inevitably reducing the volume of sales or of other lawful transactions relating to the protected works, with the result that a normal exploitation of those works would be adversely affected...

Those risks are naturally greater in a statutory licence ACS, which also covers acts of communication to the public by end-users. One potential consequence is that certain online intermediaries enabling mass use of works benefit from the system and elude intermediary liability. This is a valid concern with empirical and legal dimensions. The first dimension relates to whether such a substitution effect will occur in practice. The second dimension links to the legal effects of the ACS on the liability of Internet intermediaries.

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1544 Bernault & Lebois, 2005, p. 35; Ricketson, 1999, p. 70. See also Gervais, 2005, p. 37ff., placing cases where users cannot obtain the content “through a normal commercial transaction” outside normal exploitation.

1545 Ricolfi, 2007, p. 304 & n.53.

1546 CJEU, ACI Adam, ¶31; CJEU, Copydan, ¶76; CJEU, Reprobel, ¶58.

1547 CJEU, ACI Adam, ¶¶36, 39; Opinion AG in ACI Adam, ¶¶72, 75, 83; CJEU, Reprobel, ¶59. Expressing a similar concern regarding a different limitation, see Opinion AG in Ulmer, 57 (“The danger of large-scale unlawful distribution, which is present in the case of digital copies, does not exist either.”).

1548 CJEU, Reprobel, ¶60 (citing CJEU, ACI Adam, ¶36).
In theory, an ACS can cause the negative effects described. Yet, in practice, whether such effects occur is an empirical question with no certain answer, leaving room only for educated speculation. A good starting point is research on the effect of unauthorised use on legal platforms, and on the supply of copyright works. This research, it is noted, is not consistent on the negative effect of unauthorised copying through file sharing on the revenues of rights holders.\footnote{Poort & Weda, 2015b, pp. 65–66. See also Handke, 2011, 2012, reporting on a survey of empirical studies.} Most evidence suggests that file sharing has a relatively small effect on media sales, far from a “one-to-one displacement of sales by illegal copies”\footnote{Poort & Weda, 2015b, p. 65.}.

As noted in Chapter 1, existing studies do not support the claim that unauthorised online use has long-term negative effects on social welfare or the creation and supply of works.\footnote{Cammaerts & Meng, 2011; Grassmuck, 2010b; Handke, 2012; Huygen et al., 2009; Watson, Zizzo, & Fleming, 2014. See supra 1.1.} In fact, some studies report a positive effect, especially in the networked environment where costs of distribution are near zero.\footnote{Eijk et al., 2010; Grassmuck, 2010b; Huygen et al., 2009; Karaganis & Renkema, 2013.} Positive effects leading to increased demand for works are also reported, and include the possibility of users “sampling” different works, and “purchasing related products or services, such as concerts or merchandise”\footnote{Poort & Weda, 2015b, p. 65.} In a similar fashion, studies on competing legal offers show that free streaming or advertisement based channels have a reduced impact on the revenues of paid services.\footnote{Aguiar & Martens, 2013; Papes, Eggers, & Wlomert, 2010; Vallbé et al., 2015, p. 3. See supra 1.1, with further citations.}

The combination of results suggests that unauthorised or free (legal) use—the closest proxy we have for a statutory licence ACS—does not destroy the rights revenues generated by the online commercial market for the same type of use. Data showing an annual increase in the digital revenues of rights holders seems to reinforce this conclusion.\footnote{Iuliano, 2011, pp. 485–486.}

Thus, the evidence points towards the possibility that an ACS can co-exist with commercial exploitation, as many users remain willing to pay for commercial offers that are sufficiently appealing in terms of price, convenience, branding, aggregation, usability, quality, fairness, or simply due to lack of awareness of alternatives.\footnote{Ricolfi, 2007, p. 300, making a similar argument.}

On the other hand, despite the deployment of enforcement measures and the growth of legal alternatives, unauthorised services continue to exist and develop. At this point, it is difficult to believe that the market provides the sole solution to the territorial and substantive fragmentation issues faced by EU copyright law in the digital environment.\footnote{Kantar Media, 2012; Poort & J. Leenheer, 2012; Vallbé et al., 2015. See also supra 1.1.} In this context, legal offerings will likely remain unable to cater to consumers’ expectations and demands for cultural access channels.\footnote{Kantar Media, 2012; Poort & J. Leenheer, 2012; Vallbé et al., 2015. See also supra 1.1.}

If unauthorised and authorised services can co-exist online while preserving the digital revenues of rights holders through online platforms, it is legitimate to ask whether an ACS for non-
commercial use of works that is not exercised, enforceable, or remunerated will significantly hinder reasonably foreseeable major sources of rights revenue online.

The answer seems to hinge on the abovementioned legal dimension. Would a statutory licence ACS allow copyright owners to enforce their exclusive rights of reproduction and communication to the public against unauthorised websites that derive direct or indirect commercial benefits from the availability of works?

The answer to this question depends on the design of the system and the copyright limitation underlying it. To be clear, websites that host and make available copyright works without rights holders’ consent (e.g. unauthorised cyberlockers), take an active role in its online availability, and make a direct or indirect commercial use of said content will mostly remain infringing despite the proposed legalisation scheme. In fact, the services provided by these websites frequently go well beyond the mere storage of information provided by the individual recipient of the service. Therefore, it is difficult to envision that they would be completely exempt from liability as a result of the hosting “safe-harbour” in Article 14 E-Commerce Directive. ¹⁵⁵⁹

However, the ACS may potentially benefit decentralised P2P systems using BitTorrent software. If end-users in such a system have a legal authorisation to copy and disseminate works online, it is less clear whether the provider of the software or platform is directly infringing. ¹⁵⁶⁰ Assuming the legalisation of this type of P2P system has a greater potential to substitute for significant parts of the current online market, the likelihood that they escape any type of liability is problematic for the admissibility of a statutory licence ACS under the second step of the test. In part, it is possible to solve this problem through the definition of the “non-commercial” use covered by the licence. The scope of the permitted “non-commercial” use could for example exclude P2P exchanges by the operator (individual, group of individuals or legal person ¹⁵⁶¹) of a platform that generates advertising or sponsorship receipts or any type of financial consideration in connection with the works exchanged.¹⁵⁶² Such a definition would preserve the economic core of the right of communication to the public in EU law, and is very much an open issue before the CJEU in light of the pending

Another solution relates directly to the definition of the right of communication to the public in EU law, and is very much an open issue before the CJEU in light of the pending

¹⁵⁵⁹ On the legal regime of Article 14 E-Commerce Directive, see Christina Angelopoulos, 2016b, pp. 51–61. N.B. “the safe harbours apply to the relevant activities, not to service providers per se.” Ibid., p. 46.
¹⁵⁶⁰ Quintais, 2012. Outside copyright, it is possible to argue that the operation of such sites may be prevented on grounds such as unfair competition (in most EU jurisdictions) or passing-off (e.g. in the UK). See Lucie Guibault & Quintais, 2014, p. 21, discussing hyperlinking.
¹⁵⁶¹ N.B. in respect to certain operators, such as The Pirate Bay and Popcorn Time, whether they “actually exist de jure as natural or legal persons is doubtful. More likely, these actors are merely ‘brands’ that are used by fluid groups of loosely organized individuals”. See P. Bernt Hugenholtz & Quintais, 2016 (forthcoming).
¹⁵⁶² In this respect, see the specifications for the definition of commercial uses made by the French CMO SACEM in the context of a pilot project reported by Metzger & Heinemann, 2015, p. 16. See also the definition of “non-commercial” in the CC Non-Commercial 4.0 International Public License.
preliminary references mentioned in the previous chapter: *GS Media, Filmspeler, and Stichting Brein v Ziggo.*\(^{1563}\)

On the one hand, it is still unclear whether and to what extent linking to an unauthorised but freely accessible source (i.e. without technical restrictions) constitutes a communication to a new public. It is possible that this issue is somewhat clarified by the CJEU in *GS Media* and *Filmspeler.* However, after the Opinion of the AG in the first case, there is significant legal uncertainty as to the outcome\(^ {1564}\) and it may be naïve to assume that the Court will bring absolute clarity to this topic, rather than add further complexity to the legal analysis. On this point, it is noted some Member States’ courts have already ruled that these links are indeed restricted acts of communication to the public.\(^ {1565}\)

On the other hand, if hyperlinking to an unauthorised freely accessible source is a restricted act of communication to the public, what prevents the qualification of the services provided by the operators of platforms like The Pirate Bay or Popcorn Time as acts of communication to the public? The Pirate Bay, for example, provides a system by means of which metadata on protected works is present on the users’ computers and indexed and categorised for users, so that the users can trace and upload and download the protected works on the basis thereof. The system is functionally and visually similar to the provision of links and in that sense could be argued to make works available for subsequent up/download. This issue is at the heart of the reference in *Stichting Brein v Ziggo.*

If the outcome of these cases is favourable to rights holders—by prohibiting hyperlinks to unauthorised sources or qualifying the unauthorised acts of operators of decentralised file-sharing systems as direct infringement—a statutory licence ACS would only afford a defence against infringement for end-users sharing works for non-commercial purposes, as well as to a limited set of online intermediaries, namely those that enable or facilitate the licensed use but do not themselves reproduce or make available the works online (e.g. mere software providers). As occurs under the current regime, those predominantly “passive” and “neutral” intermediaries that qualify for the safe-harbours in Articles 12 to 14 E-Commerce Directive will remain exempt from liability in relation to their services that benefit from such exemption, but not to other activities that fall outside that limited scope.\(^ {1566}\)

Thus, the statutory licence would not privilege for-profit acts of making available online by individuals or platforms, or the activities of operators of file sharing platforms, which would typically not qualify as “non-commercial” or “individual use of works by natural persons”. Rights holders could avail themselves of remedies against these individuals and platforms, most notably proceedings for direct infringement of the exclusive right and injunctions.\(^ {1567}\)

If these scenarios play out, the situation for rights holders under a statutory licence ACS would not be worse than the current status quo in terms of enforcement measures available against

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\(^{1563}\) See *supra* 4.3.2.1.

\(^{1564}\) See *supra* 4.3.2.3.

\(^{1565}\) In Germany, see BGH, 9.07.2015, I ZR 46/12 (“Die Realitaet II”), with commentary by J. B. Nordemann, 2016.

\(^{1566}\) On the complex question of the neutrality of intermediary service providers in the E-Commerce Directive and CJEU case law, see Christina Angelopoulos, 2016b, pp. 46–48.

\(^{1567}\) On this point, see *supra* 4.3.2.3, and the argument of AG Wathelet in *Opinion AG in GS Media,* ¶¶75–79.
unauthorised platforms. If they do not play out, the limitation could be designed to include requirements that achieve a similar effect. Then, the relevant differences introduced by the ACS would be that end-users have a legal authorisation for non-commercial use, and the copyright owners receive remuneration for that use.

Furthermore, copyright owners and online intermediaries would continue to be able to pursue self-regulation through voluntary agreements for online copyright enforcement against unauthorised third party websites, possibly focusing on the “follow the money” approach endorsed by the Commission. In those agreements, parties could define the scope of allowed “non-commercial” use in the terms described above (and in line with future interpretation of the concept by the CJEU) thereby ensuring the preservation of the core of the exclusive right for commercial exploitation.

5.3.2.3.3 Normal Exploitation and Compensation

Most interpretations of the second step hold that a conflict with the normal exploitation entails a level of economic loss to the rights holder. However—and therein lies the contradiction—that conflict may not be cured by the provision of compensation to rights holders. Rather, compensation operates only to make the prejudice to rights holders reasonable under the third step. Although the CJEU is typically agnostic on this point, it has on occasion uncritically endorsed the approach.

This position does not result from the ordinary meaning of the test but from the preparatory works of Article 9(2) BC and the consideration of equitable remuneration in the system of the test. It is debatable whether such elements are determinative for the EU test. In principle, the rules of legal interpretation would not preclude considering compensation in the second step. In fact, some high-level national court decisions have done so and there have been increasing calls to that effect in academia.

An influential example is the MPI Declaration, which states that limitations do not conflict with the normal exploitation where they reflect significant competing concerns, including of a

1568 See, endorsing this approach: Communication Digital Single Market 2015, pp. 6–8; SWD Digital Single Market Strategy 2015, p. 30; Communication on Modern European Copyright Framework 2015, pp. 10–11. International Literary and Artistic Association (ALAI), 2015. See also: P. Bernt Hugenholtz, 2010, describing the emergence of “self-regulation” as a mode of extra-judicial copyright enforcement online, with the participation of ISPs and other online intermediaries; and Pérez, 2015, for a recent example of a Memorandum of Understanding aimed at protecting copyright and related rights online”.


1572 On national case-law, see e.g. Geiger, 2007b, pp. 7–8 citing: BGH, 25.02.1999, I ZR 118/96 (“Re Supply of Photocopies of Newspaper Articles by a Public Library”), and BGH, 11.07. 2002, I ZR 255/00 (“In House Press Clippings Archive – Electronischer Pressespiegel”). For academic arguments, see: Geiger et al., 2008; Geiger, 2007b, pp. 7–8; He, 2009, p. 300, including adequate remuneration on the fourth factor of his adapted fair use test, used to examine the normal exploitation condition; Geiger & Schönherr, 2014a, pp. 135–136. Contra, see Lucas, 2010, p. 278, arguing that normal exploitation must be assessed by reference to the current rights owner.
normative nature, particularly if “adequate compensation is ensured”, for example through a legal licence.\textsuperscript{1573} This aspect is important mainly where a traditional view of the test would foreclose analysis of a limitation based on a conflict with the normal exploitation, without considering the possibility that the same can fully compensate rights holders for the use allowed.

As noted in Chapter 1, a recent empirical study in the Netherlands concluded that a statutory licence ACS for the online rights of reproduction and communication to the public applying to recorded music has the potential to compensate rights holders fully. In concrete terms, a EUR 1.74 surcharge on the ISP subscription for all households with Internet connection in that country would equal the entire revenue of the Dutch physical and digital market for recorded music in 2012, including all conventional purchases of recorded music of approximately EUR 144 million.\textsuperscript{1574} As users are willing to pay a monthly amount well above that price point, this system would be welfare increasing, even after correcting the results for overestimation.\textsuperscript{1575}

If similar results apply to other content types and countries in the EU, a limitation-based statutory licence ACS would provide sufficient compensation to cure any conflict with the normal exploitation of works. Again, there is no certainty that the results hold across the board, as they merely reflect a snapshot of the moving target that is the online market for one type of content in one Member State. However, together with the uncertain negative effects of an ACS on online copyright markets, the study gives pause to question whether such a legalisation proposal would conflict with the normal exploitation of works.

### 5.3.3 Unreasonable Prejudice to Legitimate Interests

The third step of the test requires that limitations do not cause “unreasonable prejudice” to “legitimate interests” of authors or rights holders. Scholars read both expressions in quotation marks as opening the door for public interest considerations when assessing limitations.\textsuperscript{1576} This allows a balancing exercise between the interests of copyright owners in retaining exclusivity and the larger public interest in benefiting from a limitation.\textsuperscript{1577}

Striking a fair balance of rights and interests between the different categories of rights holders, as well as between them and users of works, is a central objective of the InfoSoc Directive.\textsuperscript{1578} To achieve that objective and resolve conflicts between fundamental rights the CJEU uses the principle of proportionality.\textsuperscript{1579} Proportionality is a general EU law principle that guides

\textsuperscript{1573} Geiger et al., 2008, p. 711. Similarly, see Geiger, 2010, pp. 546–547.
\textsuperscript{1574} Revenues are calculated resorting to industry statistics, such as IFPI, 2013, which estimates rights holders revenues in the Dutch recorded music market at EUR 143.6 million. The focus is on revenues rather than profits due to the lack of reliable information on costs. Data on private copying levies collected in the Netherlands was taken from WIPO, 2013. The results assume the unlikely scenario that an ACS substitutes all current sales of recorded music (perfect substitution) and provides no cost savings. See Handke et al., 2015.
\textsuperscript{1575} See supra 1.1. See also Handke et al., 2015.
\textsuperscript{1577} See R. Hilty & Nérisson, 2012, and supra 5.2.1.
\textsuperscript{1578} Recital 31 InfoSoc Directive.
\textsuperscript{1579} Christina Angelopoulos, 2015, pp. 77–81. On the consideration of copyright as a fundamental right, see: Art. 1 of Protocol No. 1 to the ECHR; Art. 17(2) Charter; recital 9 InfoSoc Directive; recital 32 Enforcement Directive.
substantive interpretation of rights and calibration of remedies in the *acquis*.\textsuperscript{1580} Through the objective of fair balance, this principle is afforded additional relevance for the interpretation of limitations.\textsuperscript{1581}

For some scholars, the principle of proportionality should apply to the three-step test as a whole.\textsuperscript{1582} However, as previously argued, in the context of a flexible analysis, the third step seems a suitable place for the final examination of competing interests.\textsuperscript{1583} In this setting, a proportionality analysis involves an evaluation of the appropriateness of a limitation for achieving its purpose, the relevance of its policy justifications, and its impact on the interests of rights holders and the public.\textsuperscript{1584} Hence, this section carries out a balancing exercise between the conflicting legitimate interests and the reasonableness of the prejudice caused by a statutory licence ACS.

First, an examination is made of the meaning of the expressions “unreasonable prejudice” (5.3.3.1) and “legitimate interests” (5.3.3.2). This is followed by the balancing exercise proper, which scrutinises the interests of rights holders as a group and the issue of fair compensation (5.3.3.3), as well as the conflicting interests of creators and exploiters (5.3.3.4). The subsequent analysis follows an innovative approach to the third step by taking into consideration the public interest in an ACS. This includes first an examination of the interests derived from the promotion of creativity and dissemination of works (5.3.3.5) and, second, a consideration of the public interest in the respect and protection of fundamental rights of end-users and intermediaries (5.3.3.6).

### 5.3.3.1 Unreasonable Prejudice

The term “prejudice” means “damage, harm or injury”.\textsuperscript{1585} By requiring that prejudice to copyright owners is “not unreasonable” the third step is setting a threshold “slightly stricter” than


\textsuperscript{1582} Kur, 2008, p. 40, noting the adequacy of proportionality to interpret “gradual” criteria, like “certain special cases” and “normal exploitation”.


\textsuperscript{1584} The analysis of this paragraph draws on Kur, 2008, pp. 39–40. See also: Roßnagel et al., 2009, p. 26; Fischman Afori, 2014, pp. 895–896, calling proportionality a new “mega standard” in European copyright law and identifying a four-factor test for proportionality in European law where the last factor – “balancing” – is often known as “proportionality stricto sensu”; and Christina Angelopoulos, 2015, pp. 78–79, noting that the CJEU approach in fundamental rights cases is to parse down proportionality to a balancing exercise.

\textsuperscript{1585} WTO, *US–Copyright*, ¶6.225.
reasonable. Hence, a limitation may impose a certain amount of prejudice up to the point where it “causes or has the potential to cause an unreasonable loss of income to the copyright owner.”

As a result, the prejudice can be substantial without being unreasonable if copyright owners do not “bear costs that are out of proportion to the benefits derived by the public”. Only then should measures be put in place to countenance it, like the payment of compensation. Logically, where the prejudice is minimal, it is possible that no compensation is required.

To make this assessment it is necessary to quantify the “legitimate interests” at stake. US–Copyright does so with reference to the economic value of exercising different exclusive rights, measured for example through licensing. Based on the BC preparatory works, the copyright panel states that the prejudice is restored to tolerable levels if compensation is provided, such as via “a system of compulsory licensing with equitable remuneration”. Compensation therefore plays a central role in the third step.

This position, however, is rather “arithmetic”, as it foregoes policy considerations. Beyond remuneration, the third step contains several flexibility tools, namely the legitimacy and unreasonableness filters. For that reason, the third step ought to account for the conflicting interests invoked by exploiters and creators against each other and “against the reasons justifying the use privilege”, like fundamental rights. Similarly, it should assess reasonableness in light of a limitation’s non-economic motivations, which mirror the legitimate public interest. This is relevant because a strong public interest motivation may provide sufficient justification for a limitation, even if the same causes loss of revenue to rights holders.

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1586 Ibid., ¶6.225. See also Records Stockholm 1967, p. 1145. This study adopts the position that the potential linguistic conflict between the originally proposed English language expression “unreasonable prejudice” and its French translation “préjudice injustifié” do not alter the interpretation of the third step. For an analysis of the linguistic issue with reference to Stockholm records, see Ficsor, 2002b, pp. 141–147; Geiger et al., 2014, pp. 584–585.


1588 Iuliano, 2011, p. 487.


1591 Ibid., ¶6.229 (n. 205), citing the WIPO Guide to the Berne Convention, authored by Claude Masouyé (then-Director of WIPO’s copyright division). Cf. Senftleben, 2004, pp. 235–241. Professor Ulmer first suggested the approach in the 1967 Stockholm revision conference in his capacity as Chairman of Main Committee I, inspired by the then-recent German Copyright Act of 1965. See Records Stockholm 1967, pp. 1145-1146. This statement should be qualified as a supplementary means of interpretation. Cf. supra 5.2.1.

1592 Kur, 2008, p. 29 & n.108, noting the similarity of this approach with the second step analysis in US–Copyright. Kur also observes that the legislative motives behind the US “home-style” and “business” exemptions discussed in US–Copyright strengthened the position of rights holders.


1595 Ginsburg, 2001, p. 57; Lucas, 2010, pp. 277–278. See also Iuliano, 2011, p. 486; Senftleben, 2006, p. 436. At EU level, see Opinion AG in Infopaq I, ¶139, recognising the normative element (the “qualitative nature of the effect”) but failing to properly consider it in the analysis.

5.3.3.2 Legitimate Interests of Rights Holders and the Public Interest

The third step considers *interests* of rights holders taken together (creators and exploiters) that qualify as *legitimate*. An interest is the economic basis of the substantive right, meant to reflect the value of exclusive rights as measured by their possibilities of exercise. Normatively, an interest is legitimate if “justifiable in the light of the objectives that underlie the protection of exclusive rights” or if “supported by relevant public policies or other social norms”. This view presupposes a balancing act and consideration of a limitation’s justification. Therefore, interests are legitimate if lawful and justifiable on normative grounds.

If this understanding is correct, it is necessary to identify the parties whose interests are legitimate because they reflect the public interest. In this respect, the industrial property three-step tests in TRIPS provide more clarity than the copyright tests, as they mention “third party interests”. This phrase denotes interests in the derogation of exclusive rights “in certain situations to encourage wider social access to and use of knowledge, information and cultural products”. “Third parties”, then, are those adverse in interest to the rights holder in the sense they are excluded from using works but for the limitation. They are the direct and indirect beneficiaries of a limitation.

Although the copyright tests only mention “authors” or “rights holders”, some influential scholarship posits that the balancing aims of international and EU copyright law require in addition a consideration of the public interest in the final step. Limitations serve the public interest by advancing the objectives of the copyright system and enabling its coexistence and coherence with fundamental rights or freedoms, allowing copyright to fulfil its social function.

As argued in the previous chapter, the public interest drives the function of copyright limitations as essential instruments to define the scope of copyright protection. Nowhere is that stated

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1598 Christie & Wright, 2014, pp. 428–429; Geiger et al., 2008; Senftleben, 2006, p. 436; R. Wright, 2009, p. 610. See also: Geiger et al., 2014, p. 595, arguing that legitimacy is “context-dependent”; and Senftleben, 2004, pp. 216–219, on the inclusion of licensees as holders of legitimate economic interests to be considered in the third step.


1600 WTO, *US–Copyright*, ¶6.224.


1604 Geiger et al., 2014, p. 587.

1605 R. Wright, 2009, p. 600.


1607 Geiger et al., 2008; Kur, 2008, p. 41. For a broad view of interests involved in the TRIPS patent test, see Lamping, 2014, pp. 687–688, 694.


1609 In this sense, see supra 4.4.1.1 and 4.4.1.3. See also Dreier, 2015.
clearer than in *Luksan*, where in connection with a film director’s claim for fair compensation the CJEU interpreted Article 17 Charter as follows:1610

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

The CJEU sets aside the notion that the recognition of copyright as property and as a fundamental right implies its absolute protection in the form of an exclusive right. Instead, the Court states that exclusive rights may be replaced by a right to fair compensation “in the public interest and in the cases and under the conditions provided for by law”.

Because the introduction of limitations in the *acquis* is regulated by the three-step test, and the balancing of competing interests—including the grant of fair compensation—usually occurs in the third step, it seems that this is the place to take into consideration the public interest.

A statutory licence ACS legalises large-scale non-commercial online use of works by individuals, in relation to which the exercise of exclusive rights is costly, impossible or undesirable. Beyond the market failure argument explained throughout this study, the public interest in regulating this use potentially falls under two headings, recognised as expressions of such interest in the MPI Declaration.1611

The first relates to the promotion of creativity and dissemination of works that comes with the statutory licence ACS and the ensuing legal certainty for end-users. In the MPI Declaration, this corresponds to the category of public interest based on “scientific progress and cultural, social, or economic development”, which would include the interest of users and certain stakeholders in access to information and works, education and research.1612

The second category relates to the respect of fundamental rights and freedoms of individuals and intermediaries affected by the enforcement of their non-commercial use. These rights include the protection of users’ personal data and privacy in telecommunications, their freedom of information and expression online, and intermediaries’ freedom to conduct a business.1613 As a fundamental right, copyright is interpreted in light of its social function. This may result in restrictions to its scope for reasons of public interest in order to strike a fair balance with countervailing fundamental rights.1614 As a result, and in line with *Luksan*, copyright has a

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1610 CJEU, *Luksan*, ¶68.
1611 Geiger et al., 2008, p. 712. The MPI Declaration also refers to a third category: interests in competition. As noted in Chapter 2, competition law may justify restrictions to abusive or collusive use of exclusive rights, as well as motivate the adoption of limitations or compulsory licences. See, e.g., *supra* 2.4.2.2, on the justification for the broadcasting compulsory licence. See also Lucie Guibault, 2002, pp. 56–68.
1612 In this respect, see Wittem Group, 2010, p. 127 & n.34, emphasising the legitimate interests of members of the public “in improving the access to the work.”
1613 Similarly, see Roßnagel et al., 2009, p. 16.
1614 Griffiths, 2013; Griffiths & McDonagh, 2013; Ramalho, 2014, pp. 87–92, with further development on the requirements of proportionality. See, inter alia: CJEU, *Germany v Council*, ¶78 (and cited case law); CJEU,
Furthermore, the CJEU recognises that fundamental rights can operate as justifications for limitations. As noted in Chapter 4, by virtue of the principle of effectiveness and the objective of legal certainty, consideration of fundamental rights prevents a restrictive interpretation of certain limitations and may warrant a widening of their scope.1616

5.3.3.3 The Interests of Rights Holders and Fair Compensation

The legitimate interests of rights holders are primarily economic. Exclusive rights are the traditional tools to protect them.1617 As a group, rights holders have a legitimate interest in the commercial exploitation of works through digital platforms.

If an ACS causes prejudice to copyright owners, it is possible to return that prejudice to reasonable levels by providing remuneration or compensation through a statutory licence.1618 Where an ACS provides an adequate, efficient and fair means to remunerate different groups of affected rights holders, it should not cause an unreasonable prejudice to their legitimate interests.1619

But how to define and calculate compensation in an ACS? As a principle, compensation should be fair and adequate to remunerate rights holders for the non-commercial online use of works by individuals.1620 Because the statutory licence ACS examined here assumes the adoption of a compensated limitation in the acquis, it makes sense that it adopts the template of the existing and comparable autonomous EU law concepts of “fair compensation” or “equitable remuneration”. Of these concepts, fair compensation provides the sounder approach: not only because it attaches to the InfoSoc Directive’s limitations (and thus to the rights licensed in a future ACS), but also for the reason that recital 36 of the directive favours this concept for future compensated limitations on the directive’s exclusive rights.1621

Chapter 4 deals with fair compensation in some detail. That analysis shows that the right of fair compensation is unwaivable and its calculation based on the harm caused to copyright owners by the introduction of a limitation. That calculation takes into consideration different mitigating

Schmidberger, ¶80; CJEU, Kadi, ¶360. For a list of case law, see Geiger & Izyumenko, 2014, p. 322 & nn.27, 331; Sganga, 2015, p. 8ff. See also infra 5.5.2.

CJEU, Promusicae, ¶61–68; CJEU, Painer, ¶113; CJEU, Bonnier Audio, ¶¶49–60; CJEU, Scarlet Extended, ¶¶43–46; CJEU, Netlog, 41; CJEU, UPC Telekabel, ¶61; and, by implication, CJEU, Luksan, ¶68. Cf. Christina Angelopoulos, 2015, pp. 72–73; European Copyright Society, 2014b, pp. 6–7; Geiger & Izyumenko, 2014, p. 334.

See supra 4.4.1.4. For CJEU case law, see in particular CJEU, Murphy, ¶¶163–164, and CJEU, Painer, ¶133. See also Sganga, 2015, p. 19.


The term “adequate compensation” is used in the MPI Declaration. See Geiger et al., 2008. For a different approach, see Art. 5.7 Wittem Code mentioning “fair and adequate remuneration”, which seems an attempt to avoid tension between the concepts of equitable remuneration and fair compensation in the acquis. Cf. Geiger & Schonherr, 2012, p. 165; Wittem Group, 2010.

Art. 5(2) (a), (b) and (e), and recital 36 InfoSoc Directive. The Orphan Works Directive follows a similar approach in Art. 6(5) and Recital 18. For an outline of this concept and relevant case law, see supra 4.4.3.3.
factors: the *de minimis* nature of the use, whether the use was authorised (for free or against payment), and the application of TPMs.1622

The resulting harm corresponds to the “prejudice” mentioned in the third step of the test. Analysis of step two clarified that the potential prejudice to copyright owners from a statutory licence ACS includes its direct and indirect effects on normal modes of commercial exploitation online. As noted, it is unclear whether the licence will have direct negative effects on that commercial exploitation if the non-commercial use it covers is too difficult to enforce, exercise or monetise. The statutory licence will remunerate this use, generating a novel revenue stream for copyright owners, thus improving their situation from a financial standpoint.1623

However, it was also stated that such a legalisation scheme may have the indirect effect of removing liability from unauthorised for-profit websites, who either make works available over the Internet on a large-scale or, depending on the legal status of their activities, facilitate that availability for economic benefit (e.g. The Pirate Bay and Popcorn Time). If this occurs, legalisation may conflict with the normal exploitation of works and cause economic harm to rights holders. For that reason, different approaches were outlined that allow rights holders to retain effective remedies against unauthorised websites despite the adoption of an ACS. If those remedies remain at the disposal of rights holders, no significant prejudice should arise from the activities of those websites as a legal consequence of an ACS, or that is attributable to its adoption.1624 Rather, the only prejudice that should be examined in the context of the three-step test here is the economic harm caused by the licensed non-commercial acts of individual users on existing commercial legal offerings (e.g. on the revenues of streaming services like Spotify or Netflix).1625

Now, it is not possible to quantify this harm with certainty. In part, this is because harm is measured against the effects of the limitation on the market, which are difficult to assess for non-commercial online use.1626 A statutory licence ACS would apply to public goods or goods not yet released on the market,1627 and to forms of use for which there is no clear market due to lack of exercise or monetisation. Moreover, certain types of use licensed by an ACS are *de minimis* or already compensated through contractual means (i.e. priced into the purchase or licence of digital content); in these cases, fair compensation may be unwarranted due to the lack of harm to copyright owners.1628

One approach to calculate harm for non-commercial use is to determine its value to end-users benefiting from the ACS. This value would correspond to the prejudice suffered by copyright owners due to the inability to exercise and enforce their rights for that use. To pass the third step

1622 See supra 4.4.3.3, 4.4.3.4, and 4.4.3.5. For the factors mentioned, see recital 35 InfoSoc Directive. The standard for equitable remuneration is the “economic value of the use in trade”. See supra 2.2.4.
1623 See, e.g., Geiger, 2014a, p. 21; Roßnagel et al., 2009, p. 14.
1624 See the analysis supra at 5.3.2.3.
1625 It is noted that by applying a limitation to acts of end-users an ACS would likely induce savings on administrative and enforcement costs. See Lescure, 2013, p. 31.
1626 Geiger et al., 2008, pp. 708–710, suggesting that adequate compensation may be set at or below market rate.
1627 Handke et al., 2015.
1628 Similar arguments are made in the context of private copying. See supra 4.4.3, and Quintais, 2015a.
of the test, then, an ACS would have to return that prejudice to reasonable levels, taking into account the aforementioned harm-mitigating factors.

If this approach is accepted, the value of the licensed non-commercial use with no clear market can be determined by gauging users’ willingness to pay through a method of contingent valuation.1629 This method was applied in the ACS research in the Netherlands mentioned in Chapter 1 and in the analysis of the second step of the test.1630 The limited findings of that study suggest that a statutory licence system can provide sufficient revenue to supplant the direct and indirect losses caused by the legalisation of the types of use in question.1631

If these results remain valid for other types of work and across the territory of the EU, and in addition copyright owners are able to enforce their exclusive rights against unauthorised websites that enter into competition with authorised commercial channels over the Internet, the provision of fair compensation in the terms described above should reduce the actual or potential harm to reasonable levels. It may even afford fair compensation the character of an appropriate reward to promote creativity, which some authors believe to be required by the aims of the InfoSoc Directive.1632

5.3.3.4 The Conflicting Interests of Creators and Exploiters

Rights holders are not a homogenous group with aligned interests. For the purposes of the third step, it is important to distinguish individual creators from exploiters.1633 This distinction, as one author puts it, “is one of the characteristics of modern copyright”.1634

The distinction finds legal basis in EU law, international law (the BC and WCT solely protect authors and do not consider the interests of exploiters), and even the fundamental rights framework, where authors are the sole beneficiaries of the human right to protection of authorship.1635

The acquis, for its part, differentiates between categories of rights holders in their legal entitlements, and for the purpose of striking a fair balance.1636 The particular place of authors is recognised by the CJEU for example in Luksan and Reprobel, from where it is clear that the economic rights granted in EU law—including exclusive, remuneration or fair compensation

1629 Handke et al., 2015, adopting this approach to ACS through conjoint analysis and flagging the challenges of applying this method to a licence that is an unfamiliar and complex quasi-public good. In this way, the ACS would address a major criticism of legalisation proposals and, in general, compulsory licences: that calculation of an overall amount of compensation outside market conditions is inefficient. See Stan J. Liebowitz, 2003; Stan J. Liebowitz & Watt, 2006; Merges, 2004a.

1630 See supra 1.1 and 5.3.2.3 (on normal exploitation and compensation).

1631 Handke et al., 2015; Vallbé et al., 2015.

1632 See Opinion AG in Padawan, ¶¶79–80, relying on the wording of recital 10 InfoSoc Directive (“appropriate reward”). Cf. Geiger & Schönherr, 2014a, pp. 132–133. See also infra 5.5.2 (on the remuneration aspect of copyright), and 5.5.3 (on adequate compensation as an objective of EU law).

1633 Geiger et al., 2008, pp. 708–710, 712. This is a conceptual simplification, as under some national laws and for certain categories of works it is possible that a legal person technically qualifies as the “original” rights holder.


1635 Cf. e.g. recital 31 and Arts 1(1), 2 and 3(2) InfoSoc Directive.
rights—are originally owned by authors and rights holders expressly identified in the law and not subsequent or related rights holders, such as publishers.  

Implicit in the distinction is the recognition of different sets of legitimate interests. Such interests can be concurrent, for example regarding the prevention of unauthorised use, or conflicting. An example of conflict is the case of compensated limitations, often viewed as beneficial to the material interests of creators but prejudicial to the ability of exploiters to maximise profits. This tension is central to the debate on legalisation proposals.

If a statutory licence is coupled with an unwaivable right to fair compensation, creators are likely to receive more remuneration for the licensed use than they would otherwise receive through the exploitation of assignable exclusive rights. Also, a statutory licence better protects creators from inequality in legal expertise and imbalance in bargaining power vis-à-vis third parties. This is especially true as emerging online access-based models of exploitation come in for criticism for their lack of transparency and failure to ensure fair remuneration to creators.

The benefits of compensated limitations, recognised by commentators and courts, are particularly salient when contrasted with the preference given by exploiters to addressing unauthorised use through enforcement measures that disregard remuneration. In light of these benefits, some scholars argue that a compensated limitation is a three-step test-compliant solution to conflicts between creators and exploiters. Underlying this position is the view that the prejudice to rights holders as a whole can be reduced to reasonable levels if the benefit to creators from a statutory licence offsets the harm caused to exploiters by the imposition of a copyright limitation on a use previously covered by an exclusive right.

5.3.3.5 Public Interest in the Promotion of Creativity and Circulation of Works

Copyright serves the public interest through the promotion of creativity, and dissemination of culture and knowledge. Access to cultural works—and thus information, knowledge and

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1637 CJEU, Luksan, ¶67; CJEU, Reprobel, ¶¶44–49.
1638 Christie & Wright, 2014, pp. 429–430, referring also to conflicting interests in relation to moral rights and licensing scenarios.
1640 Consumentenbond & Bureau Brandeis, 2014, p. 3; Europe Economics et al., 2015. On streaming, see: Chalis, 2015; IFPI, 2015; Vallbè et al., 2015.
1642 Geiger & Schönherr, 2014a, p. 135 (n.102). See also: Westkamp, 2008a, pp. 58–59, following a similar approach under national constitutional law but noting that TPM protection makes the argument less persuasive vis-à-vis the InfoSoc Directive; and P. Bernt Hugenholtz & Okediji, 2008, p. 24, pointing out that the reference to “authors” in the BC and WCT leaves more ample space for a far-reaching compensated limitation than the reference to “rights holders” in TRIPS.
1643 Sganga, 2015, p. 7, arguing that the promotion of creativity is a utilitarian function ascribed to copyright in the InfoSoc Directive, as demonstrated by recital 9 thereof. See also EP Resolution Implementation InfoSoc Directive 2015, ¶25.
culture—is not only a goal of copyright law, but also has a human rights dimension, derived from the right to take part in cultural life and to enjoy the benefits of scientific progress, in itself a manifestation of the human right to science and culture.

The InfoSoc Directive establishes a link between intended creativity, remuneration, and the scope of copyright protection through exclusive rights and limitations. Recital 9 views the harmonisation of rights through a “high level of protection” of copyright and related rights as crucial to intellectual creation. This protection, it continues, “helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large”. Recital 10 adds that if creators “are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work.”

As argued in the previous chapter, a high level of protection cannot mean endorsing infinitely extendable protection. Doing so would contradict “the finding that overly strong exclusivity in the sense of ‘excessive protection’ can have a negative impact on creativity and innovation”. Therefore, a high level of protection should be interpreted as an “adequate” or “optimal” level of protection, aimed at providing remuneration for use of works that is in turn sufficient to incentivise creation, while maintaining a fair balance between private and public interest.

Infinite extension of protection would not only prejudice rights holders, but also the public interest. Limitations thus become essential tools to calibrate broadly interpreted exclusive rights and define an ideal scope of protection. A limitation-based statutory licence ACS for non-commercial use may promote creativity and access to works by providing remuneration for that use, improving legal certainty, and fostering the circulation of culture—all declared objectives of EU copyright law, often expressly identified as such by the CJEU.

Remuneration is central to intellectual creation. If an ACS provides an unwaivable right to fair compensation, creators gain a new rights revenue and an “appropriate reward for the use of their work”, consistent with recital 10 InfoSoc Directive. All the more so when, as argued before, exclusive rights and strict enforcement fail to provide that reward for mass non-commercial online use. A statutory licence system could improve the status quo in this respect, and in this way provide a boon to intellectual creation. Furthermore, it is not obvious that this system would result in an unreasonable prejudice to exploiters, since it would provide fair compensation to all

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1644 Geiger & Schönherr, 2014a, p. 141. On the circulation of culture as a goal of EU copyright law in the jurisprudence of the CJEU, see Marcella Favale et al., 2015, pp. 33, 66–67. See also supra 1.3 and infra 5.5.3.
1645 See Art 27 UDHR and Art. 15(1) ICESCR. See also Shaheed, 2014, pp. 3–5. On the access aspect of copyright and its role as an objective of the acquis, see infra 5.5.2–5.5.3.
1646 Dreier, 2015, p. 2.
1647 See supra 4.4.1.3 and 4.4.1.4.
1648 Dreier, 2015, pp. 2–3.
1649 Marcella Favale et al., 2015, pp. 33, 66–67.
1650 From a human rights perspective, the right to protection of authorship “does not imply perfect authorial control over creative works” and ought to be interpreted as requiring fair remuneration. See Shaheed, 2014, pp. 9–11, 13, 15, 20, 2015.

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categories of rights holders in the InfoSoc Directive, precisely those whose legitimate interests are protected by Article 5(5).\textsuperscript{1651}

From a different perspective, a statutory licence system may enhance legal certainty and foster the circulation of works. Improvement at this level results from the licence authorising users to reproduce and communicate works to the public over the Internet in the EU territory, thereby releasing individuals from liability for these online activities. Individuals would benefit from a clearer and simplified set of rules governing their online use of works, in line with the InfoSoc Directive’s objectives, including the harmonisation of copyright law through the coherent application of limitations.\textsuperscript{1652}

This clarified legal framework naturally helps the dissemination of culture and should have the added benefit of improving the legitimacy of copyright law, by approximating it to prevailing online social norms, and mitigating the costly social conflict arising from litigation.\textsuperscript{1653} In this line, the additional legal certainty that a statutory licence brings to the regulation of the activities of end-users online would also contribute to the efficient administration of justice, especially as it relates to costs associated with copyright litigation against these users.

Finally, gains in legal certainty further contribute to intellectual creation by allowing authors to learn from, and build on, pre-existing knowledge and materials.\textsuperscript{1654} Authors benefit from the availability of such materials through limitations,\textsuperscript{1655} which operate as access mechanisms to “empower new creativity”.\textsuperscript{1656}

5.3.3.6 Public Interest in the Respect of Fundamental Rights and Freedoms

A main assumption of this dissertation is that strict enforcement of exclusive rights against individuals for non-commercial file sharing is problematic. This results in part from the potential conflict between enforcement measures, and fundamental rights and freedoms. If a statutory licence ACS can mitigate this conflict, it will serve the public interest, providing a counterbalance to the prejudice caused to rights holders by the imposition of a copyright limitation for non-commercial online use. This section therefore examines whether certain fundamental rights and freedoms of individuals and intermediaries—freedom of expression and information, respect for privacy and protection of personal data, and freedom to conduct a business—can justify the adoption of an ACS.

\textsuperscript{1651} CJEU, \textit{Reprobel}, ¶¶44–49, on the attribution of fair compensation to these rights holders.
\textsuperscript{1653} Grassmuck, 2012, on the social “turn” towards a sharing norm.
\textsuperscript{1656} Shaheed, 2014, p. 13. See also Westkamp, 2008b, p. 4 & n.7. N.B. if these uses cross the commerciality threshold they are outside the scope of the ACS. This design helps preserve the economic core of the exclusive right.
5.3.3.6.1 Freedom of Expression and Information

The right to freedom of expression and information is recognised at international, European, and national levels. In the copyright *acquis*, recital 3 InfoSoc Directive identifies it as on a par with intellectual property and the public interest:

The proposed harmonisation will help to implement the four freedoms of the internal market and relates to compliance with the fundamental principles of law and especially of property, including intellectual property, and freedom of expression and the public interest.

Copyright promotes freedom of expression by fostering and incentivising independent intellectual creation. However, freedom of expression imposes restrictions on the scope and enforcement of the exclusive right. In fact, States have a positive obligation to protect this fundamental freedom from interference by private parties, such as in the exercise of copyright. The risk of conflict between these rights is particularly visible in the digital environment.

On the one hand, the Internet has become an essential medium for the enjoyment and effective exercise of freedom of expression and information. This freedom includes the possibility to impart, seek and receive information and ideas online. It extends to the individuals’ enjoyment of digital cultural goods, including activities like reading, listening, viewing, browsing, hyperlinking, and sharing works online.

On the other hand, many digital cultural and information artefacts qualify for copyright protection. However, through broad interpretation of exclusive rights and strict interpretation of limitations, EU copyright law restricts the space available for non-commercial use of works that would potential qualify as a legitimate exercise of freedom of expression and information. The result is a conflict between fundamental rights. If a statutory licence ACS assists in resolving the conflict, it may find a policy justification in this fundamental freedom.

To understand the operation of freedom of expression as a limit on the scope of copyright protection it is instructive to briefly examine judgments from the ECtHR and CJEU. In ECtHR case law, exceptions to freedom of expression, including those imposed by copyright, are subject to strict interpretation. A decision or sanction for copyright infringement that restricts a person or organisation’s freedom of expression must not only refer to an unauthorised and

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1657 See Art. 19 UDHR, Art. 19 International Covenant on Civil and Political Rights, Art. 11 Charter, and Art. 10 ECHR.
1658 Lee, 2015, p. 12.
1664 See *supra* 4.4.1.4, 4.4.4.1, and 4.4.4.3. On freedom of expression and UGC, see, e.g., Lee, 2015, p. 16.
1665 As noted in Chapter 1, the EU fundamental rights framework includes principles derived from the ECHR, some of which are codified in the Charter, thus justifying the reference to it and to ECtHR judgments. See *supra* 1.3.
1666 European Copyright Society, 2014b, p. 6, with further references. See also ARTICLE 19, 2013, p. 9.
unprivileged use, but also “be pertinently motivated as being necessary in a democratic society, apart from being prescribed by law and pursuing a legitimate aim”.  

In *Ashby Donald* and *The Pirate Bay*, the ECtHR interprets freedom of expression and information as an external limit to copyright capable of justifying infringing uses of works, even on a for-profit basis. This consideration implies a reversal in the traditional analysis of restrictions to copyright as derogations to a general principle of exclusivity. In the ECHR framework, the exclusive right is perceived as “an exception to a broader principle of freedom of use”, which is the “point of departure” of analysis.

*Ashby Donald* offers further insight. It clarifies that the additional protection provided by Article 10 ECHR only attaches to “expression and content contributing to an issue of public debate or a debate of general interest for society” and not to commercial speech, i.e. “[s]peech, messages, pictures and content which are merely money driven”. Although the ECtHR is not clear on the “commerciality” criterion, it is at least apparent that expressions of a non-commercial character will fare better on a balancing test as justified restrictions on copyright. Thus, it is arguable that some (certainly not all) instances of non-commercial online use of works may benefit from added-value protection provided by this fundamental freedom against copyright.

Based on E CtHR case law, some scholars argue that in conflicts between copyright and freedom of expression, the rights holder should bear the onus of showing that the restrictions operated by copyright are proportionate. In this light, freedom of expression and information functions as a justification to redefine the boundaries of exclusivity.

The interpretation of Article 11 Charter by the CJEU has significant parallels with that of the ECtHR. On an external level, the CJEU finds that freedom of expression and information imposes limits on remedies for copyright infringement, as illustrated by the restrictions on enforcement measures like filtering and blocking injunctions in *Scarlet Extended*, *Netlog*, and *UPC Telekabel*. It is noteworthy in this respect that an increasing number of national courts interpret this fundamental freedom as a limit on exclusive rights.

On an internal level, freedom of expression and information functions as a justification to broaden the scope of certain limitations, which would otherwise be inconsistent with this fundamental right and, by derivation, the objectives of the InfoSoc Directive. Chapter 4 explains

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1667 Voorhoof & Høedt-Rasmussen, 2013. See also Geiger, 2014c, pp. 135–136; Geiger & Schönherr, 2014a, pp. 118–119, citing the ECtHR in *Pirate Bay* and *Ashby Donald* (“copyright law as a derogation of the principle of freedom of expression… needs to be prescribed by law and be necessary”). Cf. also Fischman Afori, 2014, p. 903.

1668 N.B. in those judgments the infringing uses were not considered justified by freedom of expression.

1669 Geiger & Izyumenko, 2014, p. 318–325, with analysis of the cases mentioned. But see Christina Angelopoulos, 2015, p. 85, noting that neither case involved Internet users’ rights.

1670 Voorhoof & Høedt-Rasmussen, 2013.


1672 The proportionality requirement would derive from the standard of “necessary in a democratic society” in Art 10(2) of the ECHR. See Christina Angelopoulos, 2015, p. 82; Lee, 2015, p. 22, with further references.


and exemplifies this approach, patent in the CJEU’s interpretation of the limitations of parody and quotation in *Deckmyn* and *Painer*.\textsuperscript{1676}

For the purposes of this dissertation, the core fundamental rights tension susceptible of offering a justification for a statutory licence ACS concerns the application of enforcement measures to non-commercial file sharing.\textsuperscript{1677} To illustrate this tension and the risk of disproportionate restrictions to freedom of expression and information, two remedies may be singled out: disconnection of access to the Internet, and filtering or blocking injunctions.

Disconnection from access to the Internet is usually discussed in the context of graduated response systems, although it may also be imposed through injunctions based on Article 8(3) InfoSoc Directive.\textsuperscript{1678} In either scenario, the measure has the potential to impose disproportionate restrictions on freedom of expression.\textsuperscript{1679}

The issue first came up in France. In a 2009 decision, the French Constitutional Council used freedom of expression and information to qualify Internet access as a fundamental right and reject the first iteration of the so-called HADOPI law, which allowed for individual subscribers to be disconnected from the Internet without prior judicial review.\textsuperscript{1680} The French Constitutional Council stated that

\begin{quote}
  in the current state of online means of communications and in light of the importance that these services have acquired for participation in democratic life and the expression of ideas and opinions, the right of freedom of expression implies the freedom of access to these services.\textsuperscript{1681}
\end{quote}

As a result, in 2013 France passed a law prohibiting Internet disconnection as a sanction for copyright infringement.\textsuperscript{1682} The reasoning of the French court captures the importance of free access to Internet services in light of this fundamental right. It also seems to imply a value judgement favouring the preservation of freedom for online exchange of content embodying ideas and opinions.

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1676 See the discussion supra at 4.4.1.4, 4.4.4.1, and 4.4.4.3. See also European Copyright Society, 2014b, pp. 4–7.
1677 ARTICLE 19, 2013, pp. 15–18; Mazziotti, 2013, p. 133; Shaheed, 2014, p. 11.
1678 Husovec & Peguera, 2015.
1679 ARTICLE 19, 2013, p. 15.
1680 French Constitutional Council, 10.06.2009, Decision 2009-580DC, J.O. 9675 (“Loi favorisant la diffusion et la protection de la création sur internet”), referring to Law No. 2009-669 of June 12, 2009, promoting the Dissemination and Protection of Creation on the Internet, which set up the Haute Autorité pour la Diffusion des œuvres et la Protection des droits d'auteur sur Internet (HADOPI). The legal basis for the decision was the embodiment of the right of freedom of expression in Art. 11 of the French Declaration of Human Rights of 1789. For the second iteration of the HADOPI law, see Law No. 2009-1311 of October 28, 2009. On the topic, see Geiger, 2011, p. 466–ff. See also Lucchi, 2011, with an analysis of the HADOPI decision and legislative changes in light of the constitutional concept of freedom of speech, including Internet access.
The European Parliament supported an identical view in a 2010 resolution, adopted in the context of the ACTA negotiations. The resolution stated the need for judicial examination prior to any termination of users’ access to the Internet “in order to respect fundamental rights, such as the right to freedom of expression and privacy”.  

Article 1(3)(a) Framework Directive endorses this view in EU law. It imposes an obligation on Member States implementing measures that may restrict access and use by end-users of electronic communications networks, for example through a graduated response system. The obligation is to “guarantee to the affected parties a prior, fair and impartial procedure and an effective and timely judicial review” in conformity with the ECHR, fundamental freedoms and general principles of Community law.

Similar arguments apply when considering Article 8(3) InfoSoc Directive as a valid ground for injunctions to order ISPs to disconnect allegedly infringing providers from Internet access. As argued by Husovec and Peguera, injunctions of this type raise issues of compatibility with the Charter and the ECHR, even when their effectiveness is low due to the possibility that users switch providers or obtain online access from a public space. Thus, the authors conclude, “it seems unlikely that this form of relief may end up being an attractive and effective tool to curb online infringement.”

Serious freedom of expression concerns may also arise from a different type of injunction, notably filtering and blocking. Critics of these measures state that they lack effectiveness and pose serious risks, such as general monitoring and over-blocking. For example, blocking access to content or imposing a filtering system may hinder users’ right to receive information, and interfere with website operators or targeted ISPs’ freedom of expression.

In *UPC Telekabel*, the CJEU showed openness to blocking injunctions that allow intermediaries to choose which measure to apply so long as the ISP *itself* strikes a fair balance between competing fundamental rights. The Court stated that in the implementation of an injunction the ISP must “ensure compliance with the fundamental right of internet users to freedom of information”, *inter alia* by adopting strictly targeted measures and subjecting them to immediate judicial review. To strike a fair balance, the ISP must meet two conditions. First, Internet users cannot be deprived unnecessarily of the “possibility of accessing the information available”. Second, the measures must have the effect of preventing unauthorised access to

1686 Husovec & Peguera, 2015, p. 36.
1687 Council Guidelines on Freedom of Expression 2014, 18. Cf. ARTICLE 19, 2013, pp. 15–18; Husovec & Peguera, 2015, pp. 31–32, 35; Lee, 2015, pp. 17–20; Mazziotti, 2013, pp. 133–136. See also Christina Angelopoulos, 2015, pp. 88–90, noting that filtering systems are likely to fail the fair balance test due to their propensity to involve general monitoring of uses, as well as the risks of over-blocking.
copyright works “or, at least, of making it difficult to achieve and of seriously discouraging internet users” from accessing such works through the provider’s services.\textsuperscript{1690}

As noted by Angelopoulos, this case and its effects would “not easily be reproduced” outside its native jurisdiction of Austria, due to the idiosyncratic nature of the injunctive order at stake. Still, the case illustrates the ease with which the CJEU shifted the responsibility of striking a fair balance from the national courts to intermediaries. The result is further legal uncertainty, opening the door for potential violation of the fundamental freedom of information of Internet users.\textsuperscript{1691} (It is possible that the CJEU’s direction in this respect will be adjusted in \textit{Mc Fadden}, if the Court follows the Opinion of the AG, according to whom even for “outcome” injunctions, national Courts must first ensure the existence of appropriate measures to achieve the objective of the injunction in compliance with EU law.\textsuperscript{1692})

The link drawn between the right to Internet access and freedom of expression and information of individuals online is reminiscent of Fisher’s main justification for an ACS, namely its potential to advance “semiotic democracy”.\textsuperscript{1693} This concept relates to the ability to “use and manipulate cultural artifacts... playfully or critically”\textsuperscript{1694} or the “power to make cultural meanings”.\textsuperscript{1695} By extending this power to a more generalised group that includes end-users, the Internet generated a qualitative and quantitative improvement in semiotic democracy.\textsuperscript{1696} From this perspective, access to the Internet and the ability to engage with copyright works outside the market sphere are essential to democratic culture and free speech.

In sum, a statutory licence ACS may facilitate freedom of expression and information online, preventing some of the negative effects of the strict enforcement measures. In a best-case scenario, it will foster follow-on creativity, the personal enjoyment of cultural goods, semiotic democracy, and the circulation of culture, information, ideas and opinions.\textsuperscript{1697} If it achieves these benefits and provides sufficient compensation to mitigate the financial harm caused to rights holders, an ACS will reflect a legitimate public interest based on freedom of expression and information, in a way that justifies the potential prejudice imposed on rights holders.\textsuperscript{1698}

\subsection{Protection of Privacy and Personal Data}

The fundamental rights to privacy and protection of personal data are guaranteed in the Charter and the ECHR.\textsuperscript{1699} CJEU case law on conflicts between these rights and copyright mostly relates to requests for injunctions by rights holders against ISPs pursuant to Article 8(3) InfoSoc

\begin{footnotes}
\item[1690] \textit{Ibid.}
\item[1691] Christina Angelopoulos, 2015, pp. 76, 88.
\item[1692] \textit{Opinion AG in Mc Fadden}, ¶¶119–124. See also Christina Angelopoulos, 2016a.
\item[1694] Benkler, 2006, p. 275.
\item[1696] Benkler, 2006, p. 276.
\item[1697] Lee, 2015, pp. 16–17, discussing freedom of expression and file sharing.
\item[1699] Arts 7 and 8 Charter, and Art. 8 ECHR.
\end{footnotes}
Directive and Article 8 Enforcement Directive. In general, these injunctions require gathering of evidence through the monitoring (e.g. via filtering systems) of electronic communications of allegedly infringing Internet users, and the collection and processing of their IP addresses.

The right of information in Article 8 Enforcement Directive allows rights holders, following a justified and proportionate request, to obtain a judicial order directed at infringers or intermediaries to disclose “information on the origin and distribution networks” of infringing goods and services. For the provision to apply, those goods of services must be provided on a “commercial scale”. This requirement presents interpretative challenges, giving rise to distinct national implementations and judicial rulings. For example, it is not clear whether commercial-scale includes mass non-commercial online use of works by individuals, such as high-volume uploads in a decentralised P2P network.

One of the issues at stake on the intersection between copyright enforcement and the protection of privacy and personal data is that the injunction in question is aimed at IP addresses. Because these addresses qualify as personal data, the right of information in Article 8 Enforcement Directive must be applied without the prejudice of data protection rules on collection and processing in the Data Protection and E-Privacy Directives.

The CJEU tackled this issue in two very similar cases: Promusicae and LSG. The first case involved unauthorised P2P exchanges of works by ISP subscribers. In it, the CMO Promusicae requested that an ISP disclose its clients’ personal data on grounds of copyright infringement. The Court ruled that Member States may choose not to impose on ISPs an obligation to disclose their subscribers’ personal data in the context of civil copyright cases, thus restricting the right of property in copyright in light of the right of privacy in electronic communications. The CJEU further stated that where national legislators decide to implement such an obligation, the same should be proportionate and strike the required balance between property and the rights of privacy and personal data. This means that any national procedures for effective enforcement must respect data protection rights of individual users of electronic communication services.

In essence, LSG reiterates this interpretation.

In Scarlet Extended and Netlog, the CJEU examined the imposition through an injunction of filtering systems on, respectively, an Internet access provider and a hosting provider. The broad filtering injunctions requested were aimed at identifying works exchanged on the providers’ networks for their subsequent blocking. As with L’Oréal v. eBay before, the Court confirmed

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1700 See, e.g., CJEU, Promusicae, CJEU, Scarlet Extended, CJEU, Netlog, and CJEU, Bonnier Audio. The earliest CJEU decision on injunctions against intermediaries and enunciating the “fair balance” principle was CJEU, L’Oréal v eBay, concerning trademarks.
1701 Mazziotti, 2013, pp. 138–139. See CJEU, Scarlet Extended, ¶51, classifying IP addresses as personal data because they allow for the precise identification of users.
1702 Iglezakis, 2012; Mazziotti, 2013, p. 142.
1703 Mazziotti, 2013, p. 140, suggests the provision would apply in this case.
1705 CJEU, Promusicae, ¶53. See also Iglezakis, 2012.
1706 Iglezakis, 2012.
1707 For a description of LSG, see Frabboni, 2010, pp. 130–133.
that the general monitoring prohibition in Article 15 E-Commerce Directive does not permit active monitoring of all customer data from a provider.\footnote{Christina Angelopoulos, 2013, 2015, pp. 74–76.} Because filtering systems tend to require general monitoring of use, they likely violate the rights of privacy and personal data of a provider’s customers, and as a result fail the fair balance test.\footnote{Christina Angelopoulos, 2015, pp. 88–89.}

Importantly, the CJEU follows the fair balance test whenever a conflict arises between copyright and privacy, even where the specific litigation does not touch upon the prohibition of general monitoring.\footnote{CJEU, Promusicae, ¶68; CJEU, LSG, ¶¶28–29; CJEU, Scarlet Extended, ¶¶43, 45; CJEU, Netlog, ¶¶41, 43; CJEU, UPC Telekabel, ¶¶46–47. See, however, Bonnier Audio, ¶¶55–57, reaching a different “fair balance” between privacy and copyright. For criticism, see Sganga, 2015, p. 13. N.B. in France, the issue of incompatibility of HADOPI’s graduated response system with the right of privacy was a central topic of discussion. Cf. Geiger, 2014c, p. 135 & n. 94, making a connection with the CJEU’s consideration of the right of privacy in Promusicae.} The Court’s case law on this topic highlights the privacy risk of copyright enforcement, namely that available remedies become tools to monitor personal data and intrude on the privacy of telecommunications. That risk, it seems, lies primarily with measures going beyond the bounds of the legitimate purpose that justifies the treatment of personal data, without respect for the tests of proportionality and fair balance.

The examination of existing judgments suggests that the main areas of concern are over broad filtering injunctions and, in the opinion of some authors, graduated response systems that require the processing of IP addresses to deal with infringing users.\footnote{Mazziotti, 2013, p. 139. Whether targeted monitoring constitutes an acceptable measure must be assessed on a case-by-case basis.} In this light, the question arises whether the potential encroachment on an individual’s private sphere is fair, adequate and suitable in relation to the non-commercial use of works to be licensed through an ACS.

It is difficult to respond in the affirmative. The privacy risks involved in strict enforcement measures seem high vis-à-vis non-commercial use, and perhaps unjustified if an alternative model has the potential to ensure remuneration for the same activities. Of course, for this trade-off to make sense, the design of the statutory licence system ought to respect the privacy of users in electronic communications and prohibit any processing of personal data outside a legitimate purpose. For example, such a system should guarantee that monitoring of online exchanges is anonymous, with the sole purpose of enabling collection and distribution of rights revenue.\footnote{See supra 3.4.4, on ACS proposals emphasising the importance of a privacy respecting design.} If these requirements are met, an ACS could cater to the public interest in a way similar to that of private copying since its inception—by providing an alternative to strict enforcement for acts in relation to which individuals have a legitimate interest in the respect of privacy and personal data.\footnote{See supra 2.3, on the privacy underpinning of private copying.}

\subsection*{5.3.3.6.3 Intermediaries and Freedom to Conduct a Business}

Limitations have economic value to certain businesses, which rely on privileged uses to generate revenue. This is true even for compensated limitations, due to savings in search, negotiation and litigation costs.\footnote{Geiger, 2010, p. 526, noting that these businesses are sometimes called “added-value services”.} Online intermediaries may therefore benefit indirectly from the limitation for
non-commercial use introduced by a statutory licence ACS. However, at least ISPs may suffer prejudice from such a system if they are designated intermediate debtors of the broadband levy. It is therefore important to consider their legitimate interests in the balancing exercise of the third step.

From a fundamental rights perspective, the obvious basis for such consideration is Article 16 Charter. The provision recognises the fundamental freedom to conduct a business “in accordance with Union law and national laws and practices”, in light of its social function. The CJEU defines this freedom as “the right of any business to be able to freely use, within the limits of its liability for its own acts, the economic, technical and financial resources available to it”. In its jurisprudence on the InfoSoc Directive, the Court further identifies this freedom as a limit on copyright, giving rise to the need to strike a fair balance between the rights of economic agents—broadcasting organisations, ISPs, hosting service providers—and the proprietary interests of rights holders.

In *UPC Telekabel*, the CJEU stated that an injunction violates the freedom to conduct a business if it restricts the free use of the resources at the disposal of an ISP by obliging it to take measures representing a “significant cost”, having a “considerable impact on the organisation of his activities”, or requiring “difficult and complex technical solutions”. This begs the question of whether, in relation to the non-commercial online use of works, a statutory licence ACS translates into a less costly and complex measure for online intermediaries than copyright enforcement through injunctions or graduated response systems.

In this respect, the Opinion of AG Szpunar in *Mc Fadden*, a case involving an operator of a WiFi network, is instructive, especially as it concerns the scope of permissible injunctions. The Opinion states that, when issuing an injunction against an intermediary service provider, national courts must ensure three requirements are met. First, the measures in question must comply with Article 3 Enforcement Directive; in particular, they should be effective, proportionate and dissuasive. Second, in accordance with Articles 12(3) and 15(1) E-Commerce Directive, these measures must be “aimed at bringing a specific infringement to an end or preventing a specific infringement and… not entail a general obligation to monitor”. Third, “that the application of the provisions mentioned, and of other detailed procedures laid down in national law”, must achieve “a fair balance between the relevant fundamental rights”, namely freedom of expression and information, freedom to conduct a business, and copyright as property (Articles 11, 16 and 17(2) Charter).

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1716 CJEU, *UPC Telekabel*, ¶49.
1718 CJEU, *UPC Telekabel*, ¶50.
Applying these requirements, the AG found that none of the measures at stake in *Mc Fadden* were consistent with EU law, including (with relevance here) injunctions requiring Internet disconnection or broad filtering obligations.\(^{1721}\) The termination of Internet connection was found to be incompatible with the requirement of fair balance, “since it compromises the essence of the freedom to conduct business of persons who, if only in ancillary fashion, pursue the economic activity of providing Internet access”. That measure is likewise inconsistent with Article 3 Enforcement Directive, as it creates a barrier to legitimate trade.\(^{1722}\) Furthermore, the examination of all communications passing through that Internet connection was considered to amount to a general monitoring obligation, and therefore be incompatible with Article 15(1) E-Commerce Directive.\(^{1723}\)

In light of these analyses, broad copyright injunctions aimed at preventing mass online use of works may be inconsistent with the fundamental freedom to conduct a business, mainly due to the costs imposed on the activities of Internet intermediaries. In contrast, it can be argued that an ACS would bring benefits to intermediaries, both in enforcement savings and by opening up “legal” space for provision of services aimed at facilitating lawful non-commercial use. Hence, and in the abstract, an ACS imposes lesser restrictions on the economic, technical and financial resources of intermediaries, as compared to strict enforcement measures, such as Internet disconnection and filtering injunctions.

Of course, this is not the whole story. Most legalisation proposals require the imposition of a levy on the Internet access subscription fee of households and include ISPs in the system. Therefore, at least for ISPs, an ACS imposes costs and, one might argue, a hindrance to their freedom to conduct a business.

*De lege lata*, ISPs do not engage in restricted acts and are not liable for the practices of end-users, despite being subject to injunctions. This makes their voluntary participation in an ACS unlikely. However, that participation is crucial to ensure effectiveness of the system, and would likely be required, *de lege ferenda*.\(^{1724}\)

ISP involvement in an ACS makes sense because it would be economically efficient. Not only does a (flat or metered) surcharge on the Internet subscription payment for households raise the least transaction costs among users, but it also facilitates the provision of adequate compensation to rights holders.\(^{1725}\) It is improbable that the ISP business model would suffer, as a reasonably priced subscription fee (i.e. a broadband levy lower than end-users’ estimated willingness-to-pay) will probably not have strong adverse effects on demand for these services.\(^{1726}\)

From a fairness perspective, ISPs derive value from non-commercial exchanges of works, which significantly increase their traffic and demand for their services. ISPs can choose to pass on (at least part of) the levy or absorb it—while bundling it with other products—thereby having a


\(^{1724}\) Séverine Dusollier & Colin, 2011, p. 832, arguing that the most feasible contractual model is one “in which P2P users contract with and pay fees to the CMOs”.

\(^{1725}\) Handke et al., 2015, analysing the recorded music market in the Netherlands.

\(^{1726}\) Handke et al., 2015.
competitive advantage to increase their subscription base; competition at this level benefits end-users.\textsuperscript{1727}

Through their inclusion in the system, ISPs should be involved in shaping it into a fair and efficient mechanism, together with CMOs and user representatives, under government and/or judicial supervision.\textsuperscript{1728} For example, these negotiations could define the fraction of the levy that ISPs may retain to cover their administrative costs.\textsuperscript{1729} If these costs are covered, participation of ISPs in an ACS should not impair their freedom to conduct a business, in the sense of \textit{UPC Telekabel}.

Whether this is a better option than the status quo in light of ISPs’ freedom to conduct a business is unclear. A correct answer would likely require empirical research into the costs of ISP participation in the system. However, it is important to note that the current policy orientation of EU institutions and industry stakeholders is towards increasing the role and collaboration of online intermediaries in enforcement measures, such as filtering and blocking, which entail costs and additional liability exposure for these intermediaries.\textsuperscript{1730} If such a future scenario materialises, ISPs may come to view ACS as a benign proposition.

5.3.4 Summary: Application of the Three-Step Test to Alternative Compensation Systems

This paragraph summarises the main findings of each step’s analysis and highlights the space available for a limitation-based statutory licence ACS in the \textit{acquis} under the three-step test. A limitation is a certain special case if generally determinable, not overly broad, with a reasonably foreseeable scope of application, and justified on a sound policy basis. The first step should not be so strict as to foreclose a comprehensive overall assessment of a limitation pursuant to the subsequent steps.\textsuperscript{1731}

The scope of an ACS is delimited by several exclusions. The system only benefits natural persons, usually excludes different categories of works (at least software, videogames and databases\textsuperscript{1732}), commercial use of works, and non-commercial use already covered by existing limitations, like private copying, quotation, parody, and incidental inclusion.

\textsuperscript{1727} The possibility to pass on the levy is a feature of the private copying system. Cf. CJEU, \textit{Padawan}, ¶¶46, 48. See supra 2.3.4, 3.4.6, and 4.4.3.


\textsuperscript{1729} Aigrain, 2008.


\textsuperscript{1731} Geiger, 2007b, p. 4; Geiger et al., 2008, p. 711; P. Bernt Hugenholtz & Okediji, 2008. See also Berault & Lebois, 2005, p. 33, regarding the need to consider normative justifications, such as “freedom of speech, information of the public, teaching and research. \textit{But see} Griffiths, 2009, p. 20”, doubting whether the test incorporates a standard of foreseeability.

\textsuperscript{1732} See supra 3.4.1, identifying the subject matter scope of selected ACS proposals.
Furthermore, an ACS has economic and non-economic motivations relevant for copyright policy. The economic motivations reflect a market failure argument steming from the high transaction costs of imposing full exclusivity, individual management and enforcement on the non-commercial online use of works. The non-economic motivations concern the public interest dimension of an ACS. They range from the promotion of creativity and dissemination of knowledge, to the protection of the fundamental rights and freedoms of individuals (access to science and culture, privacy, personal data, and freedom of expression and information) and online service providers (freedom to conduct a business). The analysis of step three looks in detail at these motivations.

In sum, the above characteristics may be sufficient for a potential ACS to constitute a qualitative and quantitative “certain special case” and meet the first condition of the test. However, doubts remain as to whether the exception is overly broad as it pertains to types of work and subject matter covered.

The traditional interpretation of the second step views “normal exploitation” as an economic competition standard to judge the actual and potential impact of a limitation on the market. This standard compares the hypothetical losses caused by a limitation to an idealised full exploitation of exclusive rights.

In a strict and sequential reading of the test, this traditional view prevents most online limitations from passing the second step. The result is to reject limitations irrespective of their policy rationales, remunerative potential, or consistency with the objectives of copyright. This interpretation likely precludes a limitation such as that envisioned here. However, by ignoring policy rationales, the traditional view may prevent a fair balance between the interests of copyright owners and the public interest. If this balance is one of the principal objectives of EU copyright law and the three-step test, it is worth exploring a flexible interpretation of the second step.

The flexible interpretation redefines normal exploitation and recognises the need to conduct a balancing exercise in the third step—the place to consider the non-economic motivations of a limitation—regardless of the results of the analysis in step two. This interpretation focuses on the effect of a limitation on the overall commercialisation of works. From this perspective, a conflict with the normal exploitation arises if a limitation deprives creators and exploiters of major and foreseeable sources of income under regular commercial circumstances. These sources of revenue include the online licensing of the exclusive rights of reproduction and communication to the public to commercial and end-users through digital download and streaming platforms. Excluded are uses already privileged in the acquis and de minimis use.

A statutory licence ACS is aimed at non-commercial online use by individuals, which for the most part does not generate remuneration or is exercised by copyright owners. In relation to this type of use, a statutory licence would create new rights revenue and constitute a normal form of exploitation, like other compensated limitations in EU copyright law. Regardless, relevant legal and empirical doubts subsist in relation to the compliance of an ACS with the second step. One main concern is with the (unknown) indirect effects of such a system on the overall commercial exploitation of works. Another relates to the enforceability of exclusive rights against unauthorised for-profit commercial websites capable of impinging on the normal exploitation of works.
Empirically, the issue is whether legalisation causes users to abandon lawful channels. The magnitude of such a substitution effect is unknown. The best available proxy is the effect of unauthorised use on the market; on this, empirical research suggests that the long-term effect is uncertain. In addition, unauthorised websites subsist despite the steady growth of digital revenues and available enforcement measures. The result is that authorised and unauthorised channels already co-exist in the online environment. The implication is that an ACS will not replace the commercial market, but rather offer consumers an alternative means to access and use works beyond the constraints of territorial and substantive fragmentation of copyright.

However, if compliance with the second step hinges on the statutory licence preserving the economic core of the commercial exploitation of works, it should allow rights holders to enforce their copyright against unauthorised websites. This is especially true if those websites become immune to intermediary liability as a result of the adoption of a statutory licence.

The challenge, then, is to devise a system that preserves these enforcement avenues but still provides the legal authorisation for non-commercial acts by end-users and remuneration for copyright owners. One possible way to do so is to define the allowed non-commercial use strictly, expressly excluding online exchanges by platform operators against—or linked to—financial consideration. Other options, currently under consideration by the CJEU, are to define the scope of the right of communication to the public so as to include linking to unauthorised sources and/or qualify the activities of platform operators as acts of communication to the public, which would not be covered by the limitation. A supplementary approach could be the institutional endorsement of self-regulation (of copyright owners and online intermediaries) aimed at enforcement against unauthorised for-profit third party websites.

If these scenarios are actualised, the scope of the statutory licence will only benefit end-users and a limited set of online intermediaries, namely those enabling or facilitating the licensed use, but not directly reproducing or communicating the works to the public. The licence would also not affect the legal status of those mostly “neutral” intermediaries that benefit from the E-Commerce Directive’s safe-harbours, in relation to the specific activities exempt from liability under those provisions. All other online intermediaries (or intermediary services) are outside the scope of the legalisation scheme. Thus, for-profit online platforms that make available works without the authorisation of rights holders (e.g. The Pirate Bay and Popcorn Time) will remain liable for copyright infringement and subject to strict enforcement measures. Of course, current legal commercial online service providers (e.g. Spotify and Netflix) will continue to require authorisation from rights holders to offer their services. De lege lata, only this circumscribed scope would seem to enable a statutory licence ACS to avoid a conflict with the normal exploitation of works, even under a flexible reading of the second step.

The third step prevents limitations that cause an unreasonable prejudice to legitimate interests. This assessment requires a multi-level balancing exercise guided by the principle of proportionality. The exercise takes into account the reasonableness of the prejudice caused and

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1733 The pending preliminary references in question are the following: CJEU, Reference for Preliminary Ruling, Case C-160/15, GS Media; CJEU, Reference for Preliminary Ruling, Case C-527/15, Filmpjes; CJEU, Reference for Preliminary Ruling, Case C-610/15, Stichting Brein v Ziggo.
 attempts to strike a fair balance between interests viewed as lawful and justifiable on normative grounds.

It is necessary to assess the concurrent and opposing interests of creators and exploiters, on the one hand, and the individual and collective public interest—as manifested in the interests of third parties that are beneficiaries of the limitation—on the other. Although disputed, the consideration of third party interests seems aligned with the objectives of copyright law, and a corollary of the principle of fair balance in the InfoSoc Directive. In relation to a limitation-based statutory licence ACS, relevant public interests stem from the promotion of creativity and dissemination of works, and the protection of fundamental rights.

A limitation causes unreasonable prejudice if the harm suffered by rights holders from its introduction is out of proportion to the benefits derived by the public. The potential harm caused by an ACS refers primarily to its indirect effects on the normal forms of exploitation of works online. Payment of fair compensation through a statutory licence is an acceptable means to reduce that harm to reasonable levels. The empirical research cited suggests that an ACS may provide sufficient revenue to compensate affected rights holders for non-commercial online use of works. However, the existing research has its limitations, making it crucial to examine the different policy arguments that justify the prejudice caused.

Creators and exploiters have conflicting interests. The main concern of creators is fair remuneration. Because remuneration is elusive in the digital environment, an unwaivable fair compensation right could be more favourable to creators than an assignable exclusive right. Conversely, exploiters typically have a bias against legalisation proposals; they prefer to maintain their exclusive rights and promote enforcement measures to reign in infringement.

In safeguarding the material interests and bargaining power of creators, a statutory licence system favours their interests over those of other rights holders in exclusivity and enforcement. This choice makes sense in the system of the test if the benefit to creators offsets the harm to exploiters, thereby reducing the prejudice to rights holders as a whole to tolerable levels.

Beyond the legitimate interests of creators in fair remuneration, the main justification for an ACS lies in its public interest dimension. Further to addressing a market failure in the regulation of mass-scale non-commercial use of copyright over the Internet, an ACS promises improvement over the status quo in the promotion of creativity and access to works, and thus the circulation of culture and knowledge online.

In addition, a well-designed statutory licence seems preferable to strict enforcement measures (filtering, blocking and Internet disconnection) in relation to the fundamental rights of Internet users to privacy in telecommunications, and freedom of expression and information online. It is also arguable that subjecting online intermediaries to injunctions and intermediary liability for their customers’ non-commercial use may interfere with the fundamental freedom to conduct a business. In the specific case of ISPs, it is not clear if an ACS is a superior alternative to the status quo, as the system requires their participation in the system as intermediary debtors. However, if the system allows ISPs to recover their administrative costs and pass on the broadband levy to users, it should interfere less with this fundamental freedom than broad injunctions and participation in graduated response systems.

In conclusion, there are valid arguments to suggest that a fairly compensated limitation for non-commercial online use of works and the accompanying statutory licensing system are compliant
with EU copyright law.\textsuperscript{1734} The option for an ACS rests on a fair balancing of interests that emphasises the public interest and fair compensation over exclusivity, and rests partly on the internal effect of fundamental rights in shaping the scope of copyright protection.

However, doubts linger as to whether such a system can overcome potential conflicts with the normal exploitation of works, even following a flexible reading of normal exploitation and the test as a whole. In other words, the proposed flexible reading is controversial, especially in light of some CJEU case law that posits a strict interpretation of limitations. Therefore, it is important to explore whether certain legal mechanisms can be combined with a statutory licence ACS to ensure that it overcomes potential conflicts with normal exploitation, thereby providing a more viable model of copyright reform.

5.4 Overcoming Conflicts with the Normal Exploitation of Works

The main obstacle to the adoption of a limitation-based ACS in the \textit{acquis} is step two of the test. The risk is that copyright owners’ major sources of revenue suffer by the migration of users from online commercial channels to the new system. In this scenario, to ensure compliance with the three-step test, an ACS could contain rules to avoid a conflict with the normal exploitation of works. The taxonomy of ACS in Chapter 3 identifies mechanisms providing additional flexibility to legalisation schemes. Particularly promising are embargo periods and opt-out rules.\textsuperscript{1735} This section examines these mechanisms as supplements to a statutory licence ACS and their compliance with international and EU law in order to assess whether they may help overcoming potential conflicts with normal exploitation.

5.4.1 Embargo Periods

Embargo periods are rules that subject the availability of works to a temporal condition. For example, in the field of academic publishing, an embargo period refers to a situation where an article is first available for paid online subscription and only later on open access. In that contractual context, this period of embargo corresponds to the amount of time required for journals to “deliver value to subscribing customers before a manuscript becomes available for free to the public”; the period “begins from the date the article is formally published online in its final and fully citable form (i.e. online publication date).”\textsuperscript{1736}

An example of an embargo period in copyright law is found in Article 38(4) of the German Copyright Act. This provision allows authors of scientific contributions resulting from “a research activity publicly funded by at least fifty percent” previously published in some types of periodic publication, “to make the contribution available to the public in the accepted manuscript version upon expiry of 12 months after first publication”. The subsequent open access

\textsuperscript{1734} For a number of authors, provided the fair compensation paid to rights holders covers their losses, the public interest motivation of an ACS-type limitation justifies restricting exclusivity under this step. See Bernault & Lebois, 2005, pp. 36–41; Geiger & Schönherr, 2014a, pp. 136–137; Peukert, 2005, p. 43.

\textsuperscript{1735} See supra 3.3.3 and 3.4.1. See also Senfleben, 2014, pp. 10–18, for an analysis of embargo periods and “opt-out formalities” in the context of the test.

publication cannot be for a commercial purpose and must indicate the source of the first publication.\textsuperscript{1737}

In relation to copyright limitations, an embargo period is a legal rule that causes a limitation to come into effect after a period of time has elapsed from the first lawful publication or making available of the work.\textsuperscript{1738} Thus, an “embargoed limitation” functions as a procrastinated statutory licence (see Figure 6). Ideally, the limitation comes into force after a grace period corresponding to the normal exploitation of works, thereby avoiding conflicts with the second step of the test.\textsuperscript{1739}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{embargo_period.png}
\caption{Embargo Period Alternative Compensation System}
\end{figure}

For example, if an ACS has an embargo period of six months, end-users are only free to exchange a film online six months after its release date. Downloading or making the work available before that date amounts to copyright infringement.

A rule of this nature could assist in overcoming conflicts with the normal exploitation by preventing or significantly reducing harm to rights holders during the period in which they extract the most rights revenues from the online exploitation of works. With a properly defined period, the risk of a limitation conflicting with significant online sources of revenue is low. In the example above, if a film makes most of its revenue in the months following release, the embargo period ensures that during those months the work benefits from full exclusivity, even for non-commercial online use.

Is such a rule consistent with international and EU law?

The preparatory works of the BC do not mention embargo periods, so there is no historical argument that prevents their consideration as a means to overcome conflicts in step two of the test.\textsuperscript{1740} In addition, normal exploitation refers to significant or tangible rights revenue for use of considerable economic significance. If the major sources of revenue from exploitation are reaped

\footnotesize{\textsuperscript{1737} Peukert, 2015, p. 383.  
\textsuperscript{1738} Senfleben, 2014, p. 10.  
\textsuperscript{1739} Senfleben, 2014, p. 10.  
\textsuperscript{1740} As noted above, such an argument is often made in relation to equitable remuneration. See supra 5.3.2.3 and 5.3.3.1.}
in the months following commercial release, a rule that preserves their integrity should be legally acceptable.\footnote{Senftleben, 2014, pp. 10–11.}

There are no clear-cut examples of embargo period rules in the EU acquis. However, Senftleben sees the outline of such a rule attached to the limitation that permits certain uses of orphan works by qualified institutions on the condition that the rights holder is not found after a diligent search.\footnote{Senftleben, 2014, p. 11, referring to Arts 3 and 6 Orphan Works Directive.} In his opinion, the orphaned status of a work, the failure to find the rights holder, and the application of the limitation, are all unlikely to occur during the period of normal exploitation.\footnote{Senftleben, 2014, p. 11.} Furthermore, the rights holder can choose to put an end to the orphan work status and receive fair compensation for the privileged uses.\footnote{Art. 6(5) Orphan Works Directive.} Drawing on the mechanism in the Orphan Works Directive, Senftleben considers embargo periods as flexible tools to allow digital use in compliance with the three-step test. To that effect, he recommends their adoption for mass digitisation projects and UGC.\footnote{Senftleben, 2014, p. 12.}

The literature on legalisation systems contains proposals for embargo periods on audio-visual works.\footnote{See, e.g., Creation-public-internet, 2011; L’ALLIANCE public.artistes, 2006b, 2006c.} These proposals build on existing practices in the EU to organise film exploitation chronologically in a system of release windows. Applied to a limitation-based ACS, the embargo period could correspond to an EU-wide release window permitting online non-commercial use of works after their first commercial release or online availability. The system could extend to one or more types of work, depending on the potential impact of the limitation on their normal exploitation. The specifics ought to be subject to periodically reviewed stakeholder agreements. In particular, the duration of the embargo should allow for the preservation of the core exploitation of a work following its release on the market affected by the limitation. In this way, the ACS would prevent cannibalisation of major revenue sources and aspire to monetise the long tail of works.\footnote{With similar proposals, see Kamina, 2012; L’ALLIANCE public.artistes, 2005; Modot et al., 2011, p. 14.}

A rule of this type may have additional (and unintended) benefits. One is to incentivise clearance of rights for multi-territorial commercial exploitation of works in the EU, which would be advantageous to rights holders and consumers.\footnote{Mazziotti, 2013, pp. 59–67, discussing several policy options to create a digital single market for audio-visual content.} Another is that coupling a statutory licence with such a rule could offer partial relief to the access problems created by the excessive term of protection, at least for end-users.\footnote{See Peukert, 2005, p. 56, making a similar argument in favour of his bipolar copyright system. See also Senftleben, 2014, p. 11.}

However, despite the potential benefits, an embargo period rule is not without its problems. On the one hand, it is probably too simplistic to assume that a “one-size-fits-all” embargo rule makes sense for all types of work covered by an ACS. Assuming that differentiated embargo rules per category of work are more suitable, it may be difficult to implement a system that is
comprehensible for end-users across different EU Member States, even assuming they are aware of it (many will probably not be). For example, it will already be difficult for users to identify the release or making available date of a sound recording for the purposes of calculating when an embargo period elapses; asking them in addition to calculate different embargo periods for music, films, and e-books is likely too cumbersome. The legal certainty issues here are problematic.

On the other hand, it is fair to wonder whether end-users are willing to accept and pay for an ACS with embargo periods. A statutory licence of this type hopes to solve *inter alia* the problem of large-scale copyright infringement, a substantial amount of which seems to refer to newly released works. Would users accept an embargo rule preventing them from access to these works? Or, assuming awareness of the rule, would they disregard it, continuing to unlawfully download and share these works?

Perhaps surprisingly, at least one study shows consumers are willing to accept a licence including some sort of temporal restrictions on access to catalogues of at least recorded music and audio-visual content, if the price is right. However, without further empirical research on specific designs for an embargo period rule and its EU-wide application, it is not possible to be certain on this point. In particular, it is unclear whether such a rule would in fact contribute to the decline of unauthorised file sharing for the period of its duration. Unless that is the case, the addition of such a rule to a statutory licence will fail to prevent an existing conflict with the normal exploitation of works.

5.4.2 Opt-Out Rules

In an ACS with an opt-out rule, the non-commercial use of works is subject to a statutory licence and the copyright owner is entitled to opt out of a regime where the same use is subject to exclusivity. The opt-out allows rights holders to switch from a liability rule to a property rule for the type of use in question. The choice of rule, through action or omission, makes the ACS optional for rights holders.

5.4.2.1 Opt-Out Rules and Alternative Compensation Systems

An opt-out rule allows rights holders to render a limitation inapplicable to their works through a reservation of rights. The textbook example in international copyright law is Article 10bis(1) BC, which allows legislators to impose an uncompensated exception for reproduction, broadcasting and communication to the public of certain articles and broadcast works. These uses correspond to normal forms of exploitation of the works in question. The BC provision allows copyright owners to reserve their rights in relation to the initial exploitation period, applying to “the use of fresh articles with news value”. This can be done, for example, through a statement in a published article similar to “all rights reserved”, as prescribed for in German copyright law.

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1750 Handke et al., 2015. The specific length of the temporal restriction was not defined, with participants instead being informed through a tooltip that “some rights holders prefer to wait with the online release of their works till they have broken even through other channels. A certain time after their release, all works will be available in the system, but using them before that is illegal”. (Translated from Dutch.)

1751 Proposals of this type include Eckersley, 2004; Fisher, 2004; Gratz, 2004; Litman, 2004; Partido Comunista Português (Grupo Parlamentar), 2012; Peukert, 2005.

1752 Peukert, 2005, p. 66.
By allowing a reservation of rights during the period of normal exploitation, the rule mitigates the potential for conflict under the second step of the test.\(^\text{1753}\)

The limitation in Article 10\(^{\text{bis}}\)(1) BC is justified on the freedom of the press, and has a strong public interest dimension. That justification has allowed the rule to survive challenges during the 1967 revision conference in Stockholm and to this day.\(^\text{1754}\) The TRIPS and the WCT incorporate the BC provision and subject it to the respective three-step tests. At no time during the negotiation of those treaties was the consistency of Article 10\(^{\text{bis}}\)(1) BC with the second step challenged, a fact some authors attribute specifically to the reservation of rights rule.\(^\text{1755}\)

In light of this international framework, Senftleben proposes the adoption of opt-out rules for new online limitations applicable to search engine services and UGC. In his view, these rules would make the limitations legally admissible and provide the policy benefit of examining rights holders’ perception of the effects of the exemption on the normal exploitation of works.\(^\text{1756}\)

In the realm of ACS, proposals containing opt-out rules vary in the detail they offer. Most leave the design of the rule to further legislative action or administrative acts of a central agency, the mandated CMO, or stakeholder agreement.\(^\text{1757}\) Eckersley suggests an opt-out right for creators in his “virtual market system” as a solution to overcoming potential vulnerabilities related to government dependence for income.\(^\text{1758}\) Fisher’s “tax-and-reward system” allows rights holders to opt out by releasing a work solely with TPMs, which retain legal protection.\(^\text{1759}\) Rights holders are allowed a “digital reservation of rights” for adaptations, by excluding the right to prepare derivative works when registering works in the system.\(^\text{1760}\) In Baker’s system, the opt-out rule requires that beneficiaries can only exit after a certain amount of time from the last payment of compensation.\(^\text{1761}\)

One of the most detailed schemes is advanced by Litman. Her notice based opt-out mechanism requires the work to be in a specific DRM format, as well as “affirmative but relatively modest steps” from the rights holder to exclude it from the system and inform consumers of the status change through electronic rights management information. Works only made available online “under the copyright owners’ authority” with that “*.drm” digital file format would be “ineligible for sharing or compensation”; to opt back into the system, owners would need only to

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\(^\text{1753}\) Senftleben, 2014, pp. 12–14, with a historical background of Art. 10\(^{\text{bis}}\)(1) BC.


\(^\text{1756}\) Senftleben, 2014, pp. 14–15, proposing that search engines are allowed to provide image searches of copyright works by default, while preserving the possibility to use technical tools to exclude the work \textit{a posteriori}. For an argument against the admissibility of opt-out to make a limitation compliant with the test, also in light of BC’s no formalities proviso, see Ginsburg, 2013, pp. 1604–1611

\(^\text{1757}\) See, e.g., Beltrandi et al., 2008, 2007; Dimita, 2010; Partido Comunista Português (Grupo Parlamentar), 2012; Rocha, 2010.


\(^\text{1759}\) Fisher, 2004, pp. 247–248. Fisher’s expectation is that his tax and reward system generates greater revenues and thus convinces rights holders to release works without technical protection.

\(^\text{1760}\) Fisher, 2004, p. 242: “By checking a box on the registration form, registrants could retain the entitlements they currently enjoy to control the preparation of derivative works (entitlements qualified, of course, by the fair-use doctrine).”

release the work again without such a format. Works already released are subject to a “presumption of shareability” in favour of users. Furthermore, to remove incentives to opt out, the process of withdrawing a work from the licence is purposefully burdensome.

Figure 7 illustrates the basic workings of an opt-out rule in a statutory licence ACS, including the necessary grace period between opt-out and its effectiveness.

![Diagram of Opt-Out Rule in Statutory Licence Alternative Compensation System](image)

**Figure 7. Opt-Out Rule in Statutory Licence Alternative Compensation System**

From the perspective of normal exploitation, the possibility of opting out restores legal exclusivity, either at the time of online availability of the work or later. As Sprigman puts it, even if the liability rule is set up as the default, the requirement for “authors to opt out to preserve their ability to exploit the property rule” means that “the system—unlike the usual system of compulsory licenses—is still voluntary” because it merely extends the rights holder’s options for exploitation. By placing rights holders in an identical situation to the status quo as from the effective date of withdrawal, the opt-out rule mitigates the risk of violating step two of the test.

Nevertheless, the opt-out variant of ACS is not immune to criticism. If the legal default is a liability rule as from the first lawful publication of a work, the ACS will regulate non-commercial use of works during the initial—typically more profitable—period of exploitation. To prevent potential economic harm, rights holders may opt out of the system. However, it may

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1763 Litman, 2004, p. 48. The process would require consensus from all owners, involve recalling the work in non-“.drm” format, a 24 month grace period to produce legal effects and, at the infringement level, the burden of proof that consumers had knowledge of the withdrawal. See also Gratz, 2004, pp. 421–423.
be impossible to avoid a conflict with the normal exploitation if the opt-out process is too cumbersome, or if the grace period between withdrawal and its effectiveness is too long.\textsuperscript{1765}

One solution is to implement a streamlined and relatively short grace period, making the opt-out as simple as possible for rights holders. To that effect, the rule could follow the best practices from the field of ECL and the ongoing national implementation of Article 5 Orphan Works Directive.\textsuperscript{1766} Ideally, an opt-out rule should deal efficiently with challenges related to fragmented ownership of copyright, especially in the film and music sectors.

The downside of an effective opt-out is that it provides a strong incentive for rights holders to exercise it, diminishing the attractiveness of the ACS for end-users. In addition, users would be subject to legal uncertainty and increased exposure to liability, as it would be difficult to identify works withdrawn from the system.

Different measures could mitigate these problems. First, the system could ensure that information on works, and names and contact details of the rights holder opting out is recorded in a publicly accessible database.\textsuperscript{1767} Rights holders could be required to give constructive notice of withdrawal through a simplified one-time declaration effective in all Member States, registered on publicly accessible databases (either by rights holders or the responsible CMO), and possibly signal their choice through DRM on digital copies of works.\textsuperscript{1768}

In particular, incentivising the accessibility of opt-out information in a publicly accessible online registry contributes to the effectiveness and fairness of the system, by ensuring that reference is made to the work itself (instead of a specific copy thereof), and that users are informed.\textsuperscript{1769}

To protect good faith end-users, the system should recognise a reasonable grace period between the moment of opt-out and effective exclusion of a work from the ACS.\textsuperscript{1770} Users would not be liable for use prior to the effective date of opt-out, as the same is covered by a statutory licence and subject to fair compensation (see Figure 7).

Even then, the solution may remain unattractive to users if a great number of rights holders choose to withdraw their most popular works from the system. To curtail this risk, it is possible to introduce embargo periods that disincentivise early opt-out from the ACS. However, such a

\begin{itemize}
\item \textsuperscript{1765} For works made available online before the licence is implemented, it would be necessary to recognise a legislative transitional period where rights holders can opt out before the limitation comes into force.
\item \textsuperscript{1766} Senftleben, 2014, pp. 15–16. On the desirability that prospective formalities be simple, universally applicable and affordable, see van Gompel, 2011, pp. 297–298. See also Carroll, 2013, p. 1523, arguing that in a dynamic interpretation of BC a formality that is easy to comply with in the digital environment—e.g. a mandatory notice or registration formality—is not prohibited.
\item \textsuperscript{1767} See Eechoud et al., 2009, p. 280 & n.859, making the suggestion in relation to ECL in general. In this respect, any limitations applicable to making the personal data of authors and copyright owners accessible to the public, for example by privacy regulations, must be respected. See van Gompel, 2013, p. 1429.
\item \textsuperscript{1768} Litman, 2004, pp. 48–49 & n.177, arguing that, under Art. 5(2) BC, “it should be possible to establish an optional registry of withdrawn works, and provide that listing of a work on the registry for 24 months would allow the copyright owner to show constructive notice of withdrawal.” Failing that, the author suggests “copyright owners suing for infringement of withdrawn works would need to prove actual notice.”
\item \textsuperscript{1769} In this way the system would address the criticism levied at the proposals of Lessig and Sprigman by Séverine Dusollier, 2011, pp. 88–89.
\item \textsuperscript{1770} Colin, 2011a, p. 96.
\end{itemize}
solution would introduce additional complexity to the management of the system, and suffer from the same problems raised above vis-à-vis embargo periods.\textsuperscript{1771}

5.4.2.2 Are Opt-Out Rules Prohibited Formalities?

In his objection to the opt-out variant of an ACS, Peukert ties the examination of normal exploitation to that of formalities, concluding that a violation of the test results from the qualification of opt-out rules as prohibited formalities.\textsuperscript{1772} It is worth exploring this critique, as it may prevent the adoption of an opt-out rule altogether.

Formalities aim at filtering protected from unprotected subject matter, clarifying subject matter and scope of protection, identifying subject matter and informing users of its existence, establishing a link between owners and protected works, and providing information on works, ownership and rights to third parties.\textsuperscript{1773} There are different types of formality, spanning registration of works, recordal of transfers of copyright ownership, notice requirements, and deposit of works.\textsuperscript{1774}

Article 5(2) BC prohibits formalities that affect the “enjoyment” or “exercise” of protected rights in relation to non-domestic works. The prohibition is not absolute.\textsuperscript{1775} The \textit{enjoyment} dimension relates to author’s rights coming into existence and being recognised absent any formality. Enjoyment therefore means “existence”, including the coming into being and continuation of copyright.\textsuperscript{1776} The \textit{exercise} dimension links to the possibility of enforcing rights.\textsuperscript{1777}

The term “exercise” was introduced in the 1908 Berlin revision conference with the objective of clarifying that the prohibition extended beyond constitutive formalities to those that “are prerequisites to sue”, i.e. to initiate an enforcement action.\textsuperscript{1778} Hence, exercise is meant to preserve the “process by which a liability finding is made” but not “what follows from such a finding”, namely the “means of redress”.\textsuperscript{1779}

This meaning is different from the broader use of the term “exercise” in this dissertation, which also includes the transfer and management of copyright. Unsurprisingly, the term has given rise to problems of interpretation.\textsuperscript{1780} It is submitted that, \textit{in the context of Article 5(2) BC}, prohibited formalities as to “exercise” of rights refer solely to formal requirements on the initiation of enforcement of copyright.\textsuperscript{1781}

\textsuperscript{1771} See supra 5.4.1.
\textsuperscript{1772} Peukert, 2005, pp. 58–75. Similarly, see Ginsburg, 2013, pp. 1604–1611.
\textsuperscript{1773} van Gompel, 2011, pp. 31–52, 286–287, identifying the following functions of formalities: filtering, demarcation, signalling and publicity, evidentiary, and information.
\textsuperscript{1774} van Gompel, 2011, pp. 15–27.
\textsuperscript{1775} Gervais, 2010, pp. 22–27.
\textsuperscript{1777} Gervais, 2010; Ginsburg, 2013; Ricketson & Ginsburg, 2006; von Lewinski, 2008.
\textsuperscript{1779} Sprigman, 2013, pp. 1570–1571.
\textsuperscript{1781} van Gompel, 2011, pp. 200–212.
Consequently, banned formalities are those that relate to the “coming into existence, the maintenance and enforcement of copyright”, but not those that merely affect its options of exercise. The prohibition includes mechanisms that prevent acquisition of protection or entail its loss “during the existence of copyright”; in essence, the prohibition rules out constitutive and maintenance formalities in respect of works of non-domestic origin, as well as those that function as “conditions to sue for infringement”. Conversely, certain declaratory formalities are allowed, for example if they present only evidentiary or procedural advantages, operating as incentives rather than obligations.

In ACS proposals, the possibility to opt out is typically exercised through so-called new-style formalities. These are “legal tools that establish a link between works, their creators, and/or the current copyright owners”, including “metadata-tagging of digital works, the storage of rights management information in digital repositories”, and other digital tools.

One possibility consists of a reservation of rights attached to the digital copy of the work through electronic rights management information. Another consists of a simple declaration with the CMO in charge of the system, similar to the current operation of the mechanism in ECL. The declaration is then reflected on a publicly accessible database, signalling the status of works to users.

These mechanisms do not impose conditions for the enjoyment or enforcement of copyright, but merely enable its exercise through collective management under the statutory default, or individual exercise (following opt-out). They therefore allow for the efficiency benefits of collective licensing, while offering copyright owners the option to regain full exercise and individual management of their rights. In this sense, they constitute an additional Berne-compliant legal tool for the exploitation of copyright.

However, not all opt-out rules have the same effect, making it necessary to draw a distinction between different types of ACS. In legalisation proposals that rely on ECL, the opt-out mechanism does not restore exclusivity. Instead, it offers copyright owners a choice between two models for exploitation of exclusive rights: collective versus individual. Thus, the opt-out regulates the extent of protection.

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1786 See supra 5.4.2.1., for a brief description of opt-out through new-style formalities. Gervais, 2010, pp. 25–27, suggested that the opt-out declaration can be as simple as an email. The author further notes that Art. 5(2) BC does not include “all civic and judicial formalities” concerned with the exploitation of works, neither does it include formalities that are not government related, as would occur with those imposed by CMOs, which are mostly private entities. Therefore, the prohibition does not extend to the ECL opt-out feature.
1787 Gervais, 2010, pp. 22–27, supporting his arguments on the basis of a thorough analysis of the drafting history of Art. 5(2) BC. See also Koskinen-Olsson, 2010, pp. 303–304, discussing the legislation in Denmark and arguing that the opt-out mechanism exists to ensure conformity with international treaties and EU directives.
1788 Colin, 2011a, pp. 56–63, 2011b, p. 4, referring to ECL.
1789 van Gompel, 2011, p. 209, debating ECL.
The opt-out mechanism in a statutory licence ACS is different—the choice to exclude the work restores exclusivity (see Figure 7 above, signalling a switch from a liability to a property rule). For some authors, opt-out is only admissible where the limitation otherwise meets the conditions of the three-step test. According to this school of thought, because the international system—and in particular the BC—is built to preserve exclusivity, the purpose of the test is only met if the exclusive right is “the statutory default rule”.

In this line, new-style formalities, such as opting-out through a DRM notice or requiring copyright owners to register works, relate to the “genesis” and enforcement of the right. As a result, they are formalities “for the enjoyment of minimum exclusive rights”.

This position promotes exclusivity to a totemic status, mandating its default imposition even if detrimental to the interests of authors. In doing so, such interpretation appears to conflate the tests applicable to formalities (Article 5(2) BC) and copyright limitations (Article 9(2) BC). Indeed, if a limitation passes the test, the discussion of opt-out becomes “redundant” vis-à-vis its effects on exclusivity. Only where the opt-out is the key feature that makes the limitation compliant with the test is the issue relevant.

From the conceptual standpoint, an opt-out is an internal condition akin to a method of exercising rights. For statutory licences, it eases compliance with the three-step test by allowing owners to regain exclusivity, mitigating the effects of the limitation. Article 10bis(1) BC provides a strong indicator that an opt-out right is an admissible means to make a limitation compliant with the test, where otherwise it would not be. Both the opt-out right and the no formalities rule aim to protect authors and their ability to exploit works. If they share this rationale, adoption of an opt-out should not violate the prohibition on formalities. Article 5(2) BC should therefore not impede a rule that allows authors to switch from a liability to a property rule.

In sum, the BC prohibition on formalities does not prevent the adoption of an opt-out rule in a statutory licence system. Such a rule is therefore consistent with international copyright law and may, in theory, help an ACS overcome conflicts with the normal exploitation of works. It is even conceivable that through a combination of CMO expertise, electronic rights management information, and publicly accessible databases, the system could be efficient, while providing legal certainty for copyright owners and users. However, the question that remains is whether the

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1793  Peukert, 2005, pp. 65–67, concluding that both Litman and Fisher’s opt-out models with default legal licences would violate Art. 5(2) BC. It is on this basis that Peukert proposes his opt-in “bipolar copyright system”. See Peukert, 2005, p. 69. See also Séverine Dusollier, 2011, p. 91, tentatively agreeing with Peukert, without however considering the possibility that such a limitation would be compliant with the three-step test.
1797  Senftleben, 2014; van Gompel, 2011, p. 211
1799  Sprigman, 2004; van Gompel, 2011, p. 211.
5.5 The normative choice between exclusivity and remunerated access

A choice between exclusivity and remuneration implies a normative reference point or benchmark. This dissertation has argued that the current system falls short of meeting the objectives of EU copyright law as it concerns the regulation of non-commercial online use by individuals. The question therefore is how to rethink the acquis to adapt its rules to reflect those objectives.

The present section contains the second—and markedly normative—part of this chapter, which builds on the previous compliance analysis. It addresses the question of whether and to what extent a model of access and remuneration, such as an ACS, is consistent with the general aims of copyright and the objectives of EU copyright law. To answer the question, this section draws on and recasts the findings of this study to present a normative argument for a right of access and remuneration in relation to non-commercial use of works in EU copyright law. The argument proceeds in three stages. The first stage takes a step back from the acquis and examines whether such a right is consistent with the dominant theories or rationales of copyright law; as Strowel puts it, “in situations of uncertainty, there is a need to refer to the basic philosophy of copyright.”

The analysis pays particular attention to the natural rights and utilitarian arguments that form part of the European legal tradition, in order to present an argument about what the law should be (5.5.1). The second stage discusses why and how normative considerations support a right for access and remuneration for mass non-commercial use (5.5.2). The third stage assesses whether such a right is consistent with the objectives of EU copyright law (5.5.3).

5.5.1 Copyright Theories, Exclusivity and Remuneration

The literature on the foundations of copyright is vast and a proper review of the same is beyond the scope of this dissertation. The objective of this section is to provide a brief overview of such theories and consider their value in determining the role of exclusivity, access, and remuneration in copyright protection. As the main research question of the study concerns EU copyright law, the focus is on the natural rights and utilitarian theories, which have the greatest relevance in the European legal tradition.

Theoretical attempts to justify copyright are derivations of more general theories of intellectual property, and property rights in general. These can be classified in four categories or clusters: utilitarianism or welfare, labour or fairness, personality or personhood, and culture or social planning. This last theory, it is noted, is comparatively recent and is by far the least

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1801 See supra 3.3.3.2, pointing out this issue in relation to ACS proposals based on ECL.
1803 Fisher, 2001. More recently, the same author has renamed these categories as welfare (previously utilitarianism), fairness (previously labour theory), personhood (previously personality theory), and culture (previously social planning). Cf. WILLIAM FISHER, Maps of Intellectual Property, Theories of IP, [http://cyber.law.harvard.edu/people/tfisher/IP/IPTTheory.swf](http://cyber.law.harvard.edu/people/tfisher/IP/IPTTheory.swf) (accessed 30.04.2016).
influential, especially in Europe. In their application to copyright, these theories provide both the rationale for protection and the meta-objectives of the copyright system.

All theories have a philosophical basis, sometimes dating back to the seventeenth century; the application of these theories to intellectual property and copyright, however, is much more recent.\textsuperscript{1804} The works of Bentham, Mill and Pigou influence utilitarianism.\textsuperscript{1805} Locke’s theory of property in his “Second Treatise of Civil Government” is the touchstone of the labour or fairness theory.\textsuperscript{1806} The works of Kant, Fitche, and Hegel are the main inspiration for the personality theory.\textsuperscript{1807}

The utilitarian or welfare theory combines utilitarianism and economic analysis of law to make the general argument that copyright protection should have as a central objective the promotion of the social good through the creation and supply of works.\textsuperscript{1808}

The fairness theory contends that individuals are entitled to the fruits of their intellectual labour. In essence, this is a manifestation of a broader equity argument with ample support in Western culture, according to which individuals deserve “a share of the fruits of a collective project proportionate to the magnitude of his or her contribution to the venture”.\textsuperscript{1809} The personality theory understands intellectual creations as manifestations or even extensions of the creator’s personality. In this conception, “property provides a unique or especially suitable mechanism for self-actualization, for personal expression, and for dignity and recognition as an individual person.”\textsuperscript{1810} Therefore, the approach of the fairness theory is oriented towards the object, whereas that of the personality theory is oriented to the subject.\textsuperscript{1811}

Both fairness and personality arguments are commonly placed under the umbrella of natural rights arguments for copyright protection, providing arguments for the protection of material and moral interests of creators respectively.\textsuperscript{1812} From a natural rights perspective, then, the law does not create a (positive) right but is rather a formal act of recognition of an existing (natural) right.\textsuperscript{1813}

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\textsuperscript{1804} See, e.g.: Fisher, 2001, Hughes, 1988 (on the Lockean and Hegelian theories), van Gompel, 2011, pp. 215–284 (on the fairness and personality theories), Goldstein & Hugenholtz, 2013, pp. 17–21 (briefly exploring the philosophical arguments underpinning the common law and civil law copyright traditions).

\textsuperscript{1805} The reference works in this respect are Bentham’s “A Manual of Political Economy” (1800), Mill’s “Principles of Political Economy” (1848), and Pigou’s “The Economics of Welfare” (1920).

\textsuperscript{1806} Locke, 1988. Locke’s reference work in this area dates from 1690. The most relevant part of his Second Treatise of Civil Government for our purposes is Chapter 5 (“Of property”).

\textsuperscript{1807} The reference works in this respect are Kant’s “On the Injustice of Reprinting Books” (1785), Fitche’s “Proof of the Illegality of Reprinting” (1793), and Hegel’s “Elements of the Philosophy of Rights” (1821).

\textsuperscript{1808} Some authors distinguish these two arguments in their analysis. See, e.g., Lucie Guibault, 2002, pp. 10–15, treating separately the utilitarian and economic arguments.


\textsuperscript{1810} Hughes, 1988, p. 330. See also Geller, 1994, pp. 168–169, on Kant’s general theory of authorship of norms.

\textsuperscript{1811} van Gompel, 2011, p. 218.

\textsuperscript{1812} Lucie Guibault, 2002, p. 8, refers to the “personality rights” and “reward” elements of the natural rights argument.

\textsuperscript{1813} Ginsburg, 1994; van Gompel, 2011.
The culture theory “is rooted in the proposition that… intellectual-property rights…can and should be shaped so as to help foster the achievement of a just and attractive culture”\(^{1814}\). This theory would likely support the adoption of an ACS for non-commercial online use of works. Indeed, two scholars whose works are identified within this theory, William Fisher and Neil Netanel, are also early and influential proponents of ACS.\(^{1815}\) However, it is undeniable that the culture theory is of little application, influence or acceptance in European copyright law, policy or scholarship. Even in its native US, the application of this theory to copyright and its conceptual development are at an early stage. Therefore, it is not possible to classify it as a “dominant” or “influential” theory from which to derive rationales to assess an ACS, especially if the ultimate aim of the legalisation model is reform of EU copyright law.\(^{1816}\) This section will therefore not further examine the culture theory.

As we shall see, there is no one true theory that provides a full justification for intellectual property rights. Instead, it is common for law-making in this field to combine multiple theories, sometimes inconsistently. Yet, existing theories tend to compartmentalise core themes of intellectual property—“fairness, incentives, culture-shaping”—that are frequently perceived by legislators and policy makers as interrelated and complementary, with obvious detrimental effects to their usefulness.\(^{1817}\)

This conceptual severability can perhaps be traced back to academic theorisation according to political and legal science axioms (e.g. the parallels drawn with property in general), where the above-mentioned theories are perceived as canonical “rival perspectives”.\(^{1818}\) The effects of such severability are twofold. First, these theories are inconsistent insofar as they denote “gaps, conflicts and ambiguities”.\(^{1819}\) Second and consequently, their value as interpretative guidelines for the legislative and judicial powers is hampered, limiting their practical use.\(^{1820}\)

Despite their indeterminacy, these theories have significant normative value, especially in informing doctrinal discussions, legislation and policy making in the field of intellectual property.\(^{1821}\) As such, they provide a valid platform for discussions on the optimal design of copyright law when faced with new technological and social paradigms.

\(^{1820}\) See Fisher, 2001, pp. 195–196, arguing that the value of intellectual property theories is not so much to “provide comprehensive prescriptions concerning the ideal shape of intellectual property law” but to assist in the identification of “nonobvious attractive resolutions of particular problems” and “foster valuable conversations among the various participants in the lawmaking process”.  
In the area of copyright proper, the underlying rationales for its grant are customarily divided between principles of natural right (integrating fairness and personality arguments), traditional to civil law jurisdictions, and principles of utilitarianism, followed by common law countries. \(^{1822}\)

While in civil law countries the natural rights approach conceives the “authorial entitlement… as a juridical recognition of rights inherent in the act of authorship as such”, common law countries regard copyright “as a policy instrument designed to serve the public interest in the production and dissemination of works of authorship”. \(^{1823}\) Hence, the distinction between “author’s rights” (or droit d’auteur) and “copyright”. \(^{1824}\) The former term follows a “deontic” approach, focusing on the link between creator and expression. The latter term is “instrumental”, emphasising the effect of copyright on creativity. \(^{1825}\)

These distinctions are important for understanding substantive legal differences between the copyright systems of countries belonging to each tradition. However, they should not be overstated, for several reasons. First, because even representative copyright systems of different theoretical currents like the French and US laws have, since inception, had far closer principles and goals than generally acknowledged. \(^{1826}\) Second, because international harmonisation of copyright law, initiated with the BC, has led to the convergence of legal theories and traditions. \(^{1827}\) On this point, some authors view copyright law as “a product of nineteenth-century Western culture”, which found its modern identity “with the conclusion of the Berne Convention, in 1886”. \(^{1828}\) Third, as Goldstein and Hugenholtz observe, because the evolution of copyright law is predominantly shaped by economic forces. In that process, the main role of philosophical theories is to provide arguments for the creation of new rights or the imposition of limits thereto. \(^{1829}\)

Beyond providing philosophical foundations for copyright protection, the legitimacy of these theories in the field of copyright stems from references made in the legislative texts, such as preambles, and judicial decisions, which often rely on teleological interpretation. \(^{1830}\) Herein as well lies a basis for this study’s focus on the objectives of EU law as a normative reference point to evaluate a statutory licence ACS.

It is possible to find manifestations of utilitarian arguments, for example in recital 4 InfoSoc Directive, where it indicates that harmonisation of EU copyright law

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\(^{1822}\) Goldstein & Hugenholtz, 2013, p. 6.
\(^{1824}\) Drassinower, 2012, p. 108. On the distinction between these legal traditions, see, e.g., Strowel, 1994.
\(^{1825}\) Balganesh, 2012, p. 1678, exemplifying with the works of Landes and Posner.
\(^{1828}\) Grosheide, 1994, pp. 206–207, considering that the different normative considerations of copyright stem from the different legal traditions brought together in international copyright law, with their diverse philosophical underpinnings. A similar point is made by Strowel, 1994, p. 249: “the differences between droit d’auteur and copyright can be explained not by positive or natural law conceptions but by more fundamental divergences between civil law and common law: differences which are located at the level of the drafting and interpretation of legislative and judicial texts”.
\(^{1829}\) Goldstein & Hugenholtz, 2013, pp. 8, 15.
will foster substantial investment in creativity and innovation, including network infrastructure, and lead in turn to growth and increased competitiveness of European industry, both in the area of content provision and information technology and more generally across a wide range of industrial and cultural sectors. This will safeguard employment and encourage new job creation.

Conversely, recitals 10 and 11 InfoSoc Directive emphasise the material interests of creators, echoing natural rights arguments. This is apparent from references to the “high level of protection” mantra (also featured in recital 4) in connection with incentives for creativity and the material interests of (inter alia) creators, especially to “receive an appropriate reward for the use of their work”.

These recitals, it is noted, also mention the interests of “producers, consumers, culture, industry and the public at large”, thereby incorporating investment protection and the public interest as motivation for adequate copyright protection, which again brings a utilitarian flavour to this mix. Investment protection, it is noted, is usually considered in the EU to be the main justification for affording protection to producers and broadcasters through related rights. The situation is different for performers, whose protection is considered justified on similar fairness and personality arguments to authors, and whose skills have been compared to creative authors of derivative works. From this perspective as well, then, there are grounds to draw a distinction between the legitimate interests of creators and exploiters, as previously done in this chapter.

In the end, both utilitarian and natural rights theories are reflected in the goals of the acquis and provide justification for copyright protection in the EU, as they do in copyright regimes of the droit d’auteur and common law copyright tradition. It is up to the lawmaker and interpreter to bring coherence to the copyright system by striking a fair balance between different interests. In this respect, the predominance of utilitarian or natural law principles in a legal regime may provide “an indication as to where the balance rests between conflicting interests of the rights holders and the public”.

This realisation, together with the recognition of the importance of both arguments in the European legal tradition, justifies exploring further the normative considerations of natural rights and utilitarianism. The analysis of both theories demonstrates how the public interest can shape copyright protection and justify restrictions to the exclusive right in favour of a right of access and remuneration for non-commercial online use of works.

5.5.1.1 Natural Rights

As noted, it is possible to ascribe to the natural rights theory “fairness” and “personality” dimensions. These reflect a more individualistic approach to copyright protection than in utilitarianism. The fairness dimension reflects the material interests of authors in copyright protection for the commercial exploitation of works. The personality dimension applies to the

1831 Eechoud et al., 2009, pp. 190–193.
1832 See, e.g., the discussion in Eechoud et al., 2009, pp. 186–190.
1833 See the distinction drawn in the analysis of the three-step test supra at 5.3.3.4 and infra at 6.1.5.
1834 See, regarding the latter point, Strowel, 1994, p. 248.
non-material interests of authors, reflected strongly in the protection of their moral rights most common in countries of the droit d’auteur tradition.\footnote{Lucie Guibault, 2002, p. 8; Hughes, 1988, pp. 350–351.}

As the acquis does not harmonise moral rights and an ACS does not aim at such harmonisation, the Lockean fairness theory is more relevant for this study than the Hegelian personality theory.\footnote{On the Hegelian justification of intellectual property rights, see Hughes, 1988, pp. 330–365; Radin, 1982. More generally on the personality rights theory of copyright, including references to the influences of Kant, Fichte, and Hegel, see van Gompel, 2011, pp. 247–268.} However, fairness and personality arguments are compatible. Insofar as they provide support for the material and moral interests of authors in their creative works, their combination supplies a capable natural rights justification for copyright protection.\footnote{Hughes, 1988, pp. 365–366; Strowel, 1994, p. 239; van Gompel, 2011, p. 218.}

The traditional Lockean desert-for-labour argument posits that an individual who labours on resources that are free of ownership or held in common has a natural right of property on the results of that effort, i.e. the fruits of their labour, which right should be recognised and enforced by the state.\footnote{Hughes, 1988, pp. 298. See Locke, 1988, pp. 294–295 (Second Treatise of Government, Chapter V, Section 37).}

This natural right is largely justified in the negative by two conditions or caveats, commonly known as “provisos”. The provisos operate as delimitations on the scope of protection, and “are designed to reconcile the rights of individual creators with the larger claims of society in general”,\footnote{Hughes, 1988, pp. 365–366; Strowel, 1994, p. 239; van Gompel, 2011, p. 218.} i.e. the public interest.

The first is known as the “sufficiency” proviso or “enough and as good condition”. According to this, a property right in the results of one’s labour is admissible “…at least where there is enough, and as good, left in common for others”.\footnote{Hughes, 1988, pp. 298. See Locke, 1988, pp. 287–288. (Second Treatise of Government, Chapter V, Section 27). Cf. Lucie Guibault, 2002, p. 9.}

The second, referred to as the “spoilage” proviso or “non-waste condition”, “prohibits the accumulation of so much property that some is destroyed without being used.”\footnote{Hughes, 1988, pp. 294–295 (Second Treatise of Government, Chapter V, Section 37). Cf. Lucie Guibault, 2002, p. 9.} Where such spoilage does not occur, the right is justified. With the introduction of the money economy as a means to prevent waste (e.g. by selling the surplus production), this condition assumes less relevance. In the field of copyright, due to the quasi-public good nature of intellectual works, this proviso is for the most part irrelevant.\footnote{Hughes, 1988, pp. 325–329, noting that “[i]n intellectual property systems, manifestations of a non-waste condition are few and far between”. But see Damstedt, 2003, and van Gompel, 2011, p. 222 (noting the possible justification of a limited term of protection in this proviso).}

At the outset, it is not obvious that Locke’s theory of property applies to intellectual property. Fisher, for example, considers such application to depend on “which aspects of his original
theory are considered dominant. Yet, legal scholarship generally accepts the extension of the fairness argument to intellectual property.

To be sure, ideas (unlike physical property) are non-rivalrous and non-excludable. At first glance, these characteristics raise doubts as to the extension of Locke’s theory to copyright. But such doubts are dissipated by looking deeper into Locke’s notion of “common”, and recognising that it implies an inexhaustibility condition, which is better satisfied by ideas than by physical goods held in common ownership.

In the words of Becker: “if it is the case that people can ‘deserve’ property in the (unowned) tangible objects they improve with their labor, then surely the case is no weaker for their deserving property in the intellectual objects they create.” The intuitive appeal of using Locke’s theory to “propertize” ideas is made clear by Hughes:

We can justify propertizing ideas under Locke’s approach with three propositions: first, that the production of ideas requires a person’s labor; second, that these ideas are appropriated from a ‘common’ which is not significantly devalued by the idea’s removal; and third, that ideas can be made property without breaching the non-waste condition.

As it relates to copyright, the raw materials that provide the material input for the creative labour are ideas, facts or concepts. The labour of the creator in relation to these materials “held in common” would contribute to the value of the finished product—the expressive work—and be rewarded through a proprietary entitlement over that expression.

The expression, as the reflection of the executed labour (rather than the idea or fact), is the object of copyright protection. That protection comprises the elements of prohibition (exclusivity) and reward (remuneration or compensation) inherent in exploitation rights. However, this protection can be limited.

The sufficiency proviso, for example, limits the grant of copyright insofar as it constrains the scope of “common”. The application of the proviso to copyright would then entail a series of restrictions on the scope of protection, including the exclusion of protection for ideas per se.

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1847 On the meaning of these terms, see infra 5.5.1.2.
1848 Hughes, 1988, p. 315.
1850 Hughes, 1988, p. 300
1851 Hughes, 1988, pp. 296–297, explaining that different interpretation of the theory view of reward as a condition for labour (“we must provide rewards to get labor”) or, from a normative standpoint, as a recompense (“labor should be rewarded”). For an in depth discussion on the different possible interpretations of this theory, see Hughes, 1988, pp. 296–330. See also Gordon, 1992, arguing that Locke’s theory has multiple strands and that a natural rights dimension can only be extracted from a “no-harm principle” as a “fundamental law of nature”.
1852 Hughes, 1988, p. 314.
concepts, and algorithms. The proviso would also justify the adoption of copyright limitations, such as parodies, and durational limits on protection.\footnote{Hughes, 1988, pp. 315–323.}

The sufficiency proviso embodies public interest concerns that may operate to limit the scope of copyright, including its power to exclude. However, in the context of the fairness theory, limitations on the right and its exclusive element in the public interest seem to derive more clearly from the social and political contract that accompanies a transition from the state of nature to a civil and political society.\footnote{van Gompel, 2011, pp. 222–225.} In contrast with what occurs in the state of nature, “Locke emphasizes that in the civil society, a representative government may always restrict the enjoyment and exercise of property by positive law, if the public interest so requires.”\footnote{van Gompel, 2011, pp. 219, 225.}

In the context of a civil and political society, then, the public interest (or “common good”) functions as both rationale and limit for restrictions operated by positive law on property rights.\footnote{van Gompel, 2011, p. 227: “…from a Lockean viewpoint, copyright can always be statutorily restricted if that would be in the public interest”.} To accommodate the public interest, that restriction operates on the prohibition element of the right, while retaining the reward element as an essential safeguard of the author’s material interests.

As shown earlier in the analysis of the three-step test, such an approach would be consistent with a balanced consideration of legitimate manifestations of the public interest within copyright law.\footnote{See supra 5.3.3 and 6.1.5} The analysis of precedents in Chapter 2 provides two clear illustrations—private copying in Germany and the broadcasting compulsory licence in the BC—where protection was extended to a use based on natural rights arguments, and consequently limited to a right of access and remuneration due to public interest concerns.

This is also the approach followed in the ECHR and the Charter when considering the possibility of public interest limitations to copyright as part of the fundamental right of property, possibly subject to payment of fair compensation, as highlighted by the CJEU in \textit{Luksan}.\footnote{See supra 5.3.3 and 6.1.5, and infra 5.5.2. In the CJEU’s jurisprudence, perhaps the best example of this is \textit{Luksan}, ¶68.}

Therefore, from a natural rights fairness perspective, the main justifications for a model of remunerated access over exclusivity are twofold. First, the concept of desert or reward for (intellectual) labour requires compensation or remuneration for the use of creative works, but not necessarily absolute protection in the form of exclusive rights.\footnote{See: Becker, 1992; Gordon, 1992 (noting that a compulsory licence, as a liability rule mechanism, “could offer the laborer some reward while preserving for the public its liberty to use the common.”); WILLIAM FISHER, CopyrightX: Lecture 2.2, Fairness and Personality Theories: Fairness, \url{https://www.youtube.com/watch?v=HYJuhP9s5k&feature=youtu.be} (accessed 30.04.2016) (discussing this issue from minute 29 onwards). Contra Merges, 2011, arguing that monetary compensation for authors is insufficient under the fairness theory, and that affording them a property right must entail the power to exclude.} Second and related, the definition of copyright protection around the reward element and to the detriment of the power to exclude is justified on the public interest. In this light, to the extent we can apply the Lockean
theory to copyright, this theory ought to accommodate a statutory licence for non-commercial use of copyright works.\textsuperscript{1861}

In fact, if the mechanism of the exclusive right fails to provide the creators with financial reward for their labour, a model of remunerated access and use appears better suited to safeguard their material interests in a fair and proportionate manner. The restriction of the authors’ power to exclude is justified not only because the same is ineffective in the digital environment, but primarily on public interest grounds, namely the respect of fundamental rights and freedoms, and the promotion of creation and dissemination of works over digital networks.\textsuperscript{1862} That restriction is further justified as it applies to non-commercial online use of works, and is less susceptible of affecting the material interests of authors, as results from the previous three-step test analysis.\textsuperscript{1863}

\textbf{5.5.1.2 Utilitarianism}

The utilitarian theory provides a framework for the traditional economic view of copyright. According to this theory, the attribution of temporary copyright protection to creators has the purpose of providing incentives for creativity and dissemination of works.\textsuperscript{1864}

The utilitarian argument fundamentally diverges from its natural rights counterpart. On the one hand, as regards its orientation, it does not provide a \textit{retrospective} reward for intellectual labour, but rather focuses on \textit{prospective} incentives for the creation and dissemination of works. On the other hand, the utilitarian theory has a \textit{collective} focus on societal welfare, which differs from the more \textit{individualistic} approach of the natural rights argument.\textsuperscript{1865}

This theory does not understand copyright as a derivation of natural law but as a positive right granted to further societal goals, which can and should be balanced with public interest policy concerns to shape the scope of protection.\textsuperscript{1866} The utilitarian theory thus approximates the Benthamite goal of “the greatest good for the greatest number”, setting as the purpose of copyright the stimulation of “production of the widest possible variety of creative goods at the lowest possible price.”\textsuperscript{1867}

In this framework, the exclusive right is a legal device to solve a public goods or free-rider problem in the production and dissemination of information goods, enabling its transfer to the “highest valued use” through efficient market transactions.\textsuperscript{1868} “Public goods” are defined as non-rivalrous (or inexhaustible) and non-excludable. A good is non-rivalrous if the benefit each individual derives from it is not affected or diminished when others simultaneously access it. A

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1861 To be sure, the Lockean theory includes too many ambiguities to provide more than a general answer to the types of problem faced by contemporary copyright law in the digital environment. See William Fisher, CopyrightX: Lecture 2.2, Fairness and Personality Theories: Fairness, \url{https://www.youtube.com/watch?v=HYJuhPf9s5k&feature=youtu.be} (accessed 30.04.2016).
1862 See the discussion \textit{supra} in 5.3.3 and 6.1.5.
1863 See \textit{supra} 5.3 and 6.1.5.
\end{flushright}
good is non-excludable when upon its creation and public availability it becomes difficult or impossible to prevent others from accessing or using it.\textsuperscript{1869}

Copyright shares some characteristics of public goods.\textsuperscript{1870} Although fluid and difficult to recognise in physical embodiments of traditional copyright subject matter (e.g. books, paintings, CDs), it is undeniable that the acts involved in their creation—such as authorship and composition—possess a substantial amount of both the non-rivalrous and non-excludable characteristics. Therefore, such acts are categorised and economically modelled as either quasi- or fully-fledged public goods.\textsuperscript{1871} The case is clearer still for works manifested in digital embodiments (copies) and made available online.\textsuperscript{1872}

The non-excludability feature implies that third parties can freely access and use works without payment to the creator or rights holder, meaning that the price of their use would fall below the price of creation. Hence, non-excludability would prevent private market actors from charging prices allowing a return on investment and, as a consequence, from providing these goods.\textsuperscript{1873}

This scenario entails a risk of under-supply or underproduction, as the price creators must charge for recouping their costs would be higher than the market price for the use of a copy of the work.\textsuperscript{1874} The problem is clear in the case of digital recordings of music or films. The low marginal cost associated with their reproduction and dissemination (e.g. through file sharing) exacerbates the public goods problem and creates a risk that copies of works are spread without compensation to creators, affecting their incentives for creating works in the first place.

A major assumption of this model is that creators are motivated by the prospect of economic reward which is only achievable through the making available of the work. In that configuration, a good to which access cannot be excluded is susceptible of lacking the incentives required for its creation.\textsuperscript{1875} However, this assumption is subject to criticism in copyright scholarship on the basis that there are alternative motivations for creation.\textsuperscript{1876} This is particularly true in the online environment in the context of what Peukert calls an “access culture”, which is for the most part “fed by non-commercially motivated contributions”, both public and private.\textsuperscript{1877}

Hence, it is more accurate to argue that the promise of a reward is but one of different motivating factors; “without it, some works would not be produced, and some authors might not create at

\begin{footnotes}
\footnotetext[1869]{Cohen et al., 2010, p. 6.}
\footnotetext[1870]{Gordon & Bone, 1999, p. 190; Landes & Posner, 1989.}
\footnotetext[1871]{Eckersley, 2012, p. 23. See also Gordon & Bone, 1999, pp. 192–194.}
\footnotetext[1872]{Eckersley, 2012, pp. 23–24.}
\footnotetext[1873]{Landes & Posner, 1989. See also Drexl, 2010, pp. 159–161, using the alternative terms “public”, “common” and “collective” goods to categorise copyright from an economic perspective.}
\footnotetext[1874]{Gordon & Bone, 1999, p. 192.}
\footnotetext[1875]{Gordon & Bone, 1999, p. 192.}
\footnotetext[1876]{WILLIAM FISHER, Economic Analysis of Law, http://cyber.law.harvard.edu/people/tfisher/IP/EAL.swf (accessed 30.04.2016), identifies the following “alternative motivations for production” in the broader context of intellectual property: passion, prestige, tenor, norms of science, advertising, and collaborative voluntary creation. Regarding the latter, Benkler, for example, argues that in models of peer-production the organisational framework of certain projects triggers non-monetary social-psychological rewards securing sufficient individual participation. See Benkler, 2002, pp. 378–380, 2004.}
\footnotetext[1877]{Peukert, 2015, p. 369.}
\end{footnotes}
all”. Alternative motivations for creation—especially non-monetary incentives—are important because they mitigate the public goods problem, thereby weakening the utilitarian argument for legal protection.

To solve the problem of non-excludability efficiently, copyright law uses as a default the legal mechanism of exclusivity. The expectation is that by recognising a property-like enforceable right to prohibit use absent authorisation (or at least payment) the free-rider problem is eliminated in a way that is compatible with a Coasean market model.

Through the exclusive right, copyright owners get a legal monopoly allowing them to suppress competition in the creation and distribution of (copies of) works, and to charge prices for the use of the same that are sufficiently high to offset and recoup the costs of creation (so-called “costs of expression”). In theory, this legal entitlement allows price discrimination by copyright owners in the commercialisation of their works well above their costs of expression, leading to profit maximisation. (In practice, only imperfect price discrimination is available to copyright owners.) The social welfare beneficial result of this legal design would be to induce future creative activities and maximise the output of works, which would otherwise not occur.

In essence, the legal recognition of exclusivity is an artificial imposition of scarcity grounded on a concern to secure and incentivise the creation and supply of works. In a world where these are mostly or partially embodied in physical objects such a construct is difficult to achieve, but arguably possible. However, when the same logic is applied to digital use over the networked information environment, the complexities of legally imposed digital scarcity grow exponentially.

The question that then arises is whether the benefits of property rights protection and exclusivity outweigh its costs, especially as regards the regulation of mass non-commercial online use of works by individuals. From a different perspective, it is possible to consider the costs as disadvantages of exclusive rights in relation to alternative legal solutions.

To make this assessment, we must identify the costs introduced by the grant of property rights, especially when their scope is too broad. Gordon and Boone group these costs into four categories: monopoly pricing, chilling effects on follow-on creativity, transaction costs, and

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1878 Cohen et al., 2010, p. 7.
1882 WILLIAM FISHER, CopyrightX: Lecture 4.2, Welfare Theory: The Incentive Theory of Copyright, https://www.youtube.com/watch?v=r9wqQNCC-Vs&feature=youtu.be (accessed 30.04.2016). NB “consumer surplus” is the difference between the maximum price a consumer is willing and able to pay for a work as a good or service (indicated by the demand curve) and the actual market price they in fact pay for that good or service.
administration and enforcement costs.\textsuperscript{1885} Some of these costs or disadvantages justify restrictions on the exclusive right.

The first category of costs—monopoly pricing—is characterised by the deadweight losses (i.e. foregone consumer surplus or allocative inefficiency) derived from the impossibility of perfect price discrimination, amplified by the non-rivalrous nature of intangible copyright goods.\textsuperscript{1886} In other words, because copyright owners use the exclusive right to set a price for their works well above marginal cost, a significant group of potential consumers will be priced out of the market.

The second category of costs refers to chilling effects on future creativity. It is linked to the cumulative nature of information goods, particularly salient for online use. Creative expression builds on pre-existing materials, many of which are subject to copyright protection. By establishing a property interest in creative goods, copyright imposes a cost on subsequent creators that require pre-existing works as input for their own expressive works.\textsuperscript{1887}

To limit the reach of this cumulative effect and the related social cost of exclusivity, copyright law employs devices such as the delimitation of its subject matter scope (e.g. the idea/expression distinction), and the adoption of limitations, which can be unremunerated (free uses) or remunerated. Remunerated limitations, such as in a statutory licence ACS, translate into liability rules. This economic argument for copyright limitations is echoed somewhat in normative considerations related to promotion of access and dissemination of works, and freedom of expression and information online, used in this study as normative justifications for the adoption of an ACS.\textsuperscript{1888}

The third category relates to transaction costs of licensing, namely those associated with negotiations. These costs are usually mitigated by the clear definition of rights, consolidation of ownership interests and, if individual licensing is too costly, by the intervention of CMOs or the adoption of liability rules.\textsuperscript{1889}

The fourth category is administration and enforcement costs. Whereas administration costs are dependent on the existing regulatory infrastructure for their management and operation, enforcement costs are calculated with reference to the frequency of copyright infringement and the relative cost of enforcement in each instance thereof.\textsuperscript{1890} That is to say, the proper functioning of the incentive mechanism for copyright depends on the existence of reasonably effective enforcement measures. As noted throughout this dissertation, this condition is not

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\item \textsuperscript{1885} Gordon & Bone, 1999, p. 194–ff. Some of these costs are mentioned also in Cohen et al., 2010, p. 7.
\item \textsuperscript{1886} See WIKIPEDIA, Deadweight loss, https://en.wikipedia.org/wiki/Deadweight_loss (accessed 30.04.2016): “In economics, a deadweight loss (also known as excess burden or allocative inefficiency) is a loss of economic efficiency that can occur when equilibrium for a good or service is not achieved or is not achievable. Causes of deadweight loss can include monopoly pricing (in the case of artificial scarcity), externalities, taxes or subsidies, and binding price ceilings or floors (including minimum wages).”
\item \textsuperscript{1887} Gordon & Bone, 1999.
\item \textsuperscript{1888} See supra 5.3.3.5 and 5.3.3.6.
\item \textsuperscript{1889} Gordon & Bone, 1999, p. 196, providing the example of fair use in US copyright law.
\item \textsuperscript{1890} Gordon & Bone, 1999, p. 196,
\end{itemize}
\end{footnotesize}
satisfied in relation to unauthorised file sharing over digital networks, and the legislative fortification of enforcement measures has failed to change that situation.\textsuperscript{1891}

The third and fourth categories of costs are usually at the centre of market failure justifications for the adoption of limitations or collective rights management of copyright. They likewise provide the core economic motivation for an ACS for non-commercial online use by individuals, as used throughout this study.\textsuperscript{1892}

In essence, the above-described costs of exclusive rights provide admissible justifications for deviations from the principle of exclusivity in light of the utilitarian goal of incentivising the creation and supply of works. These costs also reflect public interest considerations that may dictate whether social welfare is better served by an adjustment of the incentive element to achieve the utilitarian goal of copyright.\textsuperscript{1893}

In the case of mass online use by individuals carried out for non-commercial purposes, where direct licensing and enforcement are socially costly and/or ineffective, a legal alternative to exclusivity in the form of a right of access and remuneration appears consistent with the utilitarian rationale of copyright.\textsuperscript{1894}

In purely economic terms, whether an ACS does in fact provide such a solution will then depend on empirical research that assesses its relative costs and benefits as compared to the status quo for the copyright regulation of the use in question. As noted throughout this study, although further research is required, there are indicators that such a system may increase social welfare.\textsuperscript{1895} Therefore, as with the natural rights theory, utilitarianism seems to leave policy makers an eminently normative choice between retaining the status quo of exclusivity or, as suggested here, promoting reform through an access and remuneration model for non-commercial online use.

5.5.2 The Access and Remuneration Dimensions of Copyright

In Europe, different philosophical approaches translate into a plethora of theories on the legal nature of copyright.\textsuperscript{1896} As noted, especially in continental Europe, copyright laws are

\begin{footnotesize}
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\item[1892] On market failure as justification for an ACS, see supra 2.5, 3.3.4.1, 3.3.5.1, 4.4.1.3, 5.3.2.2, 5.3.4, 5.5.1., and infra 6.1.5.
\item[1893] Lucie Guibault, 2002, p. 11.
\item[1894] WILLIAM FISHER, Maps of Intellectual Property, Theories of IP, http://cyber.law.harvard.edu/people/tfisher/IP/IPTheory.swf (accessed 30.04.2016), identifying his ACS proposal as a possible mandatory solution in copyright to a public goods problem (“Incentive Theory”, “Possible Solutions”, “Solution #3: Government Issues Prizes to Successful Private Producers”). N.B. the mention of “prizes” in this context better applies to what the taxonomy in Chapter 3 refers to as “State Systems”, but the argument would apply also to ACS based on legal licences and mandatory collective management.
\item[1895] See supra 5.3.2.3, 5.3.3.3, 5.3.3.4, and infra 6.1.1 and 6.1.5.
\item[1896] These include, to name a few, the intellectual property theory of Poulliet, Drone and Klosterman, the personality rights theory of Gierke, the doppelrecht theory of Kohler, the exclusive rights theory of Piccard, the monopoly theory of Roguin, Roubier’s clientele rights theory (later developed by Desbois), the immaterial rights theory of Greco, the dualist theories of Plassent, De Sanctis and Le Tarnec, Savatier’s concept of “parallel rights”, De Boor and Ulmer’s monism (and its openness to Hubman’s geistiges Eigentum), and Recht’s property-creation theory. See Pereira, 2008, pp. 83–168, for a discussion of these theories.
\end{enumerate}
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predominantly of an authors’ rights tradition and follow a natural rights legal conceptual approach. At its core, this approach is guided by the objective of guaranteeing a just reward for creators, using the grant of an exclusive right as the principal legal instrument for that purpose.1897

Since the mid-twentieth century, authors (but not exploiters) have enjoyed the human right to benefit from the moral and material interests that result from their works, pursuant to Article 27(2) UDHR and, later, Article 15(1)(c) ICESCR.1898 Furthermore, the fundamental rights protection of copyright as property in Europe is well established.1899 It derives from the “property clause” in Article 1 Protocol No. 1 ECHR,1900 from the express mention in Article 17(2) Charter that “intellectual property shall be protected” (as part of the general guarantee of property in paragraph 1 of that provision), from references in recitals 9 InfoSoc Directive and 32 Enforcement Directive, and from various CJEU judgments.1901

This approximation to the right of property suggests that copyright requires a power of exclusion of third parties from access and use of works absent authorisation, i.e. a right of prohibition. Yet, such a contention is at odds with the existence of legal structures within copyright law that allow restrictions to the exclusive right.

Beyond the realisation that utilitarian and fairness arguments admit public interest limitations to copyright (see 5.5.1), this dissertation contains multiple examples of admissible restrictions on the exercise and nature of copyright. They include voluntary and mandatory models of collective rights management, statutory and compulsory licences, and even uncompensated limitations to copyright, all of which are consistent with EU copyright law.1902

Furthermore, the legal framework contains a normative filter for the future inclusion of limitations to exclusive rights: the three-step test. The very existence of such a norm suggests that it is possible to ensure copyright protection outside the template of the exclusive right. In

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1897 See, e.g., Goldstein & Hugenholtz, 2013, pp. 7, 14, 19–21.
1898 This level of protection of material and moral interests appears to mirror the fairness and personality prongs of the natural rights theory, as well as the traditional distinction between economic and moral rights in copyright. See, e.g., Gervais, 2015, p. 19. On Art. 15(1)(c) ICESCR, see G. W. Austin & Zavidow, 2015, pp. 313–321, 331.
1899 See Goldstein & Hugenholtz, 2013, pp. 23–26, with examples of how different Member States’ laws protect copyright as a fundamental right. On the consideration of copyright as a human right see, generally, P. L. C. Torremans, 2015.
1900 Art. 1 Protocol No. 1 ECHR (“Protection of property”) states: “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.” On ECHR jurisprudence applying this provision to copyright, see: ECHR, Melnychuck v Ukraine; ECHR, Balan v. Moldova; ECHR, Ashby Donald; ECHR, The Pirate Bay.
1901 CJEU, Laserdisken, ¶¶64–65; CJEU, Promusicae, ¶62; CJEU, Scarlet Extended, ¶¶43–44; CJEU, Deckmyn, ¶¶27–32.
1902 Examples of such restrictions are the non-voluntary licences discussed in Chapter 2, the different types of collective rights management described in Chapter 3, and the copyright limitations explained in Chapter 4. See also infra 6.1.2–6.1.4.
that line, this dissertation argues that a flexible interpretation of the test admits a properly delimited statutory licence ACS.1903

The possibility of imposing restrictions on the exclusive right while retaining the core of copyright protection as a fundamental right is consistent with calls to rethink copyright as an access right, rather than a prohibition right. To do so, according to Geiger, requires adapting the rules of copyright

to its initially dual character: 1) of a right to secure and organize cultural participation to creative aspects (access aspect); and 2) of a guarantee that the creator participates fairly in the fruit of the commercial exploitation of his works (protection aspect).1904

This proposition bridges the utilitarian and natural rights justifications for copyright, and recasts them in a fundamental rights framework. It emphasises not only the social dimension of copyright but also “the inclusive rather than the exclusive nature of copyright protection.”1905

The positive definition of an “access right” as focusing on the availability of works and cultural participation is in stark contrast with the more traditional definition of copyright in the online environment as a “negative” right. That is to say, a legal entitlement to prohibit the access and subsequent use of copyright works, achieved through exclusivity with legal protection of TPMs and the prohibition of their circumvention.1906

As is apparent, the positive meaning of the access right is consistent with the privilege afforded to end-users in an ACS. Borrowing the terminology of Peukert with a twist, a statutory licence ACS would adapt copyright law to foster an online “access culture”, rather than an “exclusivity culture”.1907

In Geiger’s proposal, an access right is justified by a combination of the social function of copyright with the public interest. This social function stems from the notion that the law requires a measure of balance in order to regulate private and private-public relationships within society. If that is accepted, then a right cannot be absolute, as it is constrained by competing interests within a set community. The result, then, is that subjective rights are “limited in social terms”,1908 and, regarding copyright, that the scope of protection—including the objectives and conditions of its exercise—is drawn in light of the public interest.1909

The argument set forth in this chapter is that the best approach to define the public interest as a limit on the exclusive or prohibition element of copyright is through the identification of its

1903 See supra Chapter 5 and infra 6.1.5.
1904 Geiger, 2015a, p. 4.
1906 Geiger, 2015a, p. 4 (n.9).
1907 Peukert discusses the use of copyright to foster access or exclusivity as two cultures of online communication. The twist here is that Peukert’s proposal, in line with his earlier bipolar copyright system, is for a system that allows rights holders to choose between obtaining remuneration for online use of their works either through “individual license fees (exclusivity culture) or by statutory levy (access culture). The levy would be reserved exclusively for subject matter that is available without technical barriers on the internet.” See Peukert, 2015, p. 393.
1908 Geiger, 2015a, pp. 5–7. See also G. W. Austin & Zavidow, 2015, p. 320, mentioning the social function of copyright in the context of Art. 15(1) ICESCR.
1909 See supra 5.5.1. See also Geiger, 2015a, pp. 7–8, referring to “the interest of society and the common interest”.

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collective and individual manifestations, qualified as legitimate interests in the third condition of the three-step test. This approach allows consideration of such interests within a balancing framework designed to assess restrictions on copyright protection.\textsuperscript{1910}

However, it is also possible to consider the public interest from an \textit{external} perspective, identifying foundations for a right of access in the international human or fundamental rights framework and domestic constitutional law.

In the first place, these foundations derive from the recognition in Articles 27(1) UDHR and 15(1) ICESCR of a universal right to culture and science.\textsuperscript{1911} Such rights, as noted before, provide strong public interest arguments in favour of a right of access as an element of an ACS, related to the promotion of creativity and circulation of works, and freedom of expression.\textsuperscript{1912} In this respect, Gervais notes that

\begin{quote}
…the UDHR in particular would allow exceptions that demonstrably augment access where such access (enjoyment) is not commercially reasonable or possible, and the right to reuse and thereby participate in the cultural life of the community. This seems to justify both consumptive use exceptions where commercial access is undesirable or impracticable… and exceptions for transformative uses…\textsuperscript{1913}
\end{quote}

In the second place, the elevation of copyright to human or fundamental rights status as a property right implies restrictions based on the social function of the right and the application of competing fundamental rights. Both sets of restrictions play a role in justifying a right of access and remuneration.

Regarding copyright’s social function as a justification for a right of access,\textsuperscript{1914} Article 1 Protocol No. 1 ECHR, for example, in its first paragraph allows natural or legal persons to be deprived of their property “in the public interest and subject to the conditions provided for by law and by the general principles of international law.” It further allows States to enforce laws “necessary to control the use of property in accordance with the general interest”.

In the same line, we must note the social limits identified in the general property clause of Article 17(1) Charter, which restricts the regulation of property to what is “necessary for the general interest”. This reference, as noted in the preparatory works of the Charter, applies to the protection of intellectual property in Article 17(2) Charter, considered a manifestation of the general property right. In this way, the non-absolute character of intellectual property rights is apparent.\textsuperscript{1915}

\begin{footnotes}
\textsuperscript{1910} See supra 5.3.3. See also Gervais, 2015, p. 21, arguing that human rights principles can “inform the determination of the proper scope of exceptions” under the third step of the test.
\textsuperscript{1911} Art. 27(1) UDHR states: “Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.” Art 15(1) ICESCR states: “1. The States Parties to the present Covenant recognize the right of everyone: (a) To take part in cultural life; (b) To enjoy the benefits of scientific progress and its applications; (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”
\textsuperscript{1912} See supra 5.3.3.5 and 5.3.3.6.1.
\textsuperscript{1913} Gervais, 2015, p. 21.
\textsuperscript{1914} Geiger, 2015a, p. 15.
\textsuperscript{1915} Geiger, 2015a, pp. 16–17, with further references. See also supra 5.3.3.6.
\end{footnotes}
In addition to the social function dimension, the operation of competing human or fundamental rights as external limits to copyright protection provides justification for an access right. In this respect, the present dissertation illustrated several instances where the balancing of conflicting fundamental rights resulted in the exclusive right having to cede in the interests of privacy, protection of personal data, freedom of expression and information, and freedom to conduct a business.\footnote{See supra 4.4.1.4, 4.4.1.5, 4.4.4.1, 4.4.4.3, and 5.3.3.6. On ECtHR jurisprudence and the possibility of imposing limitations on the grounds of freedom of expression (Art. 10 ECHR), see ECtHR, \textit{Ashby Donald}, and ECtHR, \textit{The Pirate Bay}. On CJEU jurisprudence in this respect, see: CJEU, \textit{Promusicae}, ¶¶65–68; CJEU, \textit{LSG}, ¶¶28–29; CJEU, \textit{Bonnier Audio}, ¶56; CJEU, \textit{Painer}, ¶105, 132; CJEU, \textit{Scarlet Extended}, ¶53; CJEU, \textit{Netlog}, ¶51; CJEU, \textit{UPC Telekabel}, ¶46; CJEU, \textit{Deckmyn}, ¶¶26–27.}

In the context of the three-step test analysis, this chapter has derived from these external limits \textit{internal fundamental rights-based justifications} for a right of access and remuneration for non-commercial online use of works, which are coherent with the CJEU’s teleological interpretation of existing \textit{acquis} limitations, illustrated in \textit{Painer} and \textit{Deckmyn}.\footnote{See supra 4.4.1.4, 4.4.1.5, 4.4.4.1, 4.4.4.3, and 5.3.3.6.}

The CJEU elucidates the point in \textit{Luksan}. In that judgment, the Court accepts the property qualification of copyright, but recognises the possibility of restrictions “in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss”. The Court further notes, “[t]he use of property may be regulated by law in so far as is necessary for the general interest”.\footnote{CJEU, \textit{Luksan}, ¶68.} In this light, the public interest and respect for fundamental rights are admissible grounds to justify a restriction on the nature of the exclusive right in favour of a right of access and fair compensation.\footnote{Geiger, 2015a, p. 20.}

That restriction, if effectuated through a statutory licence, may in fact serve the creative incentive goal of copyright and further the circulation of culture online. As noted, statutory licences have a productive function, due to their ability to foster creative use by securing access to existing works and, thus, afford a degree of freedom to authors in their creative processes. As is apparent, from this perspective, such a licence would have a basis in freedom of (artistic) expression in Articles 10 ECHR and 11 Charter.\footnote{Cf. supra 5.3.3.5 and 5.3.3.6.1. See also Geiger, 2015b, pp. 9–20, proposing a statutory licence for creative reuses of derivative works.}

The contention of this study is that these non-economic motivations, when considered in the normative framework of the three-step test, support the adoption of a model of remunerated access for non-commercial online use of works, in the form of a statutory licence ACS. This has implications for the access and remuneration aspects of copyright in the \textit{acquis}.

From the access perspective, the question arises as to whether such motivations, especially those related to fundamental rights, are sufficient to qualify the privilege of end-users as a \textit{positive user right} of equal value to the exclusive right. This would entail, for example, the ACS-limitation
being mandatory and privileged, i.e. not subject to contractual disposition or pre-emption by technological measures.\footnote{Geiger, 2015a, pp. 21–22, and references cited.}

As described in Chapter 4, the InfoSoc Directive mostly opens the door for contractual disposition of limitations by end-users and affords priority to TPMs over limitations. The possibility of contractual disposition can be set aside by the definition of limitations as imperative (e.g. as occurs in Portugal and Belgium), or by the application of imperative rules protecting end-users (e.g. consumer law). In relation to some limitations, Article 6(4) InfoSoc Directive mandates Member States to put in place appropriate measures to ensure exercise of limitations despite application of TPMs. However, that possibility is not available for works made available online on agreed contractual terms.\footnote{See supra 4.4.1.2, and 4.4.3.5. For an analysis of the impact of digital technology on the position of consumers of licensed digital content from the perspective of EU law on copyright, contract and consumer protection, see Lucie Guibault, 2016.}

This priority of contract and especially TPMs over limitations is not required by the international law provisions (in the WIPO Treaties) that Article 6 InfoSoc Directive implements. It is therefore a choice by the EU legislature. In that light, the different public interest manifestations of the access dimension of copyright discussed to this point (namely those arising from fundamental rights), together with the lack of efficiency of TPMs, the lack of proportionality of their application to non-commercial online acts, and the requirement of effectiveness of limitations, all justify a different approach for a limitation-based ACS.

One possible approach could be to build on the “appropriate measures” language of the directive and the general proposal of Article 5.8 Wittem Code. Rather than an outright prohibition on these measures, rights holders would be allowed to apply TPMs, subject to an obligation to make available means of benefiting from the ACS-limitation. That obligation would in turn be subject to the condition that those means are necessary to fully exercise the limitation.\footnote{See Wittem Group, 2010 (Article 5.8).} If the rights holder fails to meet such obligations, end-users or their representatives (including consumer associations or state entities) could judicially enforce this right to exercise the statutory limitation. Whether such a set-up creates a “subjective right” to the ACS-limitation is up for discussion; however, this approach appears to be consistent with the normative considerations that inform the access dimension of copyright under EU copyright law.\footnote{Geiger, 2015a, p. 22, suggesting the possibility of enforcing limitations as a “subjective right”. In EU law, further support for the consideration of user rights as enforceable rights of equal value to the rights of copyright owners could arguably derive from CJEU, Ulmer, ¶43, CJEU, Deckmyn, ¶26, CJEU UPC Telekabel, ¶57, CJEU Painer, ¶132. See also European Copyright Society, 2014b; Geiger, 2015a, pp. 22–23.}

However, the promotion of the access dimension of copyright for the regulation of non-commercial online use through a limitation, at the expense of the exclusive nature of the right, does not necessarily entail transforming prohibited uses into free uses. In fact, the CJEU in \emph{Luksan} accepts a restriction on the exclusive dimension of copyright “in the public interest and in the cases and under the conditions provided for by law, \textit{subject to fair compensation} being paid in good time for their loss”.\footnote{CJEU, \textit{Luksan}, ¶68 (emphasis added).} In requiring that the enhancement of access be accompanied
by a remuneration condition, the Court emphasises the central role of that condition in securing the material interests of rights holders in general, and creators in particular.

This approach is coherent, first, with the role of remuneration in both utilitarian and natural rights theories, as either creative incentive or a fairness reward for intellectual creations.¹⁹²⁶ Second, it mirrors the focus on the material interests of creators in the human and fundamental rights framework of copyright, especially in the UDHR and ICESCR, which do not require copyright protection to include a power to exclude users. That is to say, under these instruments, the material and moral interests of creators can be secured through a right of access and remuneration, rather than a pure exclusive right.¹⁹²⁷

To this effect, the present dissertation has argued that a statutory licensing system for non-commercial use would likely provide better protection to creators than a non-enforceable exclusive right for the same use. The reasons are essentially twofold. First, the exclusive right in this scenario will generate little rights revenue and, where it does, the same will accrue mostly to exploiters to whom creators have transferred the right. Second, the remuneration or compensation right attached to the statutory licence system is typically (in the EU at least) unwaivable and distributed on fair terms in the institutional setting of a CMO, ensuring that the rights revenue generated in the system finds its way to creators.¹⁹²⁸

On this point, the fact that similar results can in theory be achieved through improvements in contract law should be considered as a supplement, rather than an alternative, to the deployment of statutory licences as tools to improve the position of creators in enjoying the benefits of the digital exploitation of works.¹⁹²⁹

Affording special attention to creators is fully justified not only by their role—especially that of authors—in the international and EU legal frameworks, but also on philosophical grounds. From a natural rights perspective, it is the creator (not the exploiter) that has a direct moral and material link to his intellectual creations. From a utilitarian perspective, “if one wants to reach an optimal promotion of creativity, it is absolutely consistent to allocate a special role to the person who performs the social added value, i.e. the creator.”¹⁹³⁰

The CJEU’s wording in Luksan points towards qualifying the remuneration element within the system of EU copyright law as a right of fair compensation, rather than a right of equitable remuneration. Following an analysis of the acquis, this study makes a similar suggestion when defining the element of compensation attached to a prospective limitation for non-commercial use of works in a statutory licence ACS.¹⁹³¹

Furthermore, after Luksan and Reprobel, it appears that the fair compensation element of such an access right belongs only to the rights holders of the restricted exclusive right, i.e. the rights of reproduction and communication to the public in the InfoSoc Directive. This means that the right

¹⁹²⁶ See supra 5.5.1.
¹⁹²⁸ See supra 5.3.2.3.3, 5.3.3.3, 5.3.3.4, and 5.3.4 (and references cited). See also G. W. Austin & Zavidow, 2015, p. 330; Geiger, 2015b, pp. 5–7.
¹⁹²⁹ Geiger, 2015a, pp. 33–34, making a similar point.
¹⁹³⁰ Geiger, 2015b, p. 5.
¹⁹³¹ See supra 5.3.3.3 and 5.3.4.
of fair compensation for non-commercial use attributed ab origine to creators is unwaivable and not transferable to exploiters. In this fashion, the right ensures an adequate or appropriate level of compensation, remuneration, or reward required to incentivise creation, in line with the objectives of the InfoSoc Directive.\footnote{See supra 4.4.3.3 (on fair compensation), 5.3.3.1–5.3.3.4, and infra 5.5.3. On the use of the compensation or remuneration terminology see Opinion AG in Padawan, ¶¶79–80, and Geiger, 2015b, pp. 7–9 (endorsing the term “limitation-based remuneration rights” or “claims” instead of “levies” or “statutory licences”).}

### 5.5.3 Normative Consistency with EU Copyright Law

It is not an easy task to identify a clear set of objectives for EU copyright law. The view expressed throughout the dissertation is that the best way to do so is by extracting those objectives from the acquis, namely the existing copyright directives and their interpretation by the CJEU in over forty cases.\footnote{See supra 1.1 and 4.4.1. See also Marcella Favale et al., 2015, pp. 38–39. See supra 1.1, 4.4.1, 5.5.1 and 5.5.2. See also recital 3 InfoSoc Directive, stating that the “[t]he proposed harmonisation will help to implement the four freedoms of the internal market”.}

The Court often relies on the recitals of directives for teleological interpretation and identification of normative arguments that elucidate its objectives. Such arguments are informed by several concerns, including different philosophical justifications (utilitarianism v. natural rights), distinct legal traditions (civil law v. common law), respect for fundamental economic freedoms in EU law, and respect for fundamental rights and freedoms in the Charter.\footnote{P. Bernt Hugenholtz & Quintais, 2016 (forthcoming). See supra 1.1, 4.4.1. See also recital 3 InfoSoc Directive, stating that the “[t]he proposed harmonisation will help to implement the four freedoms of the internal market”.}

The InfoSoc Directive is of particular importance in this respect, as it is based on principles and rules already laid down in the directives in force in the area of intellectual property.\footnote{See recital 20 InfoSoc Directive, and CJEU, Murphy, ¶187 (and case-law cited).} For the present purposes, it is doubly important because it harmonises the exclusive rights and limitations within which framework an ACS would integrate.

In this light, it makes sense to rely on the empirical research on the CJEU’s copyright jurisprudence by Favale, Kretschmer and Torremans (mentioned in Chapter 1), which identifies a range of interpretative or rhetorical arguments followed by the Court that mirror objectives of the acquis. The arguments/objectives identified by the authors are listed here in a different order: \footnote{Marcella Favale et al., 2015, pp. 33, 66–67. This list omits the objective of “fair competition” listed by the authors, as the same is not called into question by the adoption of an ACS. The authors note also the Court’s preference for the teleological method and that these arguments, while possibly rhetorical, may provide an indication of whether the outcome of a case is favourable to rights holders or users. See also Lucie Guibault et al., 2007a, pp. 4–6, for the use of recitals as a means to identify the objectives of the InfoSoc Directive.}

1. Fair balance between the rights and interests of authors and the rights of users,
2. High level of protection for copyright holders,
3. Adequate compensation or appropriate reward,
4. Circulation of culture,
5. Resolution of legal uncertainty,
6. Technological development (including the promotion of the information society), and
(7) Harmonisation of copyright law to achieve a functioning internal market.

To be sure, these objectives operate at different levels of concreteness, may overlap, and at times seem contradictory. For example, it is not always apparent how to reconcile the aims of technological development and circulation of culture with a high level of protection, while safeguarding the “independence and dignity of artistic creators and performers.” Thus, it is difficult to derive from this list of objectives or the preamble of the InfoSoc Directive a unitary and coherent benchmark from which to assess a reform proposal.1937 Regardless, if a statutory licence ACS is to be normatively consistent with EU copyright law, it should generally conform to these objectives. The remainder of this section briefly examines whether that is the case, recasting the main findings of this study in light of each objective.

**Objective 1: Fair balance**

The different dimensions and applications of the concept of fair balance (objective 1) are sufficiently explained in this and the previous chapter.1938 Extant legal rules subject non-commercial online use of works to exclusive rights, TPMs and strict enforcement measures. Such rules do not sufficiently consider the interests of creators and the public interest. On the one hand, they fail to secure remuneration for creators. On the other, they create legal uncertainty, fail to promote the circulation of creative works online, and subject end-users to liability for online activities of personal enjoyment and expression. This comes at a high social cost, illustrated by the decreasing legitimacy of copyright law in the eyes of the public, and the erosion of the rule of law in this area.

This chapter carried out a balancing exercise of the legitimate interests at stake in an ACS in the context of the three-step test. The analysis suggests that such a system could contribute to restoring the balance in the acquis regarding the regulation of non-commercial online use. The introduction of a properly delimited right of access and fair compensation would not significantly harm rights holders, should add a revenue stream (by monetising hitherto uncompensated uses), and would likely improve the position of creators. Furthermore, a statutory licence ACS would better serve the public interest by improving legal certainty for end-users, reducing their liability exposure, facilitating the circulation of works online, and respecting individuals’ fundamental rights and freedoms, namely privacy in telecommunications, personal data, and freedom of expression and information. (Regarding intermediaries’ freedom to conduct business, the impact of such a reform would be at worst neutral.)

**Objectives 2 and 3: High level of protection and Adequate compensation or appropriate reward**

Perhaps the objective of EU law that is most difficult to reconcile with a legalisation scheme is that of a high level of protection for copyright holders (objective 2).1939 It is on this basis that the CJEU interprets exclusive rights broadly and limitations strictly. Still, this dissertation argues throughout that it is a misconception to equate the objective with an “absolute” level of protection. Such interpretation is harmful to rights holders and contrary to the public interest, as

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1938 Recitals 3 and 31 InfoSoc Directive. See supra 4.4.1.4, 4.4.1.5, 4.5, 5.1, 5.2.2, 5.3.3, and 5.3.4.
1939 Objective supported by recitals 4, 9, and arguably 11 (referring to “[a] rigorous, effective system for the protection of copyright and related rights”) InfoSoc Directive. See also recital 16 Rental Right Directive.
it supports broadening of exclusive rights *ad infinitum* irrespective of the possibility and desirability of individual management and enforcement of copyright.

Rather, a systematic and teleological interpretation of the preamble of the InfoSoc Directive shows that what is meant is a level of copyright protection that ensures adequate compensation or an appropriate reward for rights holders (objective 3), while allowing space for the fulfilment of the remaining objectives of EU copyright law, including the aforementioned fair balance of interests. This articulation between protection and remuneration, patent in recitals 9 and 10 of the directive, is crucial in designing an optimal scope of protection for copyright aimed at fostering creativity and the dissemination of works.

A statutory licence ACS in this mould will not directly affect the exclusive rights of creators for commercial use of works. The system focuses on non-commercial online use by individuals in relation to which exclusivity is ill suited for monetisation and/or too costly to enforce (at economic and social levels). Hence, a statutory licence system affords a level of protection that better serves the material interests of creators.

It is debatable whether other rights holders will see their financial situation improve. That will largely depend on whether the new rights revenue received under the ACS supplants the potential harm caused by its adoption on online commercial channels. On this point, existing research shows the potential of a statutory licence to generate sufficient revenue to offset any losses. Furthermore, a proper definition of the scope of the limitation could mitigate potential negative (indirect) effects on the normal exploitation of works.

**Objective 4: Circulation of culture**

If we accept that a carefully designed limitation for non-commercial online use will not negatively affect incentives for creation, then it is difficult to argue that it will not improve the circulation of culture online (objective 4). A statutory licence ACS will provide users with breathing space for lawful acts of enjoyment of cultural works online in a non-market sphere; it will also provide creators with novel rights revenue, which may incentivise further creation and dissemination of works. Those same activities were previously prohibited (or shrouded in legal uncertainty) and generated no remuneration.

It is true that in some private copying judgments the CJEU considered it “apparent from recital 22 in the preamble to Directive 2001/29 that the objective of proper support for the dissemination of culture must not be achieved by sacrificing strict protection of rights or by

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1940 Objective supported by recitals 10 (appropriate reward) and 35 (adequate compensation) InfoSoc Directive. Note that Marcella Favale et al., 2015, p. 33, mention solely “adequate compensation”. In this respect, see the *Opinion AG in Padawan*, ¶¶79–80, relying on the wording of recital 10 InfoSoc Directive (“appropriate reward”). Cf. Geiger & Schönherr, 2014a, pp. 132–133.

1941 Objective supported by recitals 14 and 22 InfoSoc Directive. The link between creativity and culture was from an early stage recognised in in the Green Paper on Copyright and the Challenge of Technology 1988, p. 6 (¶1.4.4): “Intellectual and artistic creativity is a precious asset, the source of Europe’s cultural identity and of that of each individual State. It is a vital source of economic wealth and of European influence throughout the world. This creativity needs to be protected; it needs to be given a higher status and it needs to be stimulated”. See also Art. 167(1) TFEU, containing the so-called “culture clause”. 

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tolerating illegal forms of distribution of counterfeited or pirated works”. However, this statement and the consequent interpretation of recital 22 need to be qualified.

First, the reference to “strict protection of rights” is uncannily similar to the absolutist view of a “high level of protection” rejected above. Where we interpret this phrase to mean *adequate protection to generate appropriate remuneration*, it becomes clear that a statutory licence for non-commercial online use—under the terms discussed here—is not a measure that unjustifiably sacrifices copyright protection.

Second, the effect of an ACS is not to tolerate “illegal forms of distribution of counterfeited or pirated works”. Rather, it is to promote the access and remuneration aspects of copyright protection, while safeguarding exclusivity and enforcement against for-profit unauthorised platforms. This distinction between individuals’ non-commercial use of works (privileged in a limitation-based ACS) and their unauthorised commercial use thereof (subject to the exclusive right) is an important part of the system and one of the reasons why it can comply with the three-step test.

**Objective 5: Resolution of legal uncertainty**

It is also clear from the analysis so far that the adoption of a statutory licence ACS would contribute to resolving legal uncertainty in EU copyright law (objective 5). It is true that the flexible interpretation of the *acquis* and especially the three-step test, proposed in this dissertation, may be detrimental to legal certainty. But this risk is easily offset by the advantages the system would bring. As amply demonstrated in Chapter 4, rules in the *acquis* give rise to considerable uncertainty regarding the application of exclusive rights and limitations to individuals’ online use of copyright, for example in the cases of reproduction from unauthorised sources and hyperlinking. In this context, a limitation clearly covering some of these uses would remove uncertainty in the online application of copyright.

**Objective 6: Technological development (including the promotion of the information society)**

An important objective of EU copyright law is to foster technological development, including the promotion of the information society through a flexible interpretation of the legal framework (objective 6). This objective is a clear manifestation of the InfoSoc Directive’s *raison d’être*: to adapt EU copyright law to the digital networked environment and the information society. It also has a clear public interest component, as the future development of a technological society, such as ours, is undeniably served by a well-functioning Internet.

In this light, the interpretation of copyright ought to provide stimulus for the development of digital technologies within a “general and flexible legal framework at Community level”, in line

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1942 CJEU, *Reprobel*, ¶59; CJEU, *ACI Adam*, ¶36. For criticism on the use of the Court’s interpretation of this recital in the context of its private copying jurisprudence, see supra 4.4.3.6.

1943 See supra 5.3.2 and 6.1.5.

1944 Objective supported by recitals 4, 6, 7, 21, and 25 InfoSoc Directive.

1945 See supra 4.3.1.2, 4.3.2.3, and 4.4.3.6.

1946 Objective supported inter alia by recitals 2, 5, 6, 7, 20, and 38 InfoSoc Directive. Recitals 2 and 5, in particular, emphasise the need for a flexible legal framework in respect of this objective.

1947 Peukert, 2015, p. 380, citing BGH, 17.07.2003, I ZR 259/00 (“Paperboy”), which identifies search engines and hyperlinking as essential components to secure the proper functioning of the Internet.
with recital 2 InfoSoc Directive. This would seem to require, for example, a technology neutral and functional approach to the interpretation of exclusive rights, thus responding “adequately to economic realities such as new forms of exploitation” (recital 5).  

However, the acquis falls short of this objective. As shown in Chapter 4, exclusive rights are mostly interpreted broadly and, to a significant extent, in a technical way. The result is that they extend to a substantial array of forms of online use by individuals, many of which are instrumental to the online enjoyment of works, and do not constitute forms of commercial exploitation. Furthermore, the priority of contract and technological measures in defining the scope of protection, and the use of opaque concepts (e.g. “unauthorised source”), further hinder the space available for online use.  

Perhaps the best example of how this approach can be harmful to the development of the Internet is the application of the right of communication to the public to hyperlinking. As noted by the European Copyright Society in its opinion prior to the Şvensson judgment,

Although hyperlinking takes many forms and has multiple functions, there can be no doubt that it is the single most important feature that differentiates the Internet from other forms of cultural production and dissemination. Hyperlinking is intimately bound to the conception of the Internet as a network, and hyperlinks constitute paths leading users from one location to another. As the Supreme Court of Canada has stated “[h]yperlinks … are an indispensible part of [the Internet’s] operation.

The legal regulation of hyperlinking thus carries with it enormous capacity to interfere with the operation of the Internet, and therefore with access to information, freedom of expression, freedom to conduct business, as well – of course – with business ventures that depend on these types of linkages. Europe has developed a significant sector of SMEs, many of whose web operations depend on the use and provision of links. The Court must not under-estimate the importance of its ruling in this case.

Unfortunately, the Court’s judgment in Şvensson and its application of the new public criterion not only failed to recognise the importance of placing standard hyperlinks completely outside the scope of copyright, but also added further uncertainty. This uncertainty led to further preliminary references, including the question of whether linking to an unauthorised source is a restricted act. In his Opinion in GS Media, AG Wathelet made clear the technological development issues of the question, including potential chilling effects, when he mentioned that

as a general rule, internet users are not aware and do not have the means to check whether the initial communication to the public of a protected work freely accessible on the internet was effected with or without the copyright holder’s consent. If users were at risk of proceedings for infringement of copyright under Article 3(1) of Directive 2001/29 whenever they post a hyperlink to works freely accessible on another website, they would be much

1948 See Velze, 2015, pp. 74–75, making a similar point regarding the right of communication to the public.

1949 See supra 4.3.1.2, 4.3.2.3, and 4.5.

1950 This issue is analysed supra at 4.3.2.

more reticent to post them, which would be to the detriment of the proper functioning and
the very architecture of the internet, and to the development of the information society.\footnote{301}

By placing these and other types of non-commercial use of works under a statutory licence
system, the ACS will curtail some of the negative effects arising from the overbroad and
technologically determined interpretation of online rights. From this perspective, the system will
preserve the functioning of the Internet and foster its development.

Another way in which an ACS may promote this objective is by eliminating the risk of
intermediary liability of (certain) intermediaries whose services enable end-users to exercise the
limitation. This argument, it merits pointing out, is reminiscent of one rationale underlying the
creation of the private copying system in Germany.\footnote{1953} As it now stands, intermediaries may be
subject to enforcement measures in relation to their clients’ use of their services, which impose
significant burdens on their operation, e.g. filtering or blocking injunctions. The increased focus
of EU institutions and rights holders on bolstering the role of intermediaries in copyright
enforcement will likely add to the strain, with negative implications for their ability to
innovate.\footnote{1954}

The mere threat of enforcement likely has a chilling effect on the development of new online
technologies that may involve the reproduction and communication to the public of works by
end-users, even in a context where the intermediary’s activity is not considered a normal form of
exploitation of works. The ACS may provide breathing space to such technology providers,
while retaining the possibility of enforcement of the exclusive right against unauthorised for-
profit online platforms.

**Objective 7: Harmonisation of copyright law to achieve a functioning internal market**

Finally, an overall objective of the directive is the harmonisation of copyright and related rights
as a means to achieve an internal market (**objective 7**).\footnote{1955} In recent communications, the
Commission refers to this ultimate target as the “digital single market”.\footnote{1956}

Harmonisation refers to the co-ordination or approximation “of different legal solutions through
the elimination of major differences and the creation of minimum requirements or standards”.\footnote{1957}
The EU path to harmonisation of copyright and related rights is briefly described in Chapter 1.
Nothing in this study indicates that the adoption of a statutory licence ACS is detrimental to the
existing level of harmonisation in copyright law or the digital single market goal.

If anything, the experience of the patchwork design and national implementation of limitations in
the InfoSoc Directive suggests that a new limitation for non-commercial online use would better
promote these goals, especially if such a limitation is defined as mandatory. This would ensure

\footnote{1952} *Opinion AG in GS Media*, ¶78. (This passage is cited *supra* at 4.3.2.3).
\footnote{1953} *See supra* 2.3.
\footnote{1954} *See supra* 1.1 and 5.3.3.6.3. See also P. Bernt Hugenholtz & Quintais, 2016 (forthcoming).
\footnote{1955} *Other than in the title of the directive, the harmonisation objective is mentioned in recitals 3, 4, 6, 7, 9, 23, 25, 31, 32,
47, and 56 InfoSoc Directive. Recitals 31 and 32 refer in particular to the goal of harmonising limitations (on which
see *supra* 4.4.1.3).*
\footnote{1956} *See, e.g., Communication on a Digital Single Market 2015, and Communication on Modern European Copyright
Framework 2015.*
\footnote{1957} Christina Angelopoulos, 2016b, p. 8.
that the limitation is implemented in all Member States, therefore guaranteeing a higher level of harmonisation than if the limitation is qualified as optional. However, even in this latter case, it is difficult to argue that an ACS would hinder the current level of harmonisation, as the vast majority of existing limitations in the *acquis* are facultative.

In addition to the objectives discussed thus far, it is important to consider briefly the requirement that an ACS complies with international copyright law, as this plays a role in the Court’s interpretation of the *acquis*. On this point, the analysis in the first part of this Chapter argues that a flexible interpretation of the three-step test is more consistent with international law (and in particular with Article 10 WCT and its Agreed Statement) than the strict interpretation sometimes followed by the CJEU. That flexible interpretation allows a statutory licence ACS to comply with the three-step test and informs the design of all elements of the corresponding limitation. Therefore, if such a flexible interpretation is accepted, the statutory licence ought to be consistent with international copyright law.

In conclusion, the foregoing analysis shows that a limitation-based ACS for non-commercial online use of works is consistent with the normative objectives of EU copyright law. This conclusion results from a flexible reading of the law in light of the public interest and the concept of fair balance. Other, stricter, readings are certainly possible, and could lead to a different conclusion. As with the legal interpretation of positive EU copyright law, the final position on the admissibility of an ACS may depend on one’s normative preferences and view of how copyright law should look in the future.

5.6 Conclusions

This chapter examines two related questions at the heart of this dissertation. First, it looks at whether and to what extent a limitation-based statutory licence ACS for non-commercial online use of works by individuals is admissible under EU copyright law, namely the three-step test. Second, it examines whether and how such a legalisation model is consistent with the general aims of copyright and the objectives of EU copyright law.

From a compliance perspective, the main legal challenge to an ACS-limitation is the three-step test. The chapter proposes a framework for the interpretation of the test in light of international copyright law, which considers the different versions of the test—with an emphasis on Article 10 WCT and its Agreed Statement—and spectrum of interpretations. The analysis concludes that a flexible interpretation of the test and its conditions is more consistent with the aims of copyright law, as it enables consideration of the public interest and the fair balance of competing claims. Using that flexible lens, this chapter examines a statutory licence ACS against each step of the test, with a view to its comprehensive overall assessment.

Under the first step, a potential limitation must constitute a qualitative and quantitative “certain special case”. Its scope of application should be reasonably foreseeable and not overly broad. Furthermore, the limitation should be justified on a sound policy basis.

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1958 Lucie Guibault et al., 2007a, pp. 4–6. On compliance with international law, see recitals 15 and 44 InfoSoc Directive. See also supra 1.1 and 5.2.1.4.
1959 See supra 5.3 and infra 6.2, and 5.5.2. On the proposed design for an ACS, see infra 6.2.
The aim of a statutory licence ACS is to privilege use for personal enjoyment and expression online. Its scope is restricted to natural persons, certain types of work, and non-commercial acts of reproduction and communication to the public over the Internet (not already exempted by existing limitations). Compliance with this step is contentious as regards the subject matter scope, which may require exclusion of categories of work beyond software, databases, and videogames.

On the qualitative side, the limitation is soundly justified not only by the failure of exclusive rights to regulate non-commercial online use of works, but also on non-economic public interest grounds. These include the promotion of creativity and circulation of culture, and the respect for the fundamental rights and freedoms of individuals—freedom of expression and information, privacy, and personal data—and, to a lesser extent, intermediaries’ freedom to conduct a business.

The main obstacle to a statutory licence ACS lies with the second step of the test, and more specifically with the traditional view of normal exploitation of works, anchored on the principle of strict interpretation. After exploring this view, it is argued that the same is not only overly restrictive, but also foregoes consideration of policy rationales, remunerative potential and the consistency of a limitation with the policy objectives of copyright. On that basis, in accordance with the principle of fair balance, it seems preferable to adopt a flexible understanding of the second step.

In this reading, there is a conflict with the normal exploitation if a limitation deprives creators and exploiters of major and foreseeable sources of income under normal commercial circumstances. These sources include revenue generated through online commercialisation of the exclusive rights of reproduction and communication to the public to commercial and end-users via digital network platforms.

An ACS targets non-commercial online use by individuals, which is in many cases not exercised or monetised by rights holders, and in other instances can be classified as de minimis. The introduction of a statutory licence to regulate this type of use has the potential to create new rights revenue, and to constitute a normal form of exploitation thereof. On the other hand, it is possible that the licence has negative indirect effects on downloading and streaming channels. However, the scale of these negative effects is unknown and can only be speculated at. Based on empirical research on the effect of unauthorised use on the market, it is conjectured that a properly designed system could co-exist with authorised commercial channels. (This conjecture, naturally, requires empirical testing.)

An adequate system, in any case, requires that exclusive rights are enforceable against unauthorised for-profit websites capable of impinging on the normal exploitation and the commercial core of copyright. One avenue to achieve this is through the strict definition of what constitutes an authorised non-commercial use in an ACS, and the corresponding exclusion from the scope of the licence of online exchanges by unauthorised platform operators for financial consideration. Other options, currently under consideration by the CJEU, are to include in the
The scope of the right of communication to the public acts of linking to unauthorised sources and/or the activities of platform operators.\textsuperscript{1960}

If it is possible to delimit the scope of the statutory licence in this way, the ACS will only legalise the activities of end-users and a limited number of online intermediaries, such as those enabling or facilitating the licensed use but not directly reproducing or communicating the works to the public. Also, the licence will not affect those mostly “neutral” intermediaries that benefit from the E-Commerce Directive’s safe-harbours, in relation to their activities that are exempt from liability under those provisions. De lege lata, only this circumscribed scope would seem to enable a statutory licence ACS to avoid conflicting with the normal exploitation of works, even under a flexible reading of the second step. Of course, to the extent that such a legalisation scheme is limited vis-à-vis online intermediaries, it raises the (different) question of whether this is a desirable or satisfactory system de lege ferenda.

Examination of the third step involves a multi-level balancing exercise guided by the principle of proportionality, which considers the reasonableness of the prejudice caused and conflicting legitimate interests. These include, on the one hand, the concurrent and opposing interests of creators and exploiters. On the other hand, and in line with the principle of fair balance, they include the individual and collective public interest of users stemming from the promotion of creativity and dissemination of works, and the respect of fundamental rights.

A limitation causes unreasonable prejudice if the harm suffered by rights holders from its introduction—mainly its indirect effect on the overall exploitation of works online—is out of proportion to the benefits derived by the public.

Payment of fair compensation through a statutory licence is an acceptable means of reducing that harm to reasonable levels, and there is research suggesting this is feasible. Following such research, it is proposed that compensation is calculated based on harm (including the mitigating factors described in the InfoSoc Directive) but pursuant to a contingent valuation method that approaches the notion of appropriate reward for creativity. However, the shortcomings of empirical research and the rapid evolution of the market warrant caution and emphasise the need to examine the policy motivations of the ACS, expressed in different legitimate interests.

The main concern of creators is fair remuneration for online use, whereas exploiters favour assignable exclusive rights and stricter enforcement measures. By imposing an unwaivable fair compensation right, an ACS would support the material interests of creators. However, because it also creates a novel revenue stream for exploiters, it would potentially not prejudice their financial interests. In any case, this trade-off should be acceptable if the benefit to creators offsets the harm to exploiters.

\textsuperscript{1960} The pending preliminary references in question are: CJEU, Reference for Preliminary Ruling, Case C-160/15, GS Media; CJEU, Reference for Preliminary Ruling, Case C-527/15, Filmspeler; CJEU, Reference for Preliminary Ruling, Case C-610/15, Stichting Brein v Ziggo. A supplement to both options discussed in the text could be the promotion at EU level (e.g. through a Commission communication or Memorandum of Understanding) of self-regulation measures between rights holders and online intermediaries aimed at curtailing the activities of unauthorised for-profit platforms.
On the normative level, an ACS promises to serve the public interest by promoting access to culture and knowledge in the digital environment, and ensuring an operational non-market sphere of personal enjoyment and expression for end-users. In the regulation of non-commercial use, it is further argued that a well-designed ACS is more respectful of the fundamental rights of Internet users—especially privacy in telecommunications and freedom of expression and information online—than strict enforcement measures, such as filtering, blocking and Internet disconnection.

From the perspective of the fundamental freedom to conduct a business, the advantages of a statutory licence ACS over enforcement are apparent for Internet intermediaries otherwise subject to injunctions. However, for ISPs such advantages may not offset the costs resulting from their qualification as intermediary debtors of the broadband levy. Nevertheless, if the system allows recovery of administrative costs and the levy to be passed on to users, it could be worth experimenting with, especially in light of the institutional thrust towards increasing the role of online intermediaries in enforcement measures. (Here, again, further research is required.)

On balance, there is space available for a statutory licence ACS compliant with EU copyright law. However, doubts remain as to whether the system can overcome potential conflicts with the normal exploitation of works, even following a flexible interpretation. Thus, the chapter explores two flexibility mechanisms to overcome these potential conflicts: embargo periods and opt-out rules.

Embargo periods allow exclusivity to remain the default rule for a period of time coinciding with the most intense commercial exploitation of works. After that period, the ACS would regulate non-commercial use. An opt-out rule allows rights holders to restore exclusivity as their preferred model of exploitation of non-commercial online use of works.

The analysis shows that both models are legally feasible but there is insufficient information on their hidden complexities and costs of adoption, which require additional empirical study. The main challenges lie with the difficulty of implementation across different categories of works, and the fact that they reduce the value for users of an all-encompassing legalisation scheme. A combination of an opt-out rule with an embargo period would ensure that all works eventually return to the ACS, a promising long-term solution. Yet, it will come at the high cost of additional complexity for the management of the system in the interim, making it a difficult policy proposition.

In sum, reform of EU Copyright law via a statutory licence ACS is feasible in a limited fashion. However, its adoption rests on a set of binary normative choices for policy makers as to how to regulate non-commercial use: flexible vs. strict interpretation of limitations, remunerated access vs. exclusivity with strict enforcement, and public vs. private ordering. The public interest choice for access, furthermore, requires that we recognise the internal effect of fundamental rights in shaping the scope of copyright protection. Neither choice is wrong per se. Rather, the choices hinge on a normative view of copyright and of where to strike a fair balance of interests.

The second part of the chapter therefore looks deeper into this normative dimension. It asks whether and to what extent a model of access and remuneration—a statutory licence ACS—is consistent with the general aims of copyright and the objectives of EU copyright law. This part begins by examining whether a right of access and remuneration for the non-commercial online use of works can be reconciled with the dominant rationales for copyright protection in the European legal tradition, namely natural rights (including the fairness and personality theories)
and utilitarianism. Both theories, beyond their influence in *droit d'auteur* and common law countries, are reflected in the objectives of the copyright *acquis* and provide justification for copyright protection in EU law. Consequently, they play a role in the balancing of competing interests that underlies the determination of the scope of protection, including the imposition of restrictions on the exclusive right.

From the perspective of natural rights, a statutory licence ACS impacts the material interests of authors in the commercial exploitation of copyright. Therefore, it mainly calls into question the fairness justification for copyright protection, developed from the Lockean desert-for-labour argument. Assuming *arguendo* that Locke’s theory applies to copyright and provides an acceptable rationale for granting a property right over the expressive results of creative labour, the fairness theory does not impose absolute protection for the right, but allows restrictions thereto. Those restrictions result not only from the sufficiency proviso, but more clearly from the consideration of the public interest when transitioning from the state of nature to a civil and political society. In actualising the public interest, the prohibition element (exclusivity) of copyright protection can be curtailed, while retaining its reward element (remuneration), thereby safeguarding the material interests of authors.

A statutory licence ACS can therefore be accommodated by the fairness theory, insofar as it ensures remuneration for the use of works (arguably on more favourable terms than an exclusive right) and is justified not only by market failure but also by the public interest in both the protection of fundamental rights and freedoms of users, and the promotion of creation and dissemination of works.

The utilitarian theory justifies copyright protection on the basis of the prospective incentives it provides for the creation and dissemination of works. It views copyright as a positive right granted to further the public interest, and the exclusive right as a device to solve a public goods problem in the production and dissemination of works. According to this theory, the recognition of a property-like enforceable right to prohibit use without authorisation or remuneration would address the free-rider problems arising from the non-excludable character of copyright goods, allowing a functioning market for their production and supply. The exclusive right would enable copyright owners to charge prices sufficiently high to recoup their costs of creation, inducing as a result future creative activities and maximising the production of works.

The artificial imposition of exclusivity is justified if its benefits outweigh its costs. With regard to an ACS, the question is whether regulating non-commercial online use of works through an exclusive right imposes costs that validate restrictions to that right. The analysis suggests that certain costs of exclusivity—chilling effects on follow-on creativity, transaction costs, and administration and enforcement costs—may justify the adoption of a liability rule in the form of a limitation-based statutory licence.

Hence, imposing a restriction on the exclusive right through a right of access and remuneration for non-commercial online use is in principle consistent with the utilitarian rationale of copyright. In practice, whether this switch from a property to a liability rule is desirable rests on empirical research on the costs and benefits of the new system as compared to the status quo. On this point, there are indicators that such a switch would increase social welfare.

Building on these theories, the chapter then examines the human and fundamental rights characterisation of copyright in different legal instruments (UDHR, ICESCR, ECHR, and the Charter), including its qualification as a property right. It follows from this examination that
copyright protection is not absolute and has at its core access and remuneration dimensions, characterised by the availability of works and cultural participation, and respect for the material interests of rights holders (especially creators). The possibility of restricting the prohibition element of copyright and modulating the options for its exercise is illustrated throughout this dissertation in mechanisms that include voluntary and mandatory models of collective rights management, and statutory licences.

This conceptual turn towards an access and remuneration right is justified by the social function of copyright. The argument here is that the scope of protection is not absolute. Rather, it should be drawn in light of the public interest. One method for introducing this social function into the determination of the scope of copyright is by incorporating the public interest within the three-step test analysis of a limitation, through identifying the legitimate interests of third parties and considering them in the fair balancing exercise. (This method was followed in the first part of the chapter).

Another method is to consider the public interest from an external perspective, as a fundamental (or constitutional) rights foundation for a right of access and remuneration and a limit on absolute copyright protection. From this perspective, it is possible on the one hand to find support for such a right in the universal right to culture and science in the ICESCR and UDHR. On the other hand, the fundamental rights qualification of copyright implies restrictions on its scope based not only on the public interest (see Article 1 Protocol No. 1 ECHR and Article 17 Charter) but also on the application of conflicting fundamental rights and freedoms, sometimes subject to the payment of fair compensation (see, e.g., Luksan).

The result of the application of these normative considerations to the regulation of mass non-commercial online use of works by individuals, is that a limitation-based statutory licence ACS is an admissible alternative to the exclusive right. There are also strong normative arguments to qualify the underlying fair compensation right as unwaivable and potentially mandatory, as well as to afford it some level of protection against disposition by contract or technological measures.

Finally, the last section of the chapter explores the consistency of a statutory licence ACS with the objectives of EU copyright law, as derived from the recitals of the copyright directives (with an emphasis on the InfoSoc Directive) and CJEU jurisprudence. The objectives are: (1) Fair balance between the rights and interests of authors and the rights of users; (2) High level of protection for copyright holders; (3) Adequate compensation or appropriate reward; (4) Circulation of culture; (5) Resolution of legal uncertainty; (6) Technological development (including the promotion of the information society); and (7) Harmonisation of copyright law to achieve a functioning internal market.

On balance, the analysis shows that a properly delimited ACS is consistent with these objectives, in most cases more so than the current regime. This conclusion relies on a nuanced consideration of what should constitute a desirable “high level of protection” for non-commercial online use of works—viewed as an optimal level of protection that ensures adequate compensation for rights holders—and its articulation with the aim of circulation of culture online. The conclusion also emphasises the importance of ACS to resolve legal uncertainty for end-users in their online activities, as well as the potential beneficial effects of a legalisation scheme for technological development in the information society.

To conclude, the narrative arch of this chapter (and indeed the whole dissertation) provides a credible glimpse into the future shape of copyright regulation for non-commercial online use.
The analysis allows us to make an informed choice between private vs. public ordering, strict vs. flexible interpretation, and exclusivity vs. remunerated access. The current regime, which tends towards an online culture of exclusivity, embodies the first set of choices. A statutory licence ACS, which emphasises access and remuneration for non-commercial use, represents the second set of choices. This chapter develops a normative argument for why a “public choice” approach is consistent with the rationales and objectives of the acquis. On balance, the analysis suggests that EU copyright law can and should be adapted to include a right of access and remuneration for this type of online use by individuals. In light of these findings, the following and concluding chapter summarises the findings of this dissertation and provides a blueprint for reform through a statutory licence ACS.
6 Summary and Conclusions: Towards Access and Remuneration

This dissertation explores the flexibility of EU copyright law for the regulation of mass online use of copyright works in light of the public interest. Its main research questions are as follows: Are Alternative Compensation Systems for non-commercial online use of works by individuals admissible under EU copyright law and consistent with its objectives and, if so, to what extent? How can and should EU copyright law incorporate an ACS?

These questions have been for the most part answered in the previous chapters. The first part of this concluding chapter summarises that analysis and its findings (6.1). This summary clarifies whether and to what extent an ACS is admissible in the legal framework of the copyright acquis, and consistent with its objectives. The analysis shows that the most promising model to solve the problem identified in this dissertation is a limitation-based statutory licence for non-commercial online use of works by individuals.

Building on these findings, the second part of this chapter proposes a model for such a legalisation scheme, thereby answering the question of how EU copyright law should incorporate an ACS (6.2). The proposed model is presented as a blueprint for copyright reform in the EU. Following the pragmatic approach of the research, such a blueprint is susceptible of adaptation for lower impact reform, for example relying on voluntary types of collective rights management and soft law approaches, like recommendations. The hope is that the outcome of this examination has a realistic chance of adoption, or at least offers a basis for future consideration of models of access and remuneration (rather than exclusivity and strict enforcement) for online use as viable options to modernise EU copyright law.

6.1 Summary

This section summarises the main findings of the previous five chapters. The narrative arch of the study starts with making the case for reform of EU copyright law (6.1.1). It then moves on to extract the lessons of copyright past for compensation systems (6.1.2), before designing a taxonomy of legalisation proposals that assist in the definition of their scope, limits, and effects on the exclusive right (6.1.3). This is followed by an exploration of the space available for an ACS in the acquis, which sheds light on the intersection between exclusive rights and limitations for online use of works by individuals (6.1.4). Having concluded that the best legal solution to address the fragmentation challenges of copyright law is a limitation-based statutory licence ACS, an examination is made of whether and to what extent such a licence for non-commercial online use: is admissible under EU copyright law, namely the three-step test; and is consistent with the general aims of copyright and the objectives of EU copyright law (6.1.5).

6.1.1 The Case for Reform of EU Copyright Law

Technological development allows the exploitation and use of works in different and innovative forms, influencing the social norms that regulate the online conduct of users. This cycle involving copyright, technology, and social norms, has shaped the evolution of the law since its inception.

Copyright law was originally aimed at regulating the commercial use of works between professionals. In that context, the central role of the exclusive right in the legal regime was mostly justified. However, throughout history, the landscape in which copyright operated has
gradually transformed by virtue of technology, social norms, and the market. These forces influenced and shaped the exploitation of copyright and the use of works.

In general, the response of legislators was to extend the subject matter and substantive rights scope of copyright, which currently includes all manner of digital content and different types of online use. This expansion is visible in international and EU copyright law in the multiple revisions to the BC, the adoption of TRIPS, and the WIPO Internet Treaties, which adapted the international framework to the digital network environment. It is likewise clear from the multiple copyright directives, with a particular emphasis on the InfoSoc Directive—which implemented the WIPO treaties into EU law beyond their minimum standards—, and its interpretation by the CJEU.

With the evolution of technology, it became increasingly possible for individuals to access and use works for non-commercial purposes ubiquitously and at a low cost. But the extension of copyright’s scope also meant that such use, largely for enjoyment and personal expression, may be restricted. In this way, copyright law shifted from mainly regulating professional relationships to also cover activities of individual users in the private or non-commercial sphere.\footnote{Gervais, 2009, pp. 845–857, 869–870.} The default application of such a legal regime to mass online use of works created a powerful disconnect between the law and technology-influenced social norms.\footnote{P. Bernt Hugenholtz, 2013b, p. 26.} This mismatch leads to a costly social conflict, which negatively affects the legitimacy of copyright law and pre-empts exploration of alternative legal solutions to remunerate this online use.

Advocates of the current system and stronger protection argue that strict enforcement is an effective deterrent to unauthorised file sharing, which they consider to not only be the main cause of the content industry’s losses, but also to jeopardise creative incentives. But there is reason to doubt such arguments.

Most empirical research does not consider file sharing to be a direct substitute for paid sales or services in digital platforms, and some authors even identify positive effects from these practices on the demand for content and ancillary products. Also, it is noteworthy that in a content market in transition—from physical to digital, and from ownership to access-based models—global digital rights revenues have steadily increased. The problem, however, is that creators have not seen a corresponding benefit from that increase, especially in the context of emerging streaming channels.

Furthermore, enforcement is of limited effectiveness in deterring file sharing. This much is clear from the experience of copyright litigation since the early 2000s. Despite the strengthening of exclusive rights, the recognition of legal protection of TPMs, the growing array of available enforcement measures, and institutional backing of rights holders, strict enforcement has not resulted in the elimination of file sharing. Legal, technological and social factors all play a part in this outcome.

From the legal perspective, uncertainty arises from the application of a territorial and substantively fragmented copyright regime to the online use of works. In addition, the jurisprudence of national courts and the CJEU has highlighted the significant legal risks of
enforcement. Perhaps the main peril is the potential hindrance to fundamental rights and freedoms, which have emerged as external limits to copyright protection, de facto preventing (for the time being) some of the severest enforcement measures, like broad filtering injunctions and graduated response systems.

From the technological and social standpoints, the possibilities afforded by digital technologies shape consumer expectations and habits, and allow users to meet those expectations where the law and market fail to do so. Despite the evolution of legal offerings and its potential to fulfil unmet demand, the level of fragmentation of EU copyright law all but ensures a perennial mismatch between what end-users expect and what the market can provide.

In this light, it is reasonable to conclude that a model of exclusive rights and strict enforcement will remain inadequate to address that mismatch, while imposing significant social cost. In tandem, the current legal regime is incapable of generating remuneration for the mass online use of works, and risks creating conflicts between copyright and other fundamental rights.

To address this problem, the present dissertation examines reform proposals that focus on models of remunerated access to copyright works in the online environment, rather than full exclusivity. These models are defined under the umbrella term “alternative compensation systems” or “ACS”. ACS replace the need for direct authorisation for the online use of works by individuals (e.g. downloading and uploading), resulting from the application of exclusive rights, with a licensing scheme authorising such use and ensuring remuneration to rights holders or at least creators. In other words, an ACS restricts the nature or exercise of copyright to replace the current regime for non-commercial online use of works by individuals with a “permitted-but-paid” model.

Empirical research provides a boon for the study of ACS, as it shows these models to be not only acceptable to end-users but also economically promising for rights holders. On the one hand, there is evidence of public support for such legalisation schemes, especially among users that already consume culture online, including high intensity file-sharers. The support is strongest for schemes that provide holistic access to works, with few use restrictions, and at a reasonable price (e.g. a surcharge on the monthly rate of Internet access, within the price range of existing premium streaming services). On the other hand, despite the limitations of existing research, at least one recent study in the Netherlands suggests that a statutory licence system for online recorded music can be welfare increasing and generate superior rights revenue. If nothing else, that study highlights the potential cost of exclusivity over a model of access and remuneration for copyright-protected works online.

The possible benefits of a welfare increasing ACS are many. Rights holders would not only see increased revenues but also savings in enforcement costs. Creators could benefit too if the system includes a mandatory claim to fair compensation, which would mitigate the problems with fair remuneration they suffer due to contractual imbalances in the digital exploitation of exclusive rights. End-users would face a lower risk of infringement, increased legal certainty for their online activities, and experience better online access to works. In the long term, an ACS could promote the circulation of culture and technological development in the information society. In all, a legalisation model that ensures remuneration for non-commercial use of works promises to strike a fair balance between the interests of rights holders and users. These are all good arguments to explore the legal and normative admissibility of an ACS within EU copyright law.
6.1.2 Lessons from the Past

The legal inquiry proper into legalisation systems begins with a trip to the past. If an ACS constitutes a deviation from the principle of exclusivity, it is sensible to investigate instructive precedents in the history of copyright law. Such analysis could assist in identifying legal regimes that ensure remuneration while restricting exclusivity and striking a fair balance between the public interest and the interest of rights holders. It would also allow an understanding of the underlying policy justifications for the adoption of precedents.

Precedents are rules or schemes that address similar problems and share core characteristics to ACS. They are copyright regimes that regulate large-scale use of works through compensated non-voluntary licences. Precedents aim to solve problems relating to the inability of the law to regulate the large-scale use of works made possible by technological developments, manifested in market failures, and in the difficulty or undesirability (practical, legal, or political) of enforcing exclusive rights.

The analysis focuses on two precedents that have inspired multiple legalisation proposals: statutory licences for private copying, and compulsory licences for broadcasting and communication to the public, regimes which are often combined with mandatory collective management.

The origins of private copying can be traced back to the 1950s in Germany. A series of landmark decisions by the BGH extended the right of reproduction to acts of home taping by individuals, simultaneously imposing contributory liability on the providers of copying technology. In response, the German legislator adopted a statutory licence system subjecting such use to a remunerated legal authorisation. The remuneration was paid through a levy imposed on the technology providers, who had a right to pass it on to the final user. This solution provided a workable system for the payment of remuneration (managed by CMOs), ensured a link between the actual use and the payment, respected the privacy of users, and imposed a proportionate burden on intermediaries that benefited indirectly from the legal permission, in exchange for immunity from liability. The technological neutrality of the legal formula ensured the expansion of the levy across a range of tangible media and devices (as levy targets), as well as types of content.

Internationally, references to private copying are found in the preparatory works of different copyright treaties. In the BC’s Stockholm revision conference (1967), the German system was pivotal in shaping the three-step test and equitable remuneration as a flexibility tool to accommodate public interest restrictions to the exclusive right. The debates leading to the WIPO Treaties (1996), on the other hand, addressed the possibility of phasing out levies due to developments in TPMs, but recognised the privacy underpinning of the limitation.

Private copying eventually made it to the *acquis* as an optional limitation in Article 5(2)(b) InfoSoc Directive, which extends to digital private use and is combined with a right to fair compensation. The provision remains relevant to this day despite the legal protection of technological measures and the possibility of contractual disposition of limitations. This relevance, it is submitted, results not only from its market failure justification, but also—and predominantly—from its fundamental rights pedigree.

The BC compulsory licence exempts broadcasters from authorisation for acts of communication to the public of works, subject to equitable remuneration—a largely undefined concept beyond
its ordinary meaning of a fair and just amount, linked to market value and actual use. The licence was introduced in the Rome Act of 1928 in response to the development of radio broadcasting, and amended in the Brussels Act of 1948, allowing inter alia its extension to different modalities of wireless diffusion (television broadcasting, satellite broadcasting, rebroadcasting), and wire transmissions (e.g. Internet retransmissions).

Despite proposals to abolish it, the licence survives to this day, most notably through the Agreed Statement to Article 8 WCT, interpreted by some academics as allowing the application of this regime to the online right of communication to the public. In the acquis, such an interpretation appears to be pre-empted by Article 3 InfoSoc Directive, which would subject a compulsory licence to the three-step test.

The BC licence further provided inspiration for similar regimes in the field of related rights (in the RC, TRIPS, and WPPT), which have survived in the acquis due to the limited scope of Article 3(2) InfoSoc Directive. Also noteworthy is the presence, in the SatCab Directive, of a special regime of mandatory collective management, functionally similar to compulsory licencing.

The two precedents studied illustrate the tendency of copyright law to expand its scope to novel technologies that allow exploitation and use of works outside the exclusive control of rights holders. Although it was initially unclear whether either use should be subject to protection, the response of courts and legislatures was in both cases to extend the exclusive right to such uses. This was done essentially out of a concern that failure to thus extend copyright protection would harm the economic interest of authors and preclude future avenues of commercial exploitation. For private copying, the main justification for this extension was the author’s right to a just pecuniary reward. For broadcasting, the motivation offered was fairness to authors, due to the fact that broadcasting programs were essentially comprised of copyright works.

However, the widening of the exclusive right gave rise to a conflict with the public interest. In private copying, the conflict was prompted by the intrusion of copyright in the private sphere, causing a clash between copyright and consumer rights, the fundamental right of privacy, and the ability of technology providers to carry out their activities. In broadcasting, the conflict resulted from interference with a new means of communication of profound social and democratic value (for the circulation of culture, education, and free speech), and from risks to competition caused by the potential refusal by CMOs to license broadcasters.

Both precedents, therefore, share similar public interest dynamics. On the one hand, the extension of protection is justified by an essential financial consideration: the preservation for authors (and later other rights holders) of benefits arising from the commercial exploitation and use of their works through new technologies. On the other hand, allowing authors to appropriate those exploitation possibilities through the grant of exclusive rights was deemed problematic. First, because it could give rise to market failures; and second, because it conflicted with the public interest in accessing and dissemination of knowledge, protection of privacy, technological development, and competition.

At the intersection of these competing claims, the legal alternative that emerged was to restrict the nature or exercise of the exclusive right, promoting in its stead non-voluntary models of remunerated access and use of works. These models allowed authors to retain the core element of copyright protection—remuneration for the use of works—while preserving and respecting the public interest.
This is the essential lesson from the study of precedents: exclusivity is not totemic, but rather a legal tool for copyright protection, subject to the public interest. Where conflict emerges between the exclusive right and legitimate manifestations of the public interest, models of remunerated access and use—including those based on copyright limitations—offer a legal solution to reconcile and balance competing interests. From this perspective, remuneration becomes more central to copyright protection than exclusivity.

Another important lesson from the analysis concerns the power of rhetoric in copyright policy. It is nothing short of remarkable how much the copyright discussions of yore resemble today’s debates on file sharing and other online activities, especially in relation to the arguments advanced in defence of stronger protection and stricter enforcement. Time has not only revealed these arguments to be inaccurate, but also shown balanced solutions, such as that devised in Germany for private copying, to be more sensible. This should give pause to reflect on whether the current policy direction at EU level—towards exclusivity, priority of technological measures, and stringent enforcement—is the most adequate, in particular vis-à-vis individual non-commercial online uses that are at their core activities of personal enjoyment and expression.

6.1.3 A Taxonomy of Alternative Compensation Systems

Having examined historical precedents, the dissertation turns to the conceptual understanding and definition of ACS. For that purpose, a taxonomy is developed to systematise a representative sample of legalisation proposals. The taxonomy incorporates different models and attributes, characterises their legal nature and effects on copyright in light of international and EU copyright law, and assists in defining the scope of ACS.

The first level of the taxonomy identifies five rights acquisition schemes for the wholesale legalisation of online use: voluntary collective licensing, ECL, mandatory collective management, legal licences (including statutory and compulsory licences), and State Systems. Excluded from the taxonomy are proposals that rely solely on private ordering, that fail to ensure remuneration, or that favour the abolishment of copyright protection.

Voluntary collective management and ECL with the possibility of opt-out for rights holders only operate restrictions on the exercise of copyright. From the purely legal standpoint, these voluntary models would be the most feasible and least impactful legalisation options for rights holders. However, the analysis raises concern as to their ability to facilitate the broad blanket multi-territorial licence required by an ACS. This is for two reasons.

The first reason concerns the hurdles imposed on a voluntary licensing scheme by the substantive rights and territorial fragmentation of copyright in the EU. For example, for an EU-wide licence to cover online music it would require aggregation of multiple rights in each sound recording (often from different owners) across the twenty-eight Member States of the EU.

The second reason relates to potential problems with securing the initial and continued participation of rights holders in different sectors. For either model to work, rights holders would have to, in the first place, adhere to collective management in large enough numbers to make the system worthwhile for users (in voluntary collective licensing), or to meet a representativeness threshold sufficient to trigger the extension effect (in ECL). The challenge is particularly great in sectors (such as the audio-visual) that do not have an established practice of collective rights management of online rights. However, even if the challenge is met, the possibility of opting out is a constant threat to the viability of either system. This is especially true as the value of a
legalisation system to end-users is linked to the breadth of the repertoire and consequent licence, especially regarding the most popular works. If major rights holders decide to withhold or hoard these works, an ACS offers little value to its users.

For these reasons, legalisation schemes based on non-voluntary licences yield greater promise. In this dissertation, the term refers to models such as legal licences, mandatory collective management and so-called “compulsory” ECL (i.e. not allowing rights holders to opt out). Such regimes solve the problems of participation and fragmentation, while ensuring fair remuneration. Furthermore, at least in the music sector, they could leverage the infrastructure and know-how of the existing CMO system in the EU. Of course, State Systems could also, theoretically, address some of the problems identified. However, for pragmatic reasons, proposals of this type imply replacing copyright protection for non-commercial use of works with a public funded system external to copyright. This would require a major overhaul of EU copyright law, to an extent that is not politically realistic or legally feasible. Therefore, State Systems are discarded as a valid policy option for an ACS.

The meaning of “non-voluntary licence” is ambiguous in copyright scholarship. Here, the term is used broadly to mean legal regimes that impose on the rights holder a certain model for exercising copyright, but do not necessarily entail a change to the exclusive nature of the right. In other words, the effect of a non-voluntary licence is not necessarily to transform an exclusive right into a right of remuneration or compensation. Of course, this is a fine and controversial line to walk in legal scholarship, and carries significant consequences for the legal qualification of legalisation proposals of this type. While it is clear that the application of a statutory licence to an exclusive right leads to its conversion into a remuneration right for the licensed use, it is less obvious whether that is so for mandatory collective management (and compulsory ECL), despite the functional similarities between the models.

After analysing the legal arguments for both sides of the debate, this dissertation takes the view that, from the conceptual and legal-technical standpoints, mandatory collective management affects the options for exercise of copyright, not its nature or existence. Thus, it should not be considered a copyright limitation. The upshot is that mandatory collective management of exclusive rights for non-commercial online use of works (e.g. for the licences mentioned in Article 5(3) CRM Directive) could be explored as a model for ACS, subject to the rigorous requirements of this type of collective management, but not the three-step test.

Nevertheless, the contentious nature of this interpretation raises obstacles to its adoption as a policy option. Hence, from the pragmatic and legitimacy standpoints, it is advisable to inquire whether such a model would comply with the three-step test. That same test would apply to a legalisation proposal based on statutory licensing, as the same would require the adoption of a copyright limitation to the exclusive rights affected by the licence.

In addition to characterising different rights acquisition schemes, their key attributes are examined: subject matter scope, substantive rights scope, compensation type, management system, compensation target, and burden of compensation. These attributes help delimit the scope and contours of an ACS, providing a roadmap to design a legalisation scheme consistent with EU copyright law (see infr. 6.2).

In sum, this detailed conceptual analysis provides an in depth understanding of the nature, scope and effects of an ACS, as well as the major legal and practical obstacles to its implementation. These are all essential aspects for the study of the admissibility and consistency of such systems.
with EU copyright law. The analysis also confirms and adds to the findings of the study of precedents, by demonstrating that legalisation proposals are not radical departures from the status quo. Instead, they are extensions and adaptations of existing copyright regimes. Inspiration is taken predominantly from examples of collective rights management and legal licences, with the objective of enabling a model of access and remuneration in the online environment. This realisation should allow us to view the ACS taxonomy as a toolbox of interoperable models and attributes to explore the flexibility of EU copyright law in search of viable reform options.

6.1.4 The Legal Space for Non-Commercial Online Use of Works in EU Copyright Law

The following stage of the analysis is to assess what the law is in the acquis for the regulation of online use of works by individuals. This requires an explanation of how exclusive rights and limitations apply to those uses de lege lata, including areas of legal uncertainty. It is only with this knowledge at hand that we can assess the need and scope for legal reform through an ACS.

Individuals’ online use can be classified in different categories: browsing, downloading, streaming, stream capture or ripping, uploading, hyperlinking, and digital adaptation. These activities trigger application of the harmonised exclusive rights of reproduction and communication to the public in Articles 2 and 3 InfoSoc Directive. Digital adaptations may also be subject to the right of adaptation, which although not harmonised in EU law, is a minimum right in the BC.

In the EU, territorial and substantive fragmentation of copyright makes the adjudication of online uses challenging. The challenge increases due to the CJEU’s complex case law, often a boon for legal uncertainty. In general, the Court interprets exclusive rights broadly, combining technical and economic methods of interpretation to safeguard new modes of exploitation and use of works for rights holders.

The right of reproduction includes most reproductions made over digital networks, applying to browsing, downloading, (down) streaming, stream capture, certain uploads, and the making of digital adaptations. The scope of the online right of communication to the public is less stable in the CJEU’s case law, mostly due to the inconsistent application of different criteria, and the fact that such scope may be influenced by the application of contractual and technical restrictions by rights holders (e.g. in the case of hyperlinking). Regardless, it is reasonable to conclude that this right applies broadly to online use of copyright works by individuals, including Internet transmission of streams, certain uploads, and most types of hyperlinking, with the only clear exception being links to “freely accessible” works.

The outcome of the analysis is that harmonised exclusive rights restrict a broad swath of online activities of end-users. The Court’s fickle case law and technical definition of rights leave other types of online use in a legal grey area. This is the case for example for hyperlinking to unauthorised sources, the legal qualification of the acts of certain platforms under the right of communication to the public (e.g. The Pirate Bay), and uploading copies of works to a restricted group on a social sharing platform. This uncertainty may have a chilling effect on the online activities of providers and end-users, incentivising them to avoid activities that may turn out to be lawful.

Where an exclusive right restricts a use, a copyright limitation in the InfoSoc Directive may nevertheless permit it. The directive’s limitations are mostly optional, do not apply to software and databases, can (in principle) be set aside by contract, and for the most part are superseded by
the application of TPMs. However, a teleological interpretation of limitations sees them as crucial for striking a fair balance between the interest of rights holders in exclusivity and the public interest in circulation of culture and the respect of fundamental rights.

Study of the CJEU’s case law highlights the tensions inherent to this balancing exercise. On the one hand, the Court adopts a doctrine of strict interpretation of limitations, using the three-step test as a tool to narrow the scope of limitations. On the other hand, in some of its most well-crafted judgments, it uses the teleological method to interpret the prototypical wording of some limitations flexibly, in light of their purpose and with respect for the principle of effectiveness. Where a fundamental right provides a motivation for a limitation, the latter’s scope is reinforced in the balancing of interests, to the detriment of the exclusive right.

Therefore, fundamental rights assume an internal function in the determination of the scope of protection. This function is in addition to their operation as external limits to copyright in situations of conflict between fundamental rights. Through this method, the CJEU mitigates the doctrine of strict interpretation in a way consistent with the InfoSoc Directive’s objectives of harmonisation of limitations and fair balance. Arguably, such an approach is also coherent with the goal of achieving a high level of protection, if we take it to mean an “optimal” rather than absolute level of protection.

This approach likewise allows the contemplation of the three-step test as a tool for a flexible and functional interpretation of limitations, a perspective adopted in this study when examining the legal admissibility of a statutory licence ACS (see infra 6.1.5). Yet, even recognising the CJEU’s emergent jurisprudence on fundamental rights-based limitations, it is undeniable that the scope of existing limitations in the acquis is relatively narrow. This is clear from the analysis of the limitations potentially applicable to the types of online use by individuals identified above.

The mandatory limitation for transient and temporary copies in Article 5(1) InfoSoc Directive privileges acts of browsing, but does not clearly exclude from the scope of the reproduction right copies made during (down) streaming of content. The private copying limitation in Article 5(2)(b) InfoSoc Directive could privilege acts of download, (down) streaming, stream capture, and uploading. However, after ACI Adam, the limitation does not cover up/downstream copies made from unauthorised sources, raising doubts as to the lawful character of many common online non-commercial reproductions made by end-users. It is likewise unclear whether upload copies made to cloud servers are within the scope of the limitation and, thus, subject to the payment of fair compensation through levies.

Due to a legislative omission in the acquis, digital adaptations may be subject to the right of reproduction and non-harmonised national rights of adaptation. Where they are covered by an exclusive right, certain adaptations may be exempted by the optional limitations for quotation, incidental inclusions and parody in Article 5(3)(d), (i) and (k) InfoSoc Directive.

The analysis shows that despite some flexibility in this respect, the legal space for unrestricted digital adaptations is limited. First, regulating digital adaptations through a national right of

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1963 This dissertation is critical of the CJEU’s failure to recognise a fundamental rights motivation for the private copying limitation, which may have mitigated the effect of strict interpretation of the Court’s case law on Article 5(2)(b) InfoSoc Directive.
adaptation that allows breathing room for non-commercial use would require narrowing the scope of the reproduction right to literal reproductions. This is a difficult proposition in light of the current CJEU interpretation of the reproduction right. Second, the scope of the aforementioned limitations is too narrow to privilege a significant number of digital adaptations, or decisively reduce legal uncertainty in this field. This conclusion holds true even for fundamental rights-based limitations subject to broad purposive interpretation, such as quotation (after Painer) and parody (after Deckmyn).

The conclusion of the analysis is that a substantial part of individuals’ online non-commercial activity is restricted by an exclusive right, or at least tainted by legal uncertainty. Looking forward, the trend is to reinforce the status quo and extend exclusivity to acts that, in the offline world, would be unencumbered by copyright. An example of this trend in the online environment is the legal status of certain types of hyperlinking by Internet users. In no small part, the current state of affairs is due to the priority afforded to contract and technological measures in the determination of the scope of protection.

The priority of “private choice” over “public choice” stems from the legal design of the InfoSoc Directive and is reinforced by some CJEU judgments. Illustrations include the interpretation of concepts like “authorised source” (in hyperlinking and private copying), or whether the content is “freely accessible” or subject to “restrictions” (in defining the “new public” criterion online). In contrast, “public choice” concerns emerge in the purposive reading of limitations and the impossibility of contractual disposition of fair compensation (provided TPMs are not applied).

This tension between public and private choice at the intersection of rights and limitations leads to a normative insight: the current legal framework, as interpreted by the CJEU, is partly inconsistent with the objectives of EU copyright law, as extrapolated from the InfoSoc Directive and the Court’s interpretation. As it applies to non-commercial online use of works by individuals, the acquis arguably does not ensure adequate compensation, promote the circulation of culture online, enhance legal certainty, strike a fair balance between the rights and interests of authors and the rights of users, or secure a coherent application of limitations that contributes to their harmonisation. Furthermore, a regime that focuses on strict enforcement online poses barriers to technological development in the information society.

The main objective that might be served by the current system is to secure a “high level of protection for copyright holders”. Still, as noted, this phrase should not be interpreted as a synonym for absolute protection, as that may be detrimental to rights holders. Instead, it should refer to an adequate or optimal level of protection, to be assessed in relation to the ability to generate an appropriate reward for rights holders, as well as its coherent application with the remaining objectives of copyright and the public interest.

If the current regulation of non-commercial online use by individuals is inconsistent with the acquis, reform through ACS should strive for a better alignment of the legal rules with those objectives. As noted in the development of different ACS proposals (see 6.1.3), the main obstacles to the wholesale legalisation of the mass online use of works relate to the territorial and substantive fragmentation of copyright, and to difficulties in ensuring the participation of rights

1964 On the objectives of EU copyright law, see supra 1.3, 4.4.1.3, and 5.5.3.
holders in voluntary models of collective rights management, especially in sectors (like the audio-visual) where that practice is uncommon. Furthermore, the analysis of the current legal framework, summarised in this section, highlights the significant uncertainty shrouding the legal status of the online use of works by individuals.

To overcome these obstacles, a future ACS must rely on a legalisation model that ensures aggregation of rights across the EU territory and legal certainty for the types of online use covered. *De lege ferenda*, the best legal solution to achieve these aims is a limitation-based statutory licence applying to non-commercial online acts of reproduction and communication to the public by individuals. The admissibility of such a licence rests on its ability to comply with the three-step test. *A maiore ad minus*, if a statutory licence of this type meets the conditions of the test, so should a legalisation model based on mandatory collective management, as it would arguably impose a lower level of restriction on the affected exclusive rights.

### 6.1.5 The Admissibility of a Limitation-based Statutory Licence for Non-Commercial Online Use Under the Three-step Test and its Consistency with the Objectives of EU Copyright Law

An ACS based on a compensated limitation and statutory licensing provides the best option for wholesale legalisation of non-commercial online use of works. The admissibility of such a model in EU copyright law depends on it passing the three-step test, viewed as a normative tool to strike a fair balance of interests in copyright.

This dissertation develops a framework to interpret the test in light of international law, namely Article 10 WCT and its Agreed Statement, as required by the InfoSoc Directive. After exploring this framework and the spectrum of possible interpretations of the test, it concludes that a flexible interpretation is more in line with the objectives of copyright law, as it enables the consideration of the public interest in the context of a fair balancing exercise. This flexible reading anchors the subsequent overall assessment of a limitation-based ACS in the system of the test and each of its steps or conditions.

The first step (“certain special cases”) requires that an ACS has a sound policy justification, and its scope is both reasonably foreseeable and not overly broad. An ACS is motivated on economic grounds—market failure of exclusivity and enforcement regarding large-scale online use of works by individuals—and by non-economic factors, including the promotion of creativity, circulation of culture, and the protection of fundamental rights and freedoms of end-users (freedom of expression and information, privacy, personal data) and intermediaries (freedom to conduct a business).

From the quantitative perspective, the scope of the ACS is restricted to natural persons and non-commercial online acts of reproduction and communication to the public that are not already exempted by existing limitations to those rights. In relation to the subject matter covered by the licence, it is argued that it should at least exclude software, *sui generis* databases, and videogames. These exclusions would mirror or go beyond some existing limitations in the InfoSoc Directive, such as private copying. Nevertheless, it is open for debate whether the licence ought to exclude additional subject matter to meet the quantitative first condition of the test. A definitive answer to this question would likely require empirical research into the effects of the licence on the normal exploitation of the categories of works affected, which analysis should occur in the second step.
The second step of the test (“no conflict with the normal exploitation of works”) is the main obstacle to a limitation-based ACS. The study finds that the traditional strict interpretation of this step probably prevents the adoption of a legalisation scheme. However, such an interpretation is arguably inconsistent with the objectives of international and EU copyright law, as it removes from the balancing exercise consideration of the public interest and other normative concerns, as well as the remunerative potential of a limitation. This realisation favours a flexible reading of the second step.

Hence, an ACS conflicts with the normal exploitation if it denies creators and exploiters major and foreseeable sources of rights revenue under normal commercial circumstances. In this context, such sources comprise the online commercial channels for exploitation of the exclusive rights affected by the limitation.

On the one hand, a statutory licence ACS is aimed at non-commercial online use of works by individuals. In relation to this type of use, copyright is often not exercised or monetised by rights holders. Moreover, in many circumstances, the use in question only causes minimal harm. The new limitation and accompanying statutory licence will therefore allow the monetisation of this type of use, in what could be qualified de lege ferenda as a normal form of exploitation.

Still, a statutory licence ACS with the proposed scope may indirectly affect authorised downloading and streaming platforms, for which there is a licensing market. The scale of such negative effects is unknown and is therefore only subject to speculation. The best available proxy to make that calculation comes from empirical research on the effect of unauthorised file sharing. Based on existing research, this study conjectures (but cannot state with certainty) that a properly delimited statutory licence can co-exist with authorised commercial offerings. (On this empirical question, further research is necessary, including experiments.)

For this finding to hold, however, the statutory licence should ensure that exclusive rights are enforceable against unauthorised for-profit websites capable of having a significant negative effect on the normal exploitation of copyright online, e.g. through existing authorised commercial channels. Different legal approaches in the design of the limitation or interpretation of exclusive rights may assist in achieving this objective. One is to clearly define what constitutes a permitted non-commercial use by individuals in the ACS, excluding from that scope (and the benefit of the limitation) online exchanges by unauthorised platform operators for financial consideration. Another option, which more clearly addresses the definition of the exclusive right rather than the limitation, is to include within the scope of the right of communication to the public acts of linking to unauthorised sources and/or the activities of platform operators. The combination of an ACS-limitation with this interpretation of the exclusive right would in effect exclude such unauthorised platforms from the benefit of the licence. This last option, it is noted, may materialise (at least partly) as a result of the CJEU’s interpretation of the right of communication to the public in pending cases on hyperlinking.1965

These options could be supplemented by self-regulation, endorsed at EU level, aimed at targeting unauthorised for-profit platforms, but not end-users.

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1965 The pending cases at the time of writing are: CJEU, Reference for Preliminary Ruling, Case C-160/15, GS Media; CJEU, Reference for Preliminary Ruling, Case C-527/15, Filmspeler; CJEU, Reference for Preliminary Ruling, Case C-610/15, Stichting Brein v Ziggo.
Assuming it is possible to delimit the scope of the ACS along these contours, the system will legalise online use by end-users, eliminating primary liability for their actions, and a limited set of online intermediaries, who should no longer be subject to intermediary liability. Among the intermediaries indirectly benefiting from this legalisation effect will be those providers that enable or facilitate permitted acts by individuals under the licence, but whose activities do not qualify as reproduction or communication to the public of works. The ACS should also not affect the current regime of safe-harbours of the E-Commerce Directive, meaning that the activities of “neutral” intermediaries that qualify for those exemptions of liability will not be infringing. Outside the limited scope of those safe-harbours, the legal status of the activities of intermediaries will be assessed on the above terms. As a rule, the delimited scope of the statutory licence will mean that unauthorised online platforms providing access to works on a for-profit basis will not benefit from the legalisation scheme.

As noted before, even on a flexible interpretation of the second step, only by delimiting the scope of the statutory licence in this manner is it possible to argue that it does not conflict with the normal exploitation of works. However, it is legitimate to ask, de lege ferenda, whether this limited legalisation effect on online intermediaries is the most satisfactory from a normative perspective.

The third step (“unreasonable prejudice to legitimate interests”) warrants a balancing exercise pursuant to the principle of proportionality. This exercise takes into account the reasonableness of the prejudice imposed by the limitation, together with a consideration of the legitimate interests of rights holders (i.e. the creators and exploiters of exclusive rights identified in the InfoSoc Directive) and the collective and individual manifestations of the public interest. The legitimate interests of rights holders include the concurrent and opposing interests of creators and exploiters; a major tension between creators and exploiters relates to the focus of the former on fair remuneration and the preference of the latter for assignable exclusive rights and stricter enforcement. On the other side of the spectrum, the public interest should include the legitimate interests of users and intermediaries in the protection of their fundamental rights and freedoms, as well as in the promotion of creativity and circulation of works.

A limitation leads to unreasonable prejudice if it causes harm to rights holders in a way that is disproportionate to the benefits it brings to the public interest. The main prejudice caused by an ACS for rights holders relates to the aforementioned indirect effects on the commercialisation of works through authorised online channels.

One method to reduce harm to reasonable levels is through the provision of fair compensation. Existing research suggests that a statutory licence ACS is able to generate sufficient rights revenue to operate such a reduction. In light of this research, it is suggested that fair compensation in an ACS is calculated on the basis of harm, observing the mitigating factors identified in the InfoSoc Directive, but following a method of contingent valuation. This method would maintain the required link between harm and privileged use, while approximating fair compensation to the notion of “appropriate reward” to incentivise creativity, thereby fulfilling a declared objective of EU copyright law.

Still, in light of the limitations of existing research and the volatile nature of business models in digital networks, the study stresses the need to examine the policy motivations of an ACS, extracted from the analysis of different legitimate interests of creators, exploiters, and the users.
A limitation-based statutory licence ACS coupled with an unwaivable fair compensation right would favour the interests of creators in fair remuneration for online use of their works. It would, it is true, run counter to the declared preference of some (perhaps most) exploiters for preserving assignable exclusive rights in the online environment and for stronger enforcement measures. However, the system simultaneously ensures rights holders of the affected exclusive rights a share of the fair compensation collected, which amounts to a new rights revenue stream from previously uncompensated use.

The prejudice caused by the ACS should be considered reasonable if the fair compensation provided to creators and exploiters as a whole offsets the harm caused by the limitation. Because this calculus relies to a significant extent on empirical questions for which there is no definitive answer, the fate of the limitation ought to rest on the balancing of normative considerations. In other words, the public interest should be the final arbiter of whether it is justified and proportionate to adjust the scope of protection of the exclusive rights of online reproduction and communication to the public in EU law to accommodate an ACS-limitation.

On a balance of interests, this dissertation finds that a statutory licence ACS serves the public interest better than the status quo on two important levels, which relate to goals of EU copyright law. First, it is a superior scheme to promote access and dissemination of knowledge, and therefore the circulation of culture over digital networks, as it concerns non-commercial individual online use of works. Second, for the regulation of such types of use, a properly designed statutory licence provides superior protection for the fundamental rights and freedoms of Internet users as compared to strict enforcement measures (e.g. filtering, blocking, and Internet disconnection). This is true for the right of privacy in telecommunications, the protection of personal data, and freedom of information and expression.

Analysis of the fundamental right to conduct a business is inconclusive in this respect. Some intermediaries will benefit from the ACS, as the risk of intermediary liability arising from the online activities of their users will diminish. For ISPs, however, these benefits may be offset by the requirement that they participate in the system as intermediary debtors of a broadband levy. Allowing ISPs to pass on the levy to their non-professional subscribers and to recover administrative costs imposed by the system will reduce most of the burden; this option may even be preferable to a future scenario where these intermediaries are subject to additional liability and responsibilities in the application of enforcement measures.

The net result of the balancing exercise is that it is legally admissible to adopt a limitation-based statutory licence in compliance with EU copyright law. This possibility, however, hinges on careful delimitation of the scope of the limitation and a flexible reading of the concept of “normal exploitation of works”, which turns on complex legal and empirical questions. Whereas this dissertation addresses the legal issues, resolution of the crucial empirical questions is outside its scope.

In this light, the dissertation resorts to the toolbox developed in the ACS taxonomy to explore two flexibility mechanisms that have the potential to assist in overcoming conflicts with the normal exploitation of works: embargo periods and opt-out rules. Although embedding either model in an ACS is legally feasible, it concludes that they add complexity and impose costs that are difficult to quantify. Therefore, their adoption warrants caution. Notably, it appears extremely challenging to implement either mechanism across different categories of works and content sectors. Consequently, managing such a differentiated system could translate into a
costly logistical challenge, detrimental to its consideration as a policy option. Furthermore, adoption of either mechanism would hinder the value of the system to end-users by reducing the subject matter scope of the licence, and significantly decreasing legal certainty for Internet users. The balance of arguments suggests that, absent compelling evidence to that effect, the coupling of an embargo period or opt-out rule to a statutory licence ACS would not be decisive in overcoming a conflict with the normal exploitation of works.

The analysis concludes for the tentative admissibility under EU copyright law of an ACS for mass non-commercial online use of works by individuals based on a statutory licence and compensated limitation to the exclusive rights of reproduction and communication to the public. That admissibility, however, rests on fundamental normative choices for policy makers on the regulation of non-commercial use of works. A choice for such a legalisation model is a choice for flexible over strict interpretation, for access and remuneration over exclusivity and enforcement, for public over private ordering. Furthermore, a public ordering approach requires recognition of the internal effect of fundamental rights in determining the scope of copyright protection. As noted before, both choices are possible and have their merits and drawbacks. Whether we favour one over the other will in essence turn on our normative view of EU copyright law and where its fair balance should be struck in the regulation of this type of use.

In that light, the remainder of the analysis assesses whether a public ordering choice for a model of access and remuneration for non-commercial online use through a statutory licence ACS is consistent with the rationale for copyright, various normative considerations, and the objectives of EU copyright law.

In the first instance, an examination is made as to whether the dominant theories of copyright in the European legal tradition—natural rights (encompassing the fairness and personality theories) and utilitarianism—can accommodate a right of access and remuneration. Manifestations of these theories, it is noted, serve both as justifications for the grant of protection and objectives of EU copyright law. Therefore, they play a role in determining the scope of protection, including in justifying restrictions on exclusivity.

From the perspective of the natural rights theory, a statutory licence ACS impacts the material interests of authors in the online exploitation of their works. Therefore, the main challenge it poses is to Locke’s fairness theory. The application of the theory and its desert-for-labour argument to copyright is not undisputed. However, assuming that its application provides a sound rationale for copyright protection through a property right in creative works, the fairness theory does not mandate the absolute nature of that right. Instead, it allows restrictions thereto. For the present purposes, the most relevant restrictions result from the operation of the sufficiency proviso and, even more prominently, from the public interest. In particular, Locke’s theory envisages that the transition from the state of nature to a civil and political society can be accompanied by restrictions on rights based on public interest considerations. Among the acceptable restrictions is the contraction of the prohibition element of copyright (exclusivity), provided its reward element (remuneration) is secured. In this way, the material interests of authors, central to copyright protection, are safeguarded.

The result of the analysis is that there is space in the fairness theory to accommodate an ACS for non-commercial use, subject to certain conditions. First, that it ensures remuneration for the permitted use. Second, that it is justified on the public interest, arguably beyond market failure.
For the reasons detailed above in the examination of the three-step test analysis, it is submitted that both conditions are met by statutory licence ACS.

From the viewpoint of the utilitarian theory, copyright protection is justified in the public interest, with the aim of incentivising the creation and dissemination of works. Copyright works share some of the characteristics of public goods, meaning that they are non-rivalrous and non-excludable. Consequently, they also share some of its problems, namely that third parties can freely access and use works without payment to the creator or rights holder, preventing private market actors from charging prices that allow a return on investment and ultimately endangering the provision of such goods. The exclusive right (a property rule) is viewed as an efficient solution to the problem of non-excludability, as it allows copyright owners to recover their costs of creation in a market setting, fostering the production and supply of works.

In the context of the utilitarian theory, the grant of exclusive rights is justified if the benefits it creates offset the costs it imposes. Conversely, if the costs outweigh the benefits, it is justifiable to impose restrictions on the exclusive nature of the right. For the regulation of non-commercial online use by individuals, the application of the exclusive right imposes different types of cost: chilling effects on follow-on creativity, transaction costs, and administration and enforcement costs. It is argued that these costs could justify regulating this type of use through a liability rule, such as a limitation-based statutory licence ACS. Therefore, and in theory, such a legalisation model is consistent with the utilitarian theory. Still, whether its adoption is desirable ultimately depends on empirical research on the associated costs and benefits, as compared to the current regime. In this respect, although further evidence is required, existing research cited throughout the dissertation suggests that a properly designed ACS could be welfare increasing.

After establishing that it is possible to accommodate a model of access and remuneration in the natural rights and utilitarian theories, the analysis focuses on whether such a model is coherent with the human and fundamental rights characterisation of copyright, including its property right status in certain legal instruments, such as the ECHR (Article 1 Protocol No. 1) and the Charter (Article 17). It is clear from this study that copyright protection is not absolute, and by extension neither is the exclusive dimension of the right. Rather, copyright protection has at its core dimensions of access (the availability of works and cultural participation), and remuneration (securing the material interests of authors).

It is suggested that restrictions to the scope of copyright protection are a result of its social function, which requires an adequate balance of interests in the definition of that scope. Hence, the contours of the right, including the objectives and conditions of its exercise, should consider not only the position of rights holders, but be drawn in light of the public interest.

There are different methods to incorporate the social function and public interest in the calibration of the scope of protection. From an internal perspective, it is possible to consider individual and collective manifestations of the public interest in the three-step test and its balancing exercise, thereby providing a justification for the introduction of a copyright limitation. (An example of this approach is found in Chapter 5 of this dissertation).

From an external perspective, we can envisage two different angles. From one angle, certain fundamental (or constitutional) rights provide a justification for a positive right of access and remuneration. This is the case for the universal right to culture and science in Articles 27(1) UDHR and 15(1) ICESCR. From another angle, the property right protection of copyright allows restrictions on its scope resulting from the public interest in the relevant provisions of the ECHR.
and Charter, and imposes limits on protection by virtue of the application of conflicting fundamental rights and freedoms; in some cases, like in *Luksan*, those limits are admissible subject to the payment of fair compensation.

These normative considerations lead to the conclusion that it is admissible to modulate the nature and options for exercise of copyright in light of the public interest. This is evidenced throughout this dissertation in mechanisms that include voluntary and mandatory models of collective rights management, as well as statutory and compulsory licences. Translating these considerations into the regulation of mass non-commercial online use of works by individuals, there are strong normative arguments to accept the replacement of the exclusive right with a limitation-based statutory licence ACS. In addition, the analysis supports the qualification of the underlying fair compensation right as unwaivable, and denotes a preference for its mandatory imposition, together with some level of protection against disposition by contract or technological measures.

The last stage of the normative analysis explores whether and to what extent the proposed legalisation model is consistent with objectives of EU copyright law. These objectives are taken from the recitals of the copyright directives—especially the InfoSoc Directive—and the vast jurisprudence of the CJEU on copyright. The seven objectives identified are: fair balance between the rights and interests of authors and the rights of users; high level of protection for copyright holders; adequate compensation or appropriate reward; circulation of culture; resolution of legal uncertainty; technological development, including the promotion of the information society; and harmonisation of copyright law to achieve a functioning internal market.

The analysis concludes that a statutory licence ACS for non-commercial online use by individuals, subject to the delimitations arising out of the three-step test analysis, is more consistent with these objectives than the current regime. A touchstone of this analysis, derived from the previous normative considerations, is the view that a “high level of protection” does not mean an “absolute” level of protection. Rather, it means an optimal level of protection to ensure adequate compensation for copyright owners, with an emphasis on creators. Furthermore, this level of protection is not determined in a normative vacuum. It must be articulated with the remaining objectives. That is to say, the level of copyright protection—and with it the scope of the right—can and should be modulated in order to achieve the remaining objectives of the law, such as the circulation of culture, the improvement of legal certainty for users in the online environment, and the removal of obstacles to technological development in the information society.

Ultimately, where there once was a wall, this dissertation hopes to open a policy window for lawmakers in the copyright field regarding the regulation of non-commercial online use. The view from that window shows a possible alternative to a legal regime that favours private ordering, strict interpretation, exclusive rights, and technological measures. It shows a system based on public ordering, a flexible and technology neutral reading of copyright law, and an online culture of access and fair remuneration. That system, as demonstrated here, can be reconciled with the justificatory theories of copyright and the particular objectives of EU copyright law, arguably better than the current regime. As a result, it is concluded that the *acquis* can and should be reformed to include a limitation-based statutory licence ACS. The following section draws the contours of such a system, offering a blueprint for copyright reform.
6.2 A Blueprint for Reform: A Limitation-based Statutory Licence for Non-Commercial Online Use of Works by Individuals

Until this point, the present dissertation has developed a normative argument for reform of EU copyright law to accommodate a right of access and remuneration for non-commercial online use of works by individuals. This section concludes the analysis and provides the last piece to answer the dissertation’s research questions by setting out a workable structure for such a right. In other words, this section provides a legal blueprint for a limitation-based statutory licence ACS that is consistent with a flexible view of EU copyright law. The objective is to supply policy-makers with a modest proposal to inspire legal reform. The following paragraphs set forth the scope and essential elements of that ACS.

6.2.1 Beneficiaries (and Intermediaries)

The ACS authorises acts by Internet users that are natural persons. Legal persons and institutions are not direct beneficiaries of the system. Nevertheless, a limited number of online intermediaries may benefit indirectly from the statutory licence, to the extent they were subject to intermediary liability for acts of their users that are now exempt from authorisation. As noted above, this legalisation effect will benefit providers that enable or facilitate permitted acts of individuals under the licence, but whose activities do not qualify as acts of reproduction or communication to the public of works. It is difficult to make an exact determination of the number and type of intermediaries exempted due to the legal uncertainty arising from CJEU case law on the right of communication to the public, and the fact that intermediary liability is not harmonised in EU law beyond the safe-harbours in the E-Commerce Directive. However, as previously argued, a properly scoped licence should exclude unauthorised online platforms that provide access to works on a for-profit basis, whose activities will continue to be infringing.

Furthermore, as with other compensated limitations in the acquis, pragmatic considerations should make it possible to identify an intermediary as the primary debtor of fair compensation, with a right to pass on the levy to end-users. For efficiency reasons, ISPs are the preferred levy targets. However, as discussed below at 6.2.6, other intermediaries may be targeted, namely online service providers that indirectly benefit from the limitation. While that is a possibility, the analysis in this dissertation and existing empirical research suggest that it is sufficient to levy solely ISPs and household connections. Therefore, the extension of the levy base to other goods or services should be justified by evidence, as it may needlessly interfere with the affected intermediaries’ freedom to conduct a business.

6.2.2 Subject Matter Scope

In theory, the ACS can apply to all types of work capable of digital expression and online sharing. This is one of the advantages of the system: that it presumptively includes all works

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1966 See, in the context of private copying, CJEU, Padawan, ¶¶46, 48; CJEU, Reprobel, ¶70.
1967 See supra 5.3.3.6.3. See also Handke et al., 2015.
made available online, both domestic and foreign to an EU Member State.\textsuperscript{1968} An ACS in this form would amount to a “global” as opposed to sector-specific legalisation scheme.

However, a global licence extending to all conceivable categories of work and subject matter may not be compliant with the three-step test for failing to be a certain special case.\textsuperscript{1969} Thus, in line with other legalisation proposals, it is important to consider subject matter exclusions to the licence.\textsuperscript{1970}

If the ACS-limitation applies to the exclusive rights regulated in the InfoSoc Directive, logic dictates the exclusion from its scope of software and databases.\textsuperscript{1971} These types of work or subject matter have idiosyncratic justifications and legal regimes, set out in the “vertical” Software and Database Directives, which are difficult to articulate in a single system with other types of work. Moreover, the software and database sectors do not suffer to the same extent from the problem of mass-scale infringement, and operate according to specific logics.\textsuperscript{1972}

Similar arguments apply to videogames. These complex works of authorship include and combine different types of copyright subject matter that may be individually protected (e.g. film, music, text, databases, photographs, and maps) and involve an element of human interaction “while executing the game with a computer program on specific hardware.”\textsuperscript{1973} The majority of video games contain as core elements an audio-visual component and the software on which they run, there being significant controversy as to their legal qualification as multimedia works, audio-visual works, or software.\textsuperscript{1974} The CJEU seems to embrace a multi-layered protection approach in \textit{Nintendo}, when it states that videogames

constitute complex matter comprising not only a computer program but also graphic and sound elements, which, although encrypted in computer language, have a unique creative value which cannot be reduced to that encryption. In so far as the parts of a videogame, in this case, the graphic and sound elements, are part of its originality, they are protected, together with the entire work, by copyright in the context of the system established by Directive 2001/29.\textsuperscript{1975}

The complex legal nature of videogames, their proximity to software, the specificities and norms of the sector, and the absence of infringement and enforcement issues that justify an ACS, all argue for their exclusion from the system.\textsuperscript{1976}

\textsuperscript{1968} N.B. solutions based on collective rights management can only include foreign works if mandated by law or based on representation agreements with foreign CMOs.

\textsuperscript{1969} See supra 5.3.1, 5.3.4, and 6.1.5.

\textsuperscript{1970} See supra 3.4.1.

\textsuperscript{1971} See supra 4.4.1, on the legal framework of limitations in the InfoSoc Directive.

\textsuperscript{1972} See, regarding software, Kantar Media, 2015.

\textsuperscript{1973} Ramos, López, Rodriguez, Meng, & Abrams, 2013, pp. 7–9. See also Grosheide, Roerdink, & Thomas, 2013.

\textsuperscript{1974} Grosheide et al., 2013, pp. 9–11; Ramos et al., 2013, pp. 7, 10–11. In distinguishing videogames from audiovisual works, the element of control/interaction in the former seems to be crucial. Cf. Grosheide et al., 2013, p. 11: “So it may be said that control is the defining keyword that discerns video games from movies. Stated differently: when a film runs, it performs the same work every time, whereas when an interactive game is played it follows the instructions by its user.”

\textsuperscript{1975} CJEU, \textit{Nintendo}, ¶23.

\textsuperscript{1976} See e.g.: Katzenbach, Herweg, & Roessel, 2016, finding imitation is accepted as a common practice in at least a sector of the videogame industry, despite copyright law; Ramos et al., 2013, pp. 7–11, 93–96, on the legal
It may also be sensible to exclude categories of work linked to particular purposes and sectors which are alien to the rationale of an ACS. One possibility is to exclude scientific publications which are used primarily for research purposes, rather than self-expression or personal enjoyment. Currently, online access to these works in the EU results from a combination of paid subscription and open access models, with much debate on the best model going forward. The objective of an ACS is not to solve this problem. Furthermore, the InfoSoc Directive already contains a limitation for “teaching or scientific research”, as well as “research or private study”.

The main policy choice on the table is whether to extend the ACS to all or most types of work covered by the InfoSoc Directive, carving out specific categories where justified, or build the system on a sectorial approach, as occurs in ECL systems. Sectorial approaches—like a statutory licence for online music, audio-visual works, photos or literary works—may be easier to implement and justify with recourse to empirical research. For example, a licence specifically tailored to the audio-visual sector can better take into consideration the territorial segmentation practices in that area than a “one-size-fits-all” scheme.

A sectorial or category-based approach would also have the practical advantage of building on existing infrastructures of collective rights management. For example, these infrastructures are already in place in the music and literature sectors, but are far less developed or even non-existent in other sectors. This reality should inform policy makers and may steer them towards the more pragmatic approach of considering an ACS for more traditional categories of protected works and related subject matter.

In addition, from the perspective of evidence-based reform, it is wise to experiment with the system in discrete fields based on research on the inadequacy of the market to fulfil user expectations. A limitation of this fashion is not foreign to EU copyright tradition, and subject matter-specific privileges can be found for example in the InfoSoc Directive. The disadvantage is obvious: end-users will have only a limited licence for one type of content. The resulting system may be unattractive to users desiring access to other types of content for non-commercial purposes. For the excluded categories, the issue of large-scale unauthorised use may persist. What is more, the value of an ACS to users resides in the universal nature of the licence. It turns out that the sum of all parts (a global licence) is more valuable than each part in isolation.

qualification of video games, concluding that the “majority of jurisdictions tend to protect these works of authorship as software”, but noting that it is a common practice in the industry to share part of the source code between different developers; and Grosheide et al., 2013, p. 13, noting that “in the EU generally and in the Netherlands particularly, proceedings about infringing intellectual property rights in video games seldom take place”. On the relatively low volume of online infringement of videogames, see, e.g., Kantar Media, 2015.

Art. 5(3)(a) and (n) InfoSoc Directive. Another example, less relevant for mass online use, is sheet music. Sheet music is already excluded from the scope of the reprography and private copying limitations. See CJEU, Reprobel, ¶¶50–56.


See P. Bernt Hugenholtz & Quintais, 2016 (forthcoming), exemplifying with music, text, visual and video.

See, e.g., Art. 5(3) (c), (f), (h), and (m) InfoSoc Directive.
isolation (a sector-specific licence). For that reason, research shows that the relative revenue generated by a sectorial licence may be lower than its value within a global licence.\footnote{See the results reported in Vallbé et al., 2015 and the results reported in Handke et al., 2015 (Appendix 2, Table 5, “Subject matter”).}

In the end, there is an inextricable link between the subject matter and substantive rights scope of an ACS. If it is possible to delimit the permissible non-commercial online use so as to prevent conflicts with the commercial exploitation of the same category of works, the policy benefits of an ACS point towards its extension to the same subject matter covered by the InfoSoc Directive, with additional discrete exclusions (e.g. videogames and scientific publications). On a balance of arguments, this appears to be the preferable design choice. Still, if this approach proves too challenging, policy-makers could alternatively delimit the scope of the statutory licence to the types of content for which the risk of conflict with major sources of rights revenue is minor, and for which the payment of fair compensation reduces the potential harm to tolerable levels.

Furthermore, the scope of the ACS should only include works or subject matter lawfully published or made available online. That is to say, a work is only available for non-commercial online use after rights holders authorise its first public disclosure offline or over the Internet.\footnote{See ALAI, 2012, on the determination of the country of origin when a work is first publicly disclosed over the Internet.}

This condition does not require the lawfulness of the source of the copy of a work for its subsequent online use by individuals. As argued before when discussing private copying post-
\textit{ACI Adam} and hyperlinking post-
\textit{Svensson}, such a requirement would be impractical and detrimental to an ACS-limitation’s effectiveness, rendering it devoid of meaning.\footnote{See the discussion \textit{supra} at 4.3.2.2, 4.3.2.3, 4.4.3.6, 4.4.3.8, 5.3.2.3, 5.3.4, 5.5, 6.1.4, and 5.5.3. See also the criticism in Poort & Quintais, 2013; Quintais, 2015a, 2015b.}

Instead, it makes sense to require the authorisation of rights holders for use of a commercial nature, allowing them to enforce their copyright against unauthorised for-profit websites. This set-up allows the preservation of enforcement avenues against dissemination of works through unauthorised sources that may cause economic harm to copyright owners, without subjecting end-users to liability for infringement or high transaction costs to use works online.\footnote{With respect to the enforcement avenues available to rights holders in the context of an ACS see \textit{supra} 5.3.2.3. See also \textit{Opinion AG in GS Media}, ¶¶80–87, regarding enforcement measures available even where copyright protection does not extend to hyperlinking from unauthorised sources (discussed \textit{supra} at 4.3.2.3).}

### 6.2.3 Substantive Rights Scope: Authorised Non-Commercial Online Use of Works

The limitation-based statutory licence ACS applies to non-commercial online acts of reproduction and communication to the public by individuals. For that type of use, the aforementioned exclusive rights in the InfoSoc Directive are recast as rights of fair compensation. Hence, the limitation covers the \textit{online} rights required by end-users to engage in non-commercial exchanges of digital works over the Internet, “including other interconnected wired or wireless networks.”\footnote{P. Bernt Hugenholtz & Quintais, 2016 (forthcoming). The “online” portion of the definition should not be problematic as it mirrors an existing reference in the \textit{acquis}, namely that of “online rights in musical works” in Art. 3(n) CRM Directive.}
As a matter of legislative design, the application of the statutory licence ACS to at least two exclusive rights can give rise to one or more copyright limitations. For example, Article 5(2) InfoSoc Directive lists cases allowing for a limitation to the reproduction right, whereas Article 5(3) InfoSoc Directive and the Orphan Works Directive prescribe limitations to the rights of reproduction and communication to the public.

The scope of the limitation or limitations does not need to encompass types of use of works already covered in the directive by other limitations, discussed in Chapter 4. These include temporary and transient copying, private copying, quotation, incidental inclusion and caricature, parody and pastiche. However, the possibility of overlap with existing limitations cannot be discounted. This is not problematic per se, as overlap of this type already exists in the InfoSoc Directive, for example between the reprography and private copying limitations, and should not be detrimental to the adoption of an ACS. Rather, this possibility ought to inform the design of the system and the calculation of fair compensation (see infra 6.2.4).

A central characteristic of the proposed limitation is that it privileges “non-commercial” use. This dissertation argues that the term should be understood as a legal standard and an autonomous concept of EU law. In the context of a statutory licence ACS, the concept covers online use of works by individuals that is not in direct commercial competition with parallel use by rights holders. Using the language of the private copying limitation in art 5(2)(b) InfoSoc Directive, the use in question is “for ends that are neither directly or indirectly commercial”.

The main issue lies with drawing a precise line between direct and indirect commercial ends, acts or types of use. In the field of private copying, national legislators and courts struggle with the application of subjective and objective tests to draw this line and define the scope of the limitation. For an ACS, it is likewise possible to define non-commercial use with recourse to objective or subjective criteria.

A subjective criterion focuses on the intention of the user. It suggests knowledge as to the state of mind of the individual in relation to their online use of works. This intent-based approach is followed for example in the creative commons licences, which define non-commercial use as “not primarily intended for or directed towards commercial advantage or monetary compensation.”

In contrast, an objective criterion emphasises the commercial nature or character of the use itself (rather than the intention of the user) and attempts to identify indicators of the same. In the field of private copying, for instance, examples of this objective approach include the number of permissible copies per person or the number of persons included in the private sphere of the

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1986 For an example of this overlap, see CJEU, Reprobel, ¶¶32–43. See also von Lewinski & Walter, 2010, pp. 1027–1028.
1987 See supra 1.2 and 5.1.
1988 See supra 4.4.3.2. See also Karapapa, 2012, pp. 82, 91.
1989 See CREATIVE COMMONS, NonCommercial interpretation, https://wiki.creativecommons.org/wiki/NonCommercial_interpretation (Accessed 30.04.2016): “The definition is intent-based and intentionally flexible in recognition of the many possible factual situations and business models that may exist now or develop later.” See also Creative Commons, 2009, for an in depth study of the user understanding of the term “non-commercial”.

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copier. Another notable use of this criterion is the concept of “commercial scale” in Article 61 TRIPS. This concept has been interpreted to mean “counterfeiting or piracy carried on at the magnitude and extent of typical or usual commercial activity with respect to a given product in a given market”.\textsuperscript{1990}

Infringements on a commercial-scale are the focus of efforts by the Commission to modernise enforcement of intellectual property rights with the objective of achieving better access to digital content and a functioning Digital Single Market.\textsuperscript{1991} In this respect, it is informative to remember the European Parliament’s criticism of the use of the “commercial-scale” concept in relation to criminalisation of copyright infringement by end-users in the proposed (and rejected) directive on criminal measures. Indeed, the European Parliament requested that commercial scale expressly exclude acts “carried out by private users for personal and not-for-profit purposes”.\textsuperscript{1992} This exclusion introduces subjective criteria to delimit an objective concept.

If we consider the non-commercial concept to be a standard, it makes sense to accept a combination of subjective and objective factors to assess the purpose or nature of the use. The concept should focus on online activities carried out by individuals for personal enjoyment of works (not necessarily in the private sphere) and outside the market sphere. Hence, “non-commercial” should exclude online use of works for profit, within a commercial context (e.g. a business activity of an individual), or otherwise directed at commercial advantage or monetary compensation.

In principle, end-users should not derive profit or monetary consideration from the use. An illustration is “the use of the work in combination with ads, publicity actions or any other similar activity intended to generate income for the user or a third party”.\textsuperscript{1993} The third parties here are digital platforms, like Google, whose main business model is online advertisement.\textsuperscript{1994} As noted, this definition would prevent individual operators of P2P and other platforms that generate advertising or sponsorship or other financial consideration in connection with the exchanged works from being exempt from liability as a result of the adoption of the statutory licence.\textsuperscript{1995} However, this definition should not prevent individual Internet users from benefiting from the ACS where their use is for enjoyment of cultural works online. Hence, it must be clear that the non-commercial scope of the limitation leaves space for acts of end-users that, although not

\begin{footnotes}
\item[1993] The example is provided by Metzger & Heinemann, 2015, p. 13, reporting on a pilot project in the Netherlands developed by the CMO Buma/Stemra, which defined “commercial” as including use made against any “financial compensation”, such as “the use of the work in combination with ads, publicity actions or any other similar activity intended to generate income for the user or a third party”.
\item[1995] See the discussion supra at 5.1 and 5.3.2.3.2, with reference to Metzger & Heinemann, 2015, p. 16. See also supra 6.1.5.
\end{footnotes}
carried out with a profit-making intention, nonetheless bear economic significance. To define the concept otherwise—i.e. to exclude from its scope any type of use or works with economic value—would deprive the ACS-limitation of any useful scope and effect, limiting it to *de minimis* use. The example that comes to mind is that of cost savings for users that would be willing to pay for access to the work outside the ACS. The payment of fair compensation is designed to address such potential harm to rights holders (and return it to tolerable levels), provided the permitted use does not conflict with major sources of right revenues of copyright owners.

In the few instances where end-users’ online activities fall in the grey area between commercial and non-commercial use, it will be up to the courts—and ultimately to the CJEU in the interpretation of this autonomous concept—to qualify the use. Regardless, whatever indirect financial consideration end-users receive in grey-area cases, it is unlikely to cause substantial harm to rights holders, and should therefore be susceptible of compensation in the context of a statutory licence ACS.

### 6.2.4 Fair Compensation

An ACS should provide “fair compensation” to rights holders. To be consistent with EU law, the limitation for non-commercial use should be aligned with this autonomous concept, as interpreted by the CJEU in a number of judgments on the private copying and reprography limitations.

The right to fair compensation is unwaivable, and vests solely in the authors and related rights holders that in EU law are granted the exclusive rights affected by a limitation. As a result, the grant of a right of fair compensation ensures, first, that creators receive a share of the amounts collected under the statutory licence system and, second, that they are not forced to transfer that share to exploiters (e.g. publishers). Therefore, as argued previously, this design contributes to the objective of adequate compensation or appropriate reward to authors, in line with the remuneration aspect of copyright and its philosophical mandate to protect the material interests of authors, which are instrumental to incentivising creation.

Fair compensation should reflect the harm suffered by creators and other rights holders of the affected exclusive rights. As suggested in Chapter 5, the potential harm caused by the introduction of an ACS-limitation should be considered in terms of the prejudice suffered by copyright owners due to their inability to exercise their copyright for the non-commercial online use of works. Because there is no market to accurately determine the price for the type of use in question, harm should be calculated on the basis of a different reference point. It could be determined, for instance, by measuring users’ willingness to pay through a method of contingent valuation. In addition, the calculation of fair compensation ought to account for the

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1996 See *supra* 5.3.3.3, 5.5.2, 5.5.3, and 6.1.5.
1997 On private copying, see *supra* 2.3 and 4.4.3. On potential solutions to structure collection and distribution of rights revenue, see *supra* 3.4.4–3.4.6.
1999 Cf. *supra* 5.5.
2001 See *supra* 5.3.3.3 and 6.1.5.
mitigating factors mentioned in the InfoSoc Directive. These include the *de minimis* nature of use, prior payments for the same use, and the application of TPMs. Each factor deserves further explanation.

First, following recital 35 InfoSoc Directive, if fair compensation reflects harm, its calculation should exclude use of works causing only minimal prejudice to rights holders. This approach is consistent with a method of contingent valuation, as it is unlikely that individuals place any value on minor online use of works.

Second, calculation of fair compensation and the respective broadband levy should take into account whether rights holders include in the licence fee or purchase price of digital content an additional amount to compensate for the types of use privileged by an ACS. If this occurs, the principle of *de minimis* harm and the fair balance aim of the InfoSoc Directive may warrant that “no specific or separate payment” is due. However, there are obstacles to reduction of the levy on this account. On the one hand, after *VG Wort*, it seems that use of works allowed by a limitation is permissible regardless of authorisation by copyright owners. If the same rationale is valid for the non-commercial use permitted by an ACS, any authorisation by rights holders for that use is devoid of legal effect. Consequently, such authorisation should not influence the calculation of harm.

On the other hand, it is challenging for rights holders to price into their online transactions the utility to end-users of a licence for non-commercial use. Like with private copying from unauthorised sources, rights holders will struggle to indirectly appropriate that utility. Because the marginal costs of copying and sharing files online are constant and near zero, and the size of the user group is not fixed, rights holders are not able to price discriminate to an extent that makes indirect appropriability feasible. Hence, reducing the levy on this account may be unjustified.

In addition, calculation of the broadband levy should avoid overlap between the ACS-limitation and other compensated limitations, namely private copying. Users should not pay two levies for the same use. If private copying does not apply to copies from unauthorised sources, as is the case after *ACI Adam*, the ACS could focus on compensating the harm caused by that use in relation to the right of reproduction. In practice, one method to achieve a harmonious system is to select distinct levy targets for each limitation. Thus, the levy in the statutory licence ACS should target household Internet subscriptions but not goods or services covered by the private copying levy.

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2002 See *supra* 4.4.1.1, 4.4.3.3–4.4.3.5. Cf. CJEU, *VG Wort*, ¶¶73, 77; CJEU, *Reprobel*, ¶¶37–38 (mentioning recital 32 of the directive).


2004 See *supra* 4.4.3.3 and 4.4.3.4.

2005 Indirect appropriability refers to the “economic mechanism according to which, under certain conditions, the demand for originals will reflect the value that consumers place both on originals and subsequent copies they make.” See Poort & Quintais, 2013, p. 216; Quintais, 2015b, pp. 85–86, on indirect appropriability and private copying.


The third mitigating factor that influences the level of fair compensation is the degree of use of TPMs. In the current regime, fair compensation remains applicable irrespective of the availability or application of technological measures. However, Member States may decide that application of these measures affects the calculation and amount of fair compensation. Largely, this calibration will depend on how policy-makers choose to regulate the interface between TPMs and the ACS, namely whether and to what extent users have a right to exercise the statutory limitation.

If the level of TPM adoption is high and the means to exercise the limitation ineffective, the scope of the privilege will be constrained. In this scenario, the harm to rights holders is lower, and so should be the amount of fair compensation. In theory, compensation could even be eliminated if TPMs reduce that harm to de minimis levels, although that scenario seems unrealistic in light of the relatively low level of adoption of these measures and their reduced effectiveness in preventing many types of unauthorised online use by individuals. If the adoption of TPMs is low and users are able to enjoy the statutory limitation effectively, the level of fair compensation should not be reduced significantly. These considerations suggest that it is possible to adopt an ACS without interfering with the legal protection of TPMs in the current legal framework. This, despite the strong normative arguments in favour of affording individual users some level of protection against technological measures regarding the permitted use in an ACS.

To conclude, a right of fair compensation modelled along the lines described above ought to provide sufficient recompense to rights holders for the harm suffered by the adoption of an ACS, in line with CJEU interpretation of the concept of fair compensation, and the objectives of EU law.

6.2.5 Agreed Contractual Terms

The general scheme of the InfoSoc Directive opens the door to contractual disposition of limitations. As noted, there are various cases where a prohibition on contractual disposition is justified, spanning from the definition of limitations as imperative in national law, to instances of consumer law protection, or to cases where a limitation is subject to fair compensation (defined as unwaivable by the CJEU). In addition, the Software and Database Directives expressly prohibit contractual disposition of limitations.

After VG Wort, there is increased support for the view that limitations take precedence over freedom of contract in relation to the privileged use, at least with respect to the reproduction right. Accordingly, an authorisation for acts covered by a limitation is not valid and does not

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2008 See supra 4.4.1.2 and 4.4.3.5.
2009 Opinion AG in Copydan, ¶¶69–80; CJEU, Copydan, ¶¶68–73. See also CJEU, VG Wort, ¶¶52–57; CJEU, ACI Adam, ¶¶43–44.
2010 See supra 5.5.2 and 6.1.5.
2011 See, e.g., CJEU, Padawan, ¶¶40–42; CJEU, Reprobel, ¶36. On adequate compensation as an objective of EU law, see supra 5.5.3.
2012 See supra 4.4.1, 4.4.3.4, 4.5, 6.1.4, and 5.5.2.
affect the right to fair compensation. However, where TPMs are applied, Article 6(4)(4) InfoSoc Directive excludes priority for limitations regarding works or other subject matter made available to the public on agreed contractual terms.

De lege ferenda, two options are available for an ACS to address this issue in EU copyright law. The first option is to favour private ordering and allow contractual disposition of the ACS-limitation, letting the market influence the scope of the limitation. If this option is followed, the priority of contract over the limitation would have to be taken into account in the calculation of fair compensation, as an additional factor susceptible of mitigating the harm caused to rights holders. The second option is to follow a “public policy” approach and prohibit contractual disposition of the limitation. This can be done in different ways. One method is to distinguish between individual contracts, allowing contractual waiver of a limitation in the exercise of private autonomy, but prohibiting such waiver in standard terms and conditions. Another method is to distinguish the purpose of limitations and prohibit waivers on agreed contractual terms for limitations motivated strongly by the public interest.

Several arguments support the adoption of a public policy approach through either of the suggested methods in the context of a statutory licence ACS. First, the strong public interest foundation of the ACS-limitation, namely the respect for users’ fundamental rights, and the promotion of creativity and dissemination of works. Second, the application of the principle of effectiveness to the limitation, which would be hindered if contracts were allowed priority over limitations. Third, the consideration that this legalisation proposal privileges non-commercial use by individual users, who as a rule require protection from a structural disadvantage in contractual negotiations.

To preserve a measure of differentiation, the system could allow contractual terms to prevail in individually negotiated agreements. However, outside those cases, the ACS-limitation should have absolute protection against contractual stipulations.

6.2.6 Basic Operation

Finally, it is possible to identify some high level features of the basic operation of a statutory licence ACS. Figure 8 provides a simplified representation of these features and a window into how the system could operate at EU and national level.
First, as regards the determination of the total amount of fair compensation generated by the ACS, the calculation should follow the method outlined above in 6.2.4. The European tradition on collective rights management and statutory licensing highlights different possibilities for how to implement such a method. These include setting the applicable rates by law or regulation, with the intervention of a government agency and/or stakeholder negotiations, subject to judicial or administrative review. It is also possible to allocate this task to an independent authority or an arbitration board. The process should include stakeholder participation, involving rights holders (and their CMOs), intermediary debtors, and representatives of end-users subject to the levy.²⁰¹⁹

As shown in Figure 8, CMOs play a central role in this system. This makes sense due to the long-standing and well-developed infrastructure of collective rights management in the EU.²⁰²⁰

In an ACS, CMOs are involved not only in the process of determination of fair compensation, but also in different facets of management of the system, namely the collection and distribution

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²⁰¹⁹ See supra 3.4.4, on possible variations of an ACS management system.
²⁰²⁰ See supra 3.4.3–3.4.6, on potential solutions to structure collection and distribution of rights revenue.
of rights revenue. All aspects related to the functioning of CMOs in the system are regulated in the CRM Directive.2021

The statutory licence ACS will be tied to mandatory collective management of the fair compensation right. In this system, CMOs “play a role in centralizing and monitoring information as well as in granting fair and efficient distribution (not neglecting the defence of creators’ interests against the copyright-based industries)”.2022 Subject to the rules of the CRM Directive, cross-border articulation of CMOs could rely on a network of representation agreements of national members to manage and enforce the fair compensation right. It is also conceivable that an EU-wide umbrella CMO centralises certain aspects of the system, including data processing, information on uses, and distribution of rights revenue, to the benefit of second-level national CMOs (or subsidiaries) and other stakeholders (see Figure 8).2023

A crucial aspect that will affect the management of the system and the number of CMOs involved is the scope of the limitation. Thus, it is necessary to decide whether the ACS is embodied in one limitation covering two exclusive rights (reproduction and communication to the public), or two limitations, each covering one exclusive right. The most efficient design seems the “one limitation” option.

The system must also address issues of overlap between limitations, namely whether it will incorporate existing compensated limitations, most prominently private copying. In this respect, there are strong legal arguments against the merger of limitations, beyond the political challenges inherent to such legislative engineering. They include the difference in substantive rights covered (as private copying only applies to the reproduction right), the distinction between types of use covered regarding acts of reproduction (e.g. copies from unauthorised sources in the case of ACS), and the different levy targets. This does not prevent, from an operational standpoint, the same CMOs that manage the private copying system extending their mandate to manage the ACS, leveraging their expertise and infrastructure to reduce complexity. (See Figure 8 and the reference to a “simplification area”).

Collection of the rights revenue should be carried out by the competent national CMO directly from the intermediary debtor. As regards distribution of fair compensation, the beneficiaries of the compensation are the rights holders of the exclusive rights of reproduction and communication to the public identified in the acquis. Furthermore, because the right of fair compensation is unwaivable and non-transferable, creators are entitled to a fair share of the

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2021 On which, see supra 3.3.1–3.3.2.
2022 R. Hilty & Nérisson, 2013, p. 13, discussing the prospective role of CMOs in the digital environment. The authors suggest CMOs “could develop tools to enhance non-commercial uses of protected works thanks to micropayments and blanket licences”, thus enabling “compensation of creative people” and allowing “end-users sufficient access to copyrighted works”. In this respect, they add, “[e]xtending cases in which copyrights were to be statutorily collectively managed would help”.
2023 See SWD CRM Directive 2012, pp. 46-47, discussing and rejecting the option of a centralised portal for the EU-wide collective administration of online music on a voluntary basis. It does not seem that the centralised portal option in the context of an ACS-limitation would give rise to the same competition issues that lead to its rejection by the Commission as a model for multi-territorial licensing of musical works.
The specific distribution key for these amounts is determined by law or stakeholder negotiation, as already occurs with existing compensated limitations in the acquis. If an objective of EU law is to provide adequate compensation to incentivise creation and safeguard the “independence and dignity of artistic creators and performers” (recital 11 InfoSoc Directive), it is submitted that creators should be apportioned at least half of the rights revenue collected.

The subsequent distribution of revenue among individual rights holders within a category should be dealt with by the second-level CMOs representing each category, following the general rules of the CRM Directive. This dissertation suggests using contingent valuation methods to ascribe a value to the prejudice suffered by rights holders and, to approximate the notion of harm, using techniques such as the measurement of use through electronic rights management information, sampling, and strictly anonymous monitoring with the assistance of ISPs. The combination of these methods should allow a fair distribution of revenue to rights holders.

For practical reasons, the preferred compensation target or payment mechanism is a surcharge on the Internet subscription of individual households. The burden of compensation lies primarily with the intermediary debtors, i.e. the ISPs, and ultimately with the end-users benefiting from the limitation. To make this system effective, ISPs are allowed to pass on the levy to end-users in the price of their household (but not professional) subscriptions. As a matter of transparency, this surcharge should be visible to end-users. This set-up is similar to that of private copying systems, and should therefore be familiar to stakeholders.

As discussed above in 6.2.1, it is possible to extend the pool of levy targets to include online service providers. (For the sake of argument, this possibility is reflected in Figure 8 with a reference to “OSP”.) However, this possibility does not currently seem justified on existing empirical research and, as such, is not recommended. A similar argument can be made in relation to targeting mobile Internet connections, a possibility envisaged by some legalisation proposals, but one which does not seem empirically justified at this time.

Not all end-users engage in file sharing or consume digital culture online to the same extent. For example, a recent study in the Netherlands shows that 49% of Dutch consumers, including those without Internet access, do not access digital channels to consume music, audio-visual content or books. Therefore, in a logic similar to the payment of utilities (e.g. gas, electricity and water), it is sensible for the system to differentiate between users and targeted households, while retaining the link between harm and end-user.

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2024  See supra 6.2.4.
2025  On which, see supra 3.3.1 and 3.4.4 (making reference to this topic as part of an ACS attribute).
2026  See supra 5.3.2.3.3 and 5.3.3.3, on the use of contingent valuation to determine the total amount of fair compensation.
2027  As with certain debtors of the private copying levy, ISPs may choose to compete on price by absorbing the broadband levy. See Roßnagel et al., 2009, p. 22.
2028  For legalisation proposals mentioning this possibility, see supra 3.4.5.
2029  Vallbé et al., 2015, attributing this result to holdout groups, characterised by older less educated people that predominantly use TV and radio (“non-consumers”), and older educated people who prefer books (“bookworms”). The non-consumers amount to ca. 29%, whereas “bookworms” amount to 20%.
If we use the cited study as an indicator, a statutory licence ACS in the Netherlands could include exemptions or reductions to the broadband levy for categories of households. Candidates would be households whose residents are above a certain age or below a pre-defined income level; it is also rational to reduce the levy for slower types of Internet connection (see Figure 8 and the box referring to “End-users”). Once the system matures, it will be advisable to contemplate further variations, linked to the number of residents per household, and the possibility of users choosing between fixed or metered surcharges (dependent on Internet speed and usage). This differentiation allows for a more equitable system that better reflects the concepts of fair compensation and harm, whilst leveraging consumers’ willingness to participate in and pay for an ACS.

6.2.7 Scaling Down Reform: Adaptability of the Proposal to Collective Licensing

What is normatively desirable and what is imminently doable are not always the same thing. While the present dissertation shows that copyright reform through a right of access and remuneration for non-commercial online use of works is consistent with EU law, this by no means guarantees its adoption in the short or even medium term.

In a political climate where limitations for worthy purposes such as freedom of panorama or text- and-data mining for research are controversial, the proposal for a limitation-based statutory licence ACS will surely meet with fierce opposition. Therefore, and following the dissertation’s pragmatic approach advocated in Chapter 1, this section briefly outlines how the reform blueprint set out above can be scaled down to a more feasible legal solution. In this way, some of the core aspects of an ACS can be actualised in the shorter term.

One approach to scale down reform is to narrow the scope of the statutory licence ACS with regard to subject matter. Section 6.2.2. addresses this possibility, as well as its potential advantages and drawbacks.

Another option is to forego the application of a statutory licence and adapt the ACS blueprint to a model of pure collective rights management. Chapter 3 discusses the basic features of voluntary, extended and mandatory collective management, as well as some of their potential drawbacks, including issues of substantive and territorial fragmentation, and participation. Whatever the model adopted, CMOs could frame the substantive rights scope of the licence in Article 5(3) CRM Directive, according to which “rightholders shall have the right to grant licences for non-commercial uses of any rights, categories of rights or types of works and other subject-matter that they may choose.”

Voluntary and extended collective licences require that rights holders entrust CMOs with their exclusive online rights of reproduction and communication to the public for the non-commercial

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2030 This general approach is foreseen by multiple ACS proposals. See supra 3.4.4. See, e.g., Colin, 2011a, p. 99.
2031 Vallbé et al., 2015. See also Handke et al., 2015, regarding recorded music.
2033 See supra 1.3.
2034 These issues are also addressed in the other chapters and inform this study’s preference for a statutory licensing model. See supra 4.5, 5.1, 5.5, 6.1.4, and 6.1.5.
online use of works. Assuming for the sake of argument that mandatory collective management only affects the exercise of copyright, this model would require a legal mandate for CMOs to manage exclusive rights for non-commercial online use. In either scenario, the substantive rights scope of a “collective management ACS” could be identical to that suggested above, as could many of the features of the reform blueprint.

One important difference would of course be the nature of the remuneration, as a collective licence for exclusive rights cannot rely solely on a concept of fair compensation, designed in EU law for limitations. Instead, such a licence would more clearly follow the concept of “appropriate remuneration” in Article 16(3) CRM Directive, pursuant to which tariffs for exclusive or remuneration rights must be

reasonable in relation to, inter alia, the economic value of the use of the rights in trade, taking into account the nature and scope of the use of the work and other subject-matter, as well as in relation to the economic value of the service provided by the collective management organisation.

However, due to the non-commercial nature of the licensed use and the difficulty in defining its economic value in trade, this concept of “appropriate remuneration” offers little guidance beyond a criterion of reasonableness. Thus, it seems that the approach outlined above in 6.2.4 for a right of fair compensation does not contravene the spirit of the law, especially because a contingent valuation method offers a proxy for the market value of the licensed use.

An obvious distinction between the models of collective management mentioned is the level of legislative change to the acquis required by each of them. Mandatory collective management, for example, would probably necessitate an intervention at the level of secondary EU law, similar to the special regime for cable retransmission in Articles 9–12 SatCab Directive.

It is not clear that the same is true for ECL or voluntary collective management. First, because Article 5(3) CRM Directive provides a legal basis for a voluntary licence. Second, because the CRM Directive significantly harmonises the functioning of CMOs in the EU, containing most of the rules needed to establish a voluntary ACS through a network of representation agreements. Still, at least regarding a legalisation scheme based on ECL, there are good arguments for adopting in the acquis a basic framework for the grant of non-commercial licences for the online rights of reproduction and communication to the public. Such a framework could include, for example, a country of origin rule to enable cross-border effect for the national licences, clarify the operation of an opt-out mechanism, and set out other key aspects of the system.

However, if the necessary rules are already in place in EU law, a more politically feasible short-term solution is to promote a voluntary EU-wide system through a “soft law” instrument that

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2035 This issue is debated supra at 3.3.4 and 4.5. See also supra 6.1.3–6.1.5.
2036 On which, see supra 2.4.4 and 3.3.4.1.
2037 This view is not consensual. Some authors believe the adoption of an ECL at EU level would require commensurate legislative recognition. See the discussion supra at 3.3.3.2, where one of the objections levied against legalisation schemes based on ECL is precisely that they would require legal changes to the acquis.
2038 See supra 3.3.3.2.
nudges CMOs to grant such non-commercial licences. The obvious candidate in this respect is a recommendation by the Commission under Article 288 TFEU.

Recommendations are non-binding legislative instruments directed primarily at Member States, and possibly also at other economic operators (e.g. CMOs). In the area of copyright, the Commission has issued recommendations in, for example, the fields of online music, digitisation and digital preservation, as well as access to and preservation of scientific information.

For the present purposes, it is suggested that a recommendation incorporates and develops the key elements of the ACS blueprint above, and elucidates its articulation with the rules of the InfoSoc and CRM Directives. To increase its effectiveness, the recommendation could be addressed not only at the Member States but also at “all economic operators which are involved in the management of copyright and related rights” in the EU. This would clarify the application of the instrument to CMOs and “independent management entities” (Article 3(b) CRM Directive), reinforcing its persuasive character despite the lack of binding force.

In relation to the content of the recommendation, this instrument should:

- Recommend a subject matter and substantive rights scope for the licence in line with the proposal above in 6.2.2–6.2.3;
- Provide interpretative guidelines on the concept of “non-commercial uses” in Article 5(3) CRM Directive, in line with the CJEU definition of the autonomous concept, and the principles outlined above at 6.2.3. In particular, said definition should exclude from the scope of the concept any use by unauthorised platforms that derive financial consideration from the online exchange of works;
- Endorse a methodological approach for the calculation of “appropriate remuneration” that uses the combination of techniques identified in 6.2.4, especially contingent valuation and anonymous measurement of uses;
- Clarify the articulation of the ACS with the private copying limitation and the concept of fair compensation (on which see supra 6.2.4 and 6.2.6);
- Provide guidance on the basic operation of the system as regards collection and distribution of amounts, including reserving a fair share of rights revenue to creators (on which see above 6.2.6);
- Support the negotiation of licences between CMOs or independent management entities, on the one hand, and ISPs and online service providers, on the other hand. These intermediaries would then extend the benefit of the licence to their subscribers (natural persons) against payment of an additional fee or bundled in the services provided (see supra 6.2.6).

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2039 For exceptions to this non-binding nature of recommendations in the area of economic and monetary policy, see Bradley, 2014, p. 102.
2040 Online Music Recommendation 2005; Recommendation on Digitisation, Online Accessibility and Digital Preservation 2006; Recommendation on Access to and Preservation of Scientific Information 2012
2042 See supra 5.3.2.3.2.
It is true that recommendations are not always successful, as illustrated by the much-criticised 2005 Online Music Recommendation. However, in light of the problem of mass unauthorised online use of works and the need to actualise Article 5(3) CRM Directive, a properly designed recommendation could provide a valuable low-cost contribution to improve the regulation of this type of copyright use in the acquis. Thus, failing legal reform through statutory licensing or mandatory collective management, this possibility should be explored as a softer version of a system of online access and remuneration in EU copyright law. If the mitigated version proves successful, it will increase the policy space available for a limitation-based statutory licence ACS.

6.3 A Way Forward

The contours of copyright protection are shaped by the public interest, and rightly so. It is in the public interest for creators to receive fair remuneration for the online use of their works, thereby rewarding and incentivising creation. It is also in the public interest for end-users to retain a personal sphere of enjoyment and expression in the online environment, for which it is essential they can interact with copyright works without restriction in a non-commercial context, with legal certainty, and without fear of liability.

The current EU copyright regime does not achieve these goals. Rather, it promotes a culture of online exclusivity at the expense of cultural access and fair remuneration. It is therefore necessary to rethink how copyright can and should apply to large-scale individual use of works over the Internet.

This dissertation advances a reform proposal that recasts copyright as a right of access and remuneration for non-commercial online use. This alternative compensation system (or ACS), if properly designed, is consistent with the normative aims of EU copyright law, and would improve the regulation of this type of online use. Where that model is judged too bold, the analysis offers alternative legal solutions to “scale down” reform, so as to increase its political feasibility.

In the end, copyright reform through a model of remunerated access is a matter of normative choice or preference. It is neither a utopian nor, depending on one’s perspective, a dystopian proposition. Rather, it is a legally viable policy option worthy of further exploration and empirical research as to the details and nuances of the system.

The main argument of this dissertation is that we can and should reform EU copyright law to foster a culture of online access that is respectful of the material interests of creators, the fundamental rights of end-users, and the general interests of society. Whether policymakers take on the mantle will depend on their vision of how the copyright law of the future should look, and to what extent it should reflect the public interest.

2043 On which, see Lucie Guibault & van Gompel, 2010, pp. 155–158.
Annex 1. List of Proposals for Alternative Compensation Systems
List mentioned in Chapter 3, at 3.1.; organised chronologically

<table>
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<tr>
<th>Reference</th>
<th>Origin and Type</th>
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<tr>
<td>Stallman, 1993</td>
<td>US, Activist</td>
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<td></td>
<td>This proposal is generally recognised as an ACS precursor. Stallman advocates for the adoption of a system to tax digital copying of music, similar to European levy-based private copying systems. The system would have the following basic features: impose no restrictions on digital copying equipment; use surveys to measure the extent of copying of each musical piece; collect funds with a “tax” on machines and media; distribute these funds entirely to the individuals who create music.</td>
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<td>Fisher, 2000</td>
<td>US, Academic</td>
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<td></td>
<td>Early work from Fisher in the field of ACS. The article focuses on the downloading of recorded music, and discusses the issue of mass infringement. It briefly examines different models for harnessing the benefits of online music distribution, including some of those later detailed in Fisher, 2004 (see infra), such as the tax-and-royalty system and statutory licensing for digital music.</td>
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<td>Shavell &amp; Ypersele, 2001</td>
<td>US/Belgium, Academics</td>
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<td></td>
<td>The article compares intellectual property rights with reward systems, i.e. systems where innovators are paid directly by the government and innovations pass directly into the public domain. The authors conclude that intellectual property rights do not possess fundamental social advantages over reward systems. Furthermore, they argue, an optional reward system (where innovators choose between the status quo and a reward system) is superior to a system based solely on intellectual property rights. The article focuses mostly on patents and does not offer concrete implementation details, but its application to copyright would qualify the mandatory or optional reward system as a State System.</td>
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<td>Lunney, 2001</td>
<td>US, Academic</td>
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<td>The author’s preferred option is for a model of “digital abandon” for digital private copying. However, he suggests as a fallback model the adoption of a private digital statutory licence for private copying, similar to that in place in many EU countries.</td>
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<td>Ku, 2002</td>
<td>US, Academic</td>
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<td>The author’s preferred option is for a model of “digital abandon” for non-commercial acts of reproduction and distribution of online music between end-users. This model would be implemented through an uncompensated exception covering such use and subject matter. Kur believes the goal of incentivising the creation and dissemination of works would not be hindered by such a regime. If, however, revenue from album sales augmented by voluntary “tipping” proves insufficient, Ku proposes the adoption of a statutory licence for the use in question. In this system, levies would be imposed on services (subscriptions for Internet access) and goods (sales of computer, audio and video equipment), administered by a government entity. Compensation would be distributed to musicians and songwriters.</td>
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<td>Lincoff, 2002</td>
<td>US, Lawyer/Consultancy</td>
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|                    | Proposes a statutory licence for online music, encompassing musical compositions and sound recordings. The licence would apply to a newly created “online transmission
right”, and be managed by a single CMO (or performing rights organisation). In this system, the CMO would either license intermediary “service operators” or directly license end-users using P2P networks and similar sharing websites. Rights holders could also directly license service operators in a parallel “voluntary system”. End-users engaging in non-commercial P2P activities would pay for the licence through a monthly flat rate. Works licensed in the system would need to be registered for subsequent tracking of usage and payment of amounts collected in the system. This work is reviewed and developed in Lincoff, 2008 (see infra).

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<th>Reference</th>
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<td>Love, 2003</td>
<td>US, Advocacy/Academic</td>
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<td>Baker, 2003</td>
<td>US, Consultancy</td>
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<td>Netanel, 2003</td>
<td>US, Academic</td>
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<tr>
<td>Grassmuck &amp; Stalder, 2003</td>
<td>Europe, Academic</td>
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<td>Sobel, 2003</td>
<td>US, Academic</td>
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<tr>
<td>Nadel, 2004</td>
<td>US, Academic</td>
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US, Advocacy/Academic
Referred to as the Blur/BANFF Proposal. The main proposal is for a statutory licence for the right of reproduction (acts of downloading) of musical works exchanged in P2P networks. The system would generate compensation *inter alia* through levies on devices and services (flat rate on Internet access). Distribution would be based on relative usage and an array of other methods (including some based on social and cultural aspects). The compensation collected in this system would benefit individual creators.

US, Consultancy
Proposes a State System based on refundable tax credits for the benefit of registered creative workers, known as the Artistic Freedom Voucher (AFV). Described at 3.3.6.2.

US, Academic
Statutory licence for P2P file sharing known as the “Noncommercial Use Levy”. Described at 3.3.5.2.

Europe, Academic
After a critical review of existing proposals for ACS, the authors outline a proposal for a statutory licence for the online rights of reproduction and communication to the public (including commercial use). In this system, authors and performers are granted an unwaivable remuneration right, subject to obligatory collective management supervised by a government agency. Compensation would be paid through a flat or lump sum levy, and the amounts distributed on the basis of the actual use of works. For this purpose, works should be registered in the system with the competent CMO. This work is reviewed and developed in Grassmuck, 2010a (see infra).

US, Academic
Proposes a system where ISPs operate as “Digital Retailers” for the licensing of the rights of reproduction and communication to the public.
In this model, ISPs would license digital works from copyright owners at wholesale prices set by the owners. ISPs would then sell the digital works to their subscribers at retail prices. Copyright owners have the choice to join the system by apposing DRM on their works. Failure to do so is construed as an authorisation to freely use the works. Copyright owners may set the amount of compensation as a wholesale amount for ISPs, who can then impose a retail mark-up when licensing the works to end-users. The retail price is based on usage, determined by the number of times a work passes through an ISP’s router (pay-per-redistribution model). The DRM on digital files will allow subsequent distribution of amounts between copyright owners.

US, Academic
In a model classified by some scholars as “digital abandon”, Nadel proposes to reduce the scope of exclusive rights online and replace them with a minimal level of copyright protection against unauthorised copying. The new regime would be modelled on the fair
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<th>Reference</th>
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<td>Gervais, 2004</td>
<td>Canada/US, Academic</td>
<td>Gervais argues that music file sharing (and online sharing generally) forms part of the social norm among Internet users, making efforts to stop it through use of legal norms ineffective. He therefore proposes “embracing and licensing file-sharing” through “ISPs, copyright collectives, or technology companies, or a combination of two or all three of these entities”. Gervais argues that both voluntary collective licensing and ECL (with opt-out) are feasible options to license P2P acts of up- and download of online music.</td>
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<td>Litman, 2004</td>
<td>US, Academic</td>
<td>Proposes a statutory licence with opt-out for online music sharing. Described at 3.3.5.2.</td>
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<td>Lohmann, 2004</td>
<td>US, Advocacy</td>
<td>Proposal by the Electronic Frontier Foundation for a system of voluntary collective licensing for music file sharing. Described at 3.3.2.2. This work is updated (and mostly replicated) in Lohmann, 2008 (see infra).</td>
</tr>
<tr>
<td>Fisher, 2004</td>
<td>US, Academic</td>
<td>Monograph discussing several possible models for ACS. Preference for a “tax-and-royalty system” for entertainment works that would qualify as a State System. Fisher also discusses adoption of ACS through a statutory licence and voluntary collective licensing. Described at 3.3.6.2.</td>
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<td>Gratz, 2004</td>
<td>US, Academic</td>
<td>Proposes an ACS based on taxation and compulsory licensing for non-commercial P2P sharing of music. System includes an opt-in through the registration of works with the US Copyright Office, and allows an opt-out for rights holders.</td>
</tr>
<tr>
<td>Wizards of OS, 2004</td>
<td>Europe, Academic/Activist</td>
<td>Berlin Declaration on Collectively Managed Online Rights: Compensation Without Control (Jointly issued by speakers of the conference &quot;Wizards of OS. The Future of the Digital Commons,&quot; 10-12 June 2004, Berlin). The declaration argues for an ACS based on statutory licensing labelled as a “Content Flatrate” for digital works. The system is described as follows: “Under the proposed system, rights holders would license their on-line rights to a collecting society for collective representation, as they already do for many off-line uses today. This on-line collecting society would oversee the measurement of transfers of protected works over the Internet and then compensate the rights holders based on the actual use of their files by end users. The funds from which the rights-holders are compensated could be raised through any of a number of sources: voluntary subscription payments by end-users or proxies for them or levies on relevant associated goods and services, such as broadband Internet connections, MP3 players and others, in addition to the levies on blank media, photo copiers, and so on which are already collected today” (p.6, footnotes omitted)</td>
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<td>Eckersley, 2004</td>
<td>Australia/US, Academic and Advocacy</td>
<td>Proposes the adoption of a “virtual market reward/remuneration system”, which can be</td>
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<tr>
<td><strong>von Lewinski, 2005</strong></td>
<td>Europe, Academic. Description and compliance analysis of different legalisation proposals for P2P exchange of online works between individuals. Argues for the admissibility of mandatory collective management and ECL in EU copyright law for the management of these activities.</td>
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<tr>
<td><strong>Peukert, 2005</strong></td>
<td>Germany/US, Academic. Peukert discusses the legal compatibility with international copyright law of ACS proposals based on non-voluntary licences. Peukert’s specific proposal is for an opt-in statutory licence that he calls a “bipolar copyright system”. In this system, the default regulation for online use is exclusivity. Rights holders may choose to opt-in (through registration) to a statutory licensing system for non-commercial P2P file sharing of their works, covering the rights of reproduction and communication to the public. The licence would be funded through a “levy/tax” on the goods and services whose value is increased by file sharing (similar to Netanel, 2003). The system is different from voluntary collective licensing as rights holders would not have to form a CMO or rely on user licences, as the levy would be imposed upfront on goods/services.</td>
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<td><strong>L’ALLIANCE public.artistes, 2005, 2006; and Bernault &amp; Lebois, 2005</strong></td>
<td>France, CMOs and Academics. Proposals and feasibility study for the French licence globale model. This model combines statutory licensing for the online right of reproduction (extension of the private copying limitation to acts of downloading) and mandatory collective management for the online right of communication to the public. In this way, the licence would cover P2P acts of downloading and uploading between individuals for non-commercial purposes. The licence would cover most types of work shared online. Internet users can decide to enter into an agreement with their Internet access providers to benefit from the licence, and pay the corresponding amount through a flat rate in addition to their monthly subscriptions. Internet users that do not purchase the licence would be liable for acts of P2P file sharing. Distribution of amounts to categories of rights holders would follow traditional mandatory collective management agreements (principle of equal distribution). Within each category, compensation should be allocated based on relative usage of works online.</td>
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<td><strong>Hayward, 2007</strong></td>
<td>US, Academic. Hayward does not offer a concrete legalisation proposal but indicates a preference for statutory licensing of P2P file sharing for non-commercial purposes. His proposal relies on expanding the fair use defence to infringement claims arising from file sharing for non-commercial private use, provided “licensing fees are paid” (in a similar fashion to that which occurred with “photocopying of printed materials”).</td>
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<td><strong>Beltrandi, D’Elia, Turco, Mellano, &amp; Poretti, 2007</strong></td>
<td>Italy, Political Party. Legislative proposal presented in the Italian Parliament for a model combining statutory licensing for the online right of reproduction and ECL for the online right of communication to the public. The licence covers acts by individuals for non-commercial purposes regarding music and audio-visual content obtained from authorised sources (NB the authorisation obtained through the ECL would qualify as an authorised source). Proposal mentioned at 3.3.3.2 and replicated in Beltrandi et al., 2008 (see infra).</td>
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<td>Reference</td>
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<td>Mehra, 2008</td>
<td>US, Academic</td>
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<td>Mehra proposes a modified version of</td>
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<td>the statutory licence ACS for non-</td>
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<td>commercial P2P file sharing between</td>
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<td>individuals proposed by American</td>
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<td>scholars. His system is based on the</td>
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<td>Japanese private copying scheme and</td>
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<td>aims at creating a “Digital Clearing-</td>
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<td>house” with four main characteristics,</td>
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<td>explained as follows: 1. The clearing-</td>
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<td>house should be structured as a</td>
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<td>cooperative owned by those users who</td>
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<td>purchase copyrighted works. 2.</td>
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<tr>
<td></td>
<td>Ownership should be pro rata divided</td>
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<td></td>
<td>by users based on their annual level</td>
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<td>of purchasing copyrighted works. 3.</td>
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<td>The prices for copyrighted works</td>
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<td>should be set by the clearinghouse</td>
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<td>itself. 4. A portion of the clearing-</td>
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<td></td>
<td>house’s revenues should be rebated back</td>
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<td></td>
<td>to users annually.” The remaining</td>
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<td>aspects of the system are similar to</td>
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<td>those advanced by Netanel, 2003 and</td>
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<td>Richter, 2008</td>
<td>UK, Academic</td>
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<td>Discussion of two possible scenarios</td>
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<td>to capture the value of unauthorised</td>
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<td>file sharing of online music. The first</td>
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<td>scenario is that of a “fragmented</td>
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<td></td>
<td>landscape of privatized music spaces</td>
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<td>walled within social networks”, where</td>
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<td>“content providers partner with</td>
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<td>gatekeepers to create legal spaces of</td>
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<td>digital music”. The second scenario is</td>
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<td>of a “compulsory blanket license for</td>
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<td>digital music”, identical to that</td>
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<td>proposed in Fisher, 2004. Richter</td>
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<td></td>
<td>concludes that both are viable options</td>
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<td>and that, while it is likely that the</td>
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<td>market will cause the occurrence of the</td>
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<td>first scenario, “we as an economy and</td>
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<td></td>
<td>a society may be better off by</td>
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<td></td>
<td>choosing the second option”.</td>
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<td>Aigrain, 2008</td>
<td>France, Academic and Advocacy</td>
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<tr>
<td></td>
<td>In this monograph Aigrain develops the</td>
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<td>French Licence Globale model, with</td>
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<td>some variations. Aigrain analyses</td>
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<td>different models for regulation of</td>
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<td>non-commercial file sharing (with an</td>
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<td>emphasis on acts of reproduction and</td>
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<td>communication to the public). Although</td>
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<td>no clear choice is made, he denotes a</td>
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<td>preference for ECL (with the possibility</td>
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<td>to opt-out) and statutory licensing.</td>
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<td>The model proposed includes the</td>
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<td>registration of works (for identification</td>
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<td></td>
<td>and use measurement) and covers most</td>
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<td></td>
<td>published digital content used for</td>
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<td></td>
<td>non-commercial purposes. Compensation</td>
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<td></td>
<td>comes in the form of a “creative</td>
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<td>contribution”, which combines elements</td>
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<td>of copyright remuneration with public</td>
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<td>funding to incentivise creation of</td>
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<td>works. Collected sums are to be</td>
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<td>distributed to creators, media/</td>
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<td>intermediation channels (which include</td>
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<td>related rights holders), and public</td>
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<td>funds for subsidising cultural works.</td>
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<td>Distribution to rights holders follows</td>
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<td>the logic of traditional levy-based</td>
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<td>schemes and is proportional to the</td>
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<td>frequency of use. Levy targets include</td>
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<td>broadband Internet access. Measurement</td>
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<td>of use is the competence of an</td>
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<td>independent observatory and should take</td>
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<td>into account the results of a grand</td>
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<td>permanent panel of Internet users.</td>
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<td>These users will have measuring</td>
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<td>software installed on their computers,</td>
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<td>which will collect and transmit</td>
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<td>strictly anonymous information</td>
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<td>regarding the accessing or use of</td>
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<td>works. This work is reviewed and</td>
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<td></td>
<td>developed in Aigrain, 2012 (see infra).</td>
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<tr>
<td>Lohmann, 2008</td>
<td>Updated and identical version of</td>
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<td></td>
<td>Lohmann, 2004 (see supra).</td>
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<tr>
<td>Lincoff, 2008</td>
<td>US, Academic/Lawyer/Consultancy</td>
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<tr>
<td></td>
<td>This proposal is a revised version of</td>
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<td>Lincoff, 2002 (see supra). Lincoff</td>
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<td></td>
<td>proposes the creation of a new digital</td>
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<td>transmission right for online music,</td>
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<td>which would replace existing exclusive</td>
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<td>rights for online use of music. The</td>
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<td>new right would also apply to over-the-</td>
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<td>air broadcast radio stations, as well</td>
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<td>as to the websites they operate. As a</td>
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<td>rule, this right would be subject to</td>
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<td>voluntary collective licensing, but</td>
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<td>would allow (exceptionally) the</td>
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<td>possibility of direct licensing by</td>
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<td>rights holders. In this system, at least</td>
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<td>one CMO per territory would be</td>
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<td>authorised to grant non-exclusive</td>
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<td>worldwide licences for the right at its</td>
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<td>local rates for activities covered that</td>
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<td>originate in</td>
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<td>Origin and Type</td>
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<tr>
<td><strong>Beltrandi et al., 2008</strong></td>
<td>Identical to <em>Beltrandi, D'Elia, Turco, Mellano, &amp; Poretti, 2007</em> (see supra).</td>
</tr>
<tr>
<td><strong>Earp &amp; McDiarmid, 2008</strong></td>
<td>US, Academic</td>
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<td></td>
<td>The authors argue that voluntary collective licensing is an appropriate and achievable solution to the problems posed by P2P file sharing, and advocate for its testing in the setting of US University campuses. The model proposed is similar to that advanced by the Electronic Frontier Foundation (Lohmann 2004, 2008; see supra), adjusted to the context of Universities.</td>
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<td><strong>Sterling, 2008, 2009</strong></td>
<td>UK, Academic</td>
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<td></td>
<td>The proposal is mostly detailed in Sterling, 2008. Proposals for a Global Internet Licensing Agency (“GILA”) System to manage a system of voluntary collective licensing for an “Internet right”, i.e. “the right to make material available on demand on the Internet, including the right to reproduce such material in the course of such making available”. This right is intended to apply to global licensing via a central agency, the GILA. Sterling identifies twelve categories of act covered, including streaming (for commercial and non-commercial purposes) and downloading. The right is intended to apply both to scenarios of file hosting and file sharing (in centralised and decentralised P2P networks). The author further identifies eight different categories of potential licensee of the Internet right, namely: “uploader, host, link provider, accessor, software provider, file provider, central index provider, file receiver.”</td>
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<tr>
<td><strong>Roßnagel, Jandt, Schnabel, &amp; Yliniva-Hoffman, 2009</strong></td>
<td>Germany, Academic</td>
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<td></td>
<td>Feasibility study discussing a legalisation model for a “Culture Flat-Rate”. In general, the study concludes that a statutory licence for non-commercial acts of reproduction and making available would be compatible with EU law, subject to certain changes to the InfoSoc Directive (and compliance with the three-step test) and national laws. This licence could be adjusted so that the making available right is instead subject to mandatory collective management, administered by a CMO created for that purpose. This variation would more clearly approximate the legalisation model known as Culture Flat-Rate”. The licence would cover all protected subject matter, with the exception of software. The details of the system would resemble those of a traditional levy system, with the difference that the levy would target ISPs.</td>
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<tr>
<td><strong>Ciurcina, Martin, Margoni, Morando, &amp; Ricolfi, 2009</strong></td>
<td>Italy, Academic and Advocacy</td>
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<td></td>
<td>Proposal by the NEXA Center for Internet and Society (Politecnico di Torino) for the application of ECL for acts of P2P file sharing.</td>
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<td><strong>Dimita, 2010</strong></td>
<td>Italy/UK, Academic</td>
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<td></td>
<td>Monograph (PhD Dissertation) proposing a system combining statutory licensing with obligatory collective management of a new Global Dissemination Right (“GDR”). The GDR is designed as an unwaivable remuneration right for non-commercial acts of online dissemination of works, including user-initiated acts covered by the right of communication to the public. Dimita proposes that the GDR is implemented through a new WIPO Treaty, the “Global Dissemination Treaty”, and administered through an international collective rights management system. This system will include a supervisory body, the Global</td>
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<td>Reference</td>
<td>Origin and Type</td>
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<td>Dissemination Agency (GDA), and national agencies to administer the GDR (constituted by all the relevant stakeholders in the field). Dimita permits different methods of collection of remuneration (similar to existing collective rights management systems), and offers detailed rules on the management system, compensation targets and burden of compensation. For example, a levy may be imposed on goods or services that directly or indirectly benefit from unauthorised uses of a protected work (e.g. internet access providers and mobile network providers).</td>
<td><strong>France, Political</strong> Report “Creation et Internet” commissioned by the French Ministry of Culture and communication. The authors of the report advance different proposals for a combination of legal licensing with collective rights management. One of the proposals is for statutory licensing of the online right of (linear) communication to the public, as it applies to webcasting. The goal is to facilitate the licensing of online webcasters. This proposal would extend the existing satellite broadcasting and cable retransmission regime to the new online uses, including the applicable right of equitable remuneration and scheme of collective management of different features of mandatory collective management. The report also proposes the adoption of voluntary collective licensing for the online right of (interactive) making available of musical works (including the resulting acts of downloading), to be negotiated between stakeholders within one year. Should the negotiations fail, a fallback regime of mandatory collective management would apply to these uses as it relates to the rights of producers and performers.</td>
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<tr>
<td>Zelnik, Toubon, &amp; Cerutti, 2010</td>
<td><strong>Belgium, Political</strong> Identical legislative proposals from the Belgian Green Party for an ACS. The proposal is for a “global license” for acts of up- and download by Internet users, presumably applying to all subject matter, and based on an ECL. The licence would be negotiated between CMO(s) and ISP(s), who would be authorised by their clients to exchange files containing protected works included in the licence. The total amount of the licence is reviewed on a yearly basis. Collection is the competence of an umbrella CMO, who will distribute the amounts to sectorial CMOs in accordance with an agreed upon distribution matrix. Yearly distribution to rights holders is based on measurement of use, carried out by an Internet Observatory, based on sampling of anonymous web traffic. The proposal specifies that the monthly price of Internet access depends on the speed of the connection, and that low debit accounts are exempt from payment. It also states that the maximum price of the surcharge on Internet access is established by equating Internet access to a utility. These proposals are mentioned at 3.3.3.2.</td>
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<td>Hellings &amp; Piryns, 2010 and Morael &amp; Piryns, 2010</td>
<td><strong>US, Academic</strong> Seay advances a proposal to overhaul the US online music licensing regime “to establish one-stop licensing while preserving a minimum statutory rate and clarify the rights landscape to prevent rights-holders from demanding payment for superfluous licenses.” The licensing regime is aimed at commercial use by “online music purveyors”. The proposal entails the creation in the US of a “one-stop licensing” shop. Existing performing rights organisations would evolve into Music Rights Organisations (MROs) authorised to represent all rights holders for the licensing of their online rights of reproduction and communication to the public in musical works and recordings. This would be accompanied by the clarification in the law of which rights apply to which online acts, avoiding instances of accumulation of rights (e.g. download should involve only reproduction and streaming only performance.) The system would also impose a minimum statutory rate periodically set by a Copyright Royalty Board, applicable to all</td>
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<td>Reference</td>
<td>Origin and Type</td>
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<td>Compartilhamento Legal, 2010 (Translated to English in Rocha, 2010)</td>
<td>Brazil, Advocacy</td>
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<td></td>
<td>Legalisation model based on a combination of statutory licensing and mandatory collective management. The licence applies to acts of “online sharing” for non-commercial and personal or private purposes, including reproduction, making available and “access” to works. For these uses, rights holders are granted a remuneration right. Remuneration is collected through a broadband levy, the amount of which is fixed by a public body and charged to ISPs for every Internet access account they provide. The amount of the levy will vary according to the speed of the connection and has a low maximum ceiling. A special CMO will be created to collect and administer the levy. Distribution is made to rights holders on the basis of anonymous monitoring of Internet use. All categories of rights holders will benefit from the remuneration but individual creators (authors and performers) must receive at least half of the amount collected. Furthermore, 20% of the amounts collected must be allocated to cultural or social purposes.</td>
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<tr>
<td>Grassmuck, 2010a</td>
<td>Germany, Academic</td>
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<td></td>
<td>Proposes a statutory licence with obligatory collective management for non-commercial online sharing acts between individuals (“a legal permission for private online sharing of published copyright protected works for non-commercial purposes subject to a collectively managed levy”)</td>
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<tr>
<td>Consumentenbond en Artiestenvakbonden, 2010</td>
<td>The Netherlands, Consumers and Artists</td>
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<td></td>
<td>Joint proposal by a Union of Dutch Artists and a Dutch Consumers Association for the legalisation of non-commercial acts of P2P file sharing of music and films. The proposal combines a statutory licence for the online right of reproduction (acts of downloading) and voluntary collective licensing for the right of communication to the public (acts of making available). The statutory licence would be financed first through a levy on devices (that allow recording and playback of music and films) and later by Internet subscriptions.</td>
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<tr>
<td>Songwriters Association of Canada, 2011</td>
<td>Canada, Authors</td>
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<td></td>
<td>Proposal to monetise the non-commercial sharing of music through a model of voluntary collective licensing. “Private individuals and households who wish to music file-share would be licensed to do so in conjunction with an agreement to pay a reasonable monthly license fee.” CMOs would license consumers and partner with ISPs to facilitate that licensing.</td>
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<tr>
<td>Colin, 2011</td>
<td>Belgium, Academic</td>
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<td></td>
<td>Feasibility study of licensing systems for the P2P exchange of works on the Internet. Study commissioned by Belgian CMOs and the Belgian government. It concludes that possible mechanisms for allowing non-commercial P2P exchanges of works between individuals are those based on mandatory collective management or ECL (preferably with opt-out). This study forms the basis of the analysis in Dusollier &amp; Colin, 2011 (see infra).</td>
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<tr>
<td>Modot et al., 2011</td>
<td>EU, Consultancy</td>
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<td></td>
<td>Study commissioned by the European Parliament's Committee on Culture and Education. The study examines the political and economic “feasibility of the setting up of a content flat-rate for rights holders to provide consumers with the possibility to do P2P legally.” The study concludes that the only feasible alternative to the status quo is a</td>
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<td>Origin and Type</td>
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<td>scheme based on ECL “limited to downloading and some form of uploading (making available) to allow access to P2P networks (where the protocol usually requires some form of uploading during downloading). The system will permit the global sharing of works of an end-user’s own digital collection, and will limit any form of sharing, over P2P networks, social sites, cyberlockers, etc., to a private circle of friends and family”. Proposal mentioned at 3.3.3.2.</td>
<td></td>
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<tr>
<td>Iuliano, 2011</td>
<td>US, Academic</td>
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<tr>
<td>Dusollier &amp; Colin, 2011</td>
<td>Belgium, Academic</td>
</tr>
<tr>
<td>Creation-public-internet, 2011</td>
<td>France, Advocacy</td>
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<tr>
<td>Partido Comunista Português (Grupo Parlamentar), 2012</td>
<td>Portugal, Political</td>
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<td>Reference</td>
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<td>which cannot be passed on to end-users. Amounts thus collected are destined for a specific sharing fund, managed by the government. The compensation in this system accrues to remuneration or compensation from other statutory licences (e.g. private copying). The amounts are distributed according to the following matrix: 70% to CMOs representing authors (40%), performers (30%) and producers/publishers (30%), and 30% to a fund for investment in arts and audio-visual.</td>
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<td>Harris, 2012</td>
<td>US, Academic</td>
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<td></td>
<td>Although it does not present a detailed ACS proposal, Harris advocates for legalising certain non-commercial file sharing, either through “legislation specifically recognizing consumers’ right to noncommercial filesharing, or expanding ‘fair use’ to include filesharing, similar to time-shifting”</td>
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<td>Eckersley, 2012</td>
<td>Australia/US, Academic and Advocacy</td>
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<td></td>
<td>This PhD monograph develops Eckersley, 2004, and the proposal for a type of State System labelled “virtual market reward/remuneration system” (see supra). Eckersley’s proposal is similar to a blanket licence for non-commercial acts of reproduction and making available to the public (although the coverage of this second type of act is not clearly explained). The proposal deviates from statutory licensing insofar as it is based on public funding, with a significant part of the compensation (one third) collected originating from taxation. The remaining compensation (two thirds) originates from levies on devices/media and Internet connections. Furthermore, the system relies on a Central Government Agency for collection and on a complex virtual market scheme for distribution of monies, relying on contingent valuation methods based on voting by Internet users (in a “one user, one vote” system). The proposal further defines a minimum amount of the collected sums that must be awarded to individual creators, following the logic of progressive distribution. This proposal is described at 3.3.6.2.</td>
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<tr>
<td>Ricolfi, 2012</td>
<td>Italy, Academic</td>
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<td>Ricolfi’s proposal is for a hybrid “Copyright 2.0” system, which is closer to a model of “digital abandon” for non-commercial use. This system comprises two co-existing legal regimes: The current regime (“Copyright 1.0”), and a separate copyright regime for digital works and uses, in which creators are limited to a right of attribution without remuneration (“Copyright 2.0”). Copyright 2.0 would be the default regime for the digital environment, meaning that creators would have to opt out—through the introduction of a copyright notice on works at the time of original release—in order to be regulated by the Copyright 1.0 exclusive rights regime. After release of the work, opt-out would still be possible but its effects limited to restoring the exclusive right against subsequent unauthorised commercial use; non-commercial use would remain uncompensated.</td>
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<tr>
<td>Aigrain, 2012</td>
<td>France, Academic and Advocacy</td>
</tr>
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<td></td>
<td>This monograph builds on Aigrain, 2008, and the author’s proposal for a Creative Contribution model. The proposal is described as a mutualised financing scheme for cultural and expressive activity, based on a statutory (compulsory) financial contribution, supplemented by voluntary resource pooling. Unlike the licensing approach in Aigrain, 2008, this proposal follows a “social rights approach”, which defines two “positive social rights”: the right to access the cultural commons of non-market sharing, and the right to be rewarded for one’s contribution to their enrichment. The right to share allows for the reproduction and communication to the public of all categories of subject matter lawfully published or made available for “non-market” or</td>
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</tbody>
</table>
**REFERENCE**

| Non-profit purposes, except software and databases. (The author accepts the possibility of extending the right to adaptations, such as remixes.) The compensation portion of the system (the Creative Contribution) is viewed as a two-prong reward for non-market use and for financing production and quality of new works. It is qualified as a statutory payment (not a tax), meaning that rewards are not part of the State budget but collected and managed by a specific entity for a specific purpose. The beneficiaries of the reward are individual creators of creative works; the beneficiaries of the financing part of the Creative Contribution are certain intermediaries.
| N.B. the financial reward is optional, as creators may choose to waive their right to it.
| Aigrain further develops a complex system for measurement of use and distribution of sums, including elements of monitoring, sampling and contingent valuation.

**ORIGIN AND TYPE**

| La Quadrature du Net & Aigrain, 2013 |
| France, Academic and Advocacy |
| This proposal builds on Aigrain 2008, 2012. The authors advocate the application of the doctrine of exhaustion to online acts of “non-market sharing of digital works between individuals” (involving the rights of reproduction and communication to the public). The proposal aims to place these acts outside the scope of copyright protection, whilst recognising “new social rights to remuneration and access to financing for contributors.” The preferred remuneration model follows a “Creative Contribution scheme”, implemented through a legally organised resource pooling system. Creators are entitled to a “remuneration/reward” funded through a monthly Internet flat-rate on household connections, distributed on the basis of data stored and made available by voluntary users about their non-market exchanges of works (e.g. P2P sharing, recommendations, or blog posting). The general features of the proposal qualify it as a State System type of ACS. This proposal is described at 3.3.6.2. |

| Consumentenbond, FNV KIEM, Ntb, & UFC-Que Choisir, 2012, 2014 |
| The Netherlands/France; Consumer Associations, Trade Union of Creative Workers and a Dutch Performers Association |
| Proposal originally presented in 2012 for a licence for the non-commercial P2P exchange of music and films (lawfully published or made available between individuals). The licence would combine mandatory collective management and ECL for the relevant online rights. In 2014, following the CJEU judgment in ACI Adam (discussed in Chapter 4), the proposal was submitted again in a letter to representatives of the Dutch. In this letter, the proponents approximate the licensing model advanced as similar to the licensing schemes used for broadcasting, public lending, and private copying. |
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Copyright law was originally aimed at regulating the commercial use of works between professionals. In that context, the central role of the exclusive right in the legal regime was mostly justified. However, throughout history, the landscape in which copyright operates has gradually transformed by virtue of technology, social norms, and the market. These forces influenced and shaped the exploitation and use of copyright.

The general response of legislators was to extend the subject matter and substantive rights scope of copyright, which currently includes all manner of digital content and different types of online use. This expansion is visible in international and EU copyright law in the multiple revisions to the BC, the adoption of TRIPS, and the WIPO Internet Treaties, which adapted the international framework to the digital network environment. It is likewise clear from the multiple copyright directives, with a particular emphasis on the InfoSoc Directive and its interpretation by the CJEU.

With the evolution of technology, individuals can increasingly access and use works for non-commercial purposes ubiquitously and at a low cost. But the extension of copyright’s scope also meant that such use, largely for enjoyment and personal expression, may be restricted. In this way, copyright law shifted from primarily regulating professional relationships to also cover activities of individual users in the private or non-commercial sphere, mainly through exclusive rights. The application of such a legal regime to mass online use of works created a powerful disconnect between the law and technology-influenced social norms. This mismatch leads to a costly social conflict, which negatively affects the legitimacy of copyright law and pre-empts exploration of alternative legal solutions to remunerate this online use.

Furthermore, despite the efforts of legislators and copyright owners, there is little evidence that strict enforcement is effective in deterring unauthorised file sharing. Rather, it has become clear that strict enforcement poses a serious threat to fundamental rights and freedoms. In addition, the current legal regime is ill-suited to generating adequate remuneration for the mass online use of works.

To address these problems, the present dissertation examines reform proposals that focus on models of remunerated access to copyright works in the online environment. These models are defined under the umbrella term “alternative compensation systems” or “ACS”. In simple terms, ACS replace the need for direct authorisation for the online use of works by individuals (e.g. downloading and uploading) resulting from the application of exclusive rights, with a licensing scheme authorising such use and ensuring remuneration to rights holders or at least creators.

Empirical research suggests that ACS are not only acceptable to end-users but also economically promising for rights holders. The possible benefits of a welfare-increasing ACS are many. Rights holders would see increased revenues and savings in enforcement costs. Creators could benefit too if the system includes a mandatory claim to fair compensation, which would mitigate the problems with fair remuneration they suffer due to contractual imbalances in the digital exploitation of exclusive rights. End-users would face a lower risk of infringement, increased legal certainty for their online activities, and experience better online access to works. In the long term, an ACS could promote the circulation of culture and technological development in the information society. In all, an ACS promises to strike a fair balance between the interests of rights holders and users. These are good arguments to study the admissibility of ACS within EU copyright law.
The main research questions of this dissertation are the following: Are Alternative Compensation Systems for non-commercial online use of works by individuals admissible under EU copyright law and consistent with its objectives and, if so, to what extent? How can and should EU copyright law incorporate an Alternative Compensation System? The questions aim to study the legal admissibility and normative consistency of an ACS with the EU copyright acquis. The different components of the questions are recast as sub-research questions, answered sequentially in each chapter.

Chapter 2 seeks to understand whether ACS are a wholly new phenomenon or have instructive precedents in the history of copyright. To do so, it asks the following questions: What influential historical examples of copyright rules qualify as precedents to ACS? What is their legal design? What justifications underlie their adoption? The objective is to draw lessons from the past for the examination of similar models in the online environment. The chapter examines two influential copyright rules that qualify as precedents to ACS: private copying and broadcasting compulsory licences. The goal is to uncover their legal characteristics and justifications for implementation.

It emerges from this chapter’s analysis that the exclusive right is not totemic. Rather, it is a legal tool for copyright protection, subject to the public interest. Where a conflict emerges between the exclusive right and the public interest, legal licences and mandatory collective management offer a solution to reconcile and balance competing interests, moving remuneration to the centre of copyright protection. In addition, the chapter highlights the power of rhetoric in copyright policy, showing how past debates resemble today’s discussions on file sharing. This is especially true in relation to arguments used in support of stronger protection and stricter enforcement. By demonstrating the inaccuracy of those arguments and the success of access and remuneration approaches, the analysis provides insights that may be useful in current policy discussions on how best to regulate online activities for personal enjoyment and expression.

Chapter 3 investigates how to conceptualise legalisation proposals and their attributes in light of EU copyright law. In other words, how to understand these proposals in a legally coherent way that enables the study of their nature, characteristics and effects as compared to each other and EU law. The questions this chapter examines are: What legal models are most commonly used for legalisation proposals? How can these models be qualified in light of EU copyright law? What is their nature and effect on the exclusive right? What are their main attributes? The chapter designs a conceptual framework that systematises different types of legalisation proposal and their attributes, while connecting these to the acquis, i.e. a taxonomy of ACS. The analysis focuses on different models of collective rights management—voluntary, extended, and mandatory—, on legal licences, and on state funded systems. The chapter clarifies the scope and effects of legalisation proposals, as well as the central role of CMOs in their design. This research sets the stage for the subsequent compliance and normative analysis of legalisation proposals in light of EU law.

The analysis also confirms and adds to the findings of the study of precedents, by demonstrating that legalisation proposals are not radical departures from the status quo. Instead, they are extensions and adaptations of existing copyright regimes. Inspiration is taken predominantly from examples of collective rights management and statutory or compulsory licences, with the objective of enabling a model of access and remuneration in the online environment. This realisation should allow us to view the ACS taxonomy as a toolbox of interoperable models and attributes to explore the flexibility of EU copyright law in search of viable reform options.
Chapter 4 then maps the space available in the acquis for non-commercial online use by individuals, which is instrumental in evaluating the potential scope of an ACS. The main question addressed here is: how does the bundle of exclusive rights and corresponding limitations in the acquis apply to non-commercial online use by individuals? The analysis provides a snapshot of what the law is in light of CJEU interpretation. It first proposes a typology of online use by individuals, including browsing, downloading, streaming, stream capture, uploading, hyperlinking, and digital adaptation. This typology is then examined against the exclusive rights of reproduction and communication to the public in the acquis. Where a use triggers the application of an exclusive right, the chapter assesses whether it may nonetheless be authorised by an exception or limitation, namely for temporary and transient use, private copying, quotation, incidental inclusion, and caricature, parody, or pastiche. Because the Court often follows a teleological method of interpretation, and sometimes relies on fundamental rights to define the scope of exclusive rights and limitations, the legal research in this chapter is both descriptive and normative. The chapter elucidates the legal status of mass online use and the extent to which the types of ACS identified in Chapter 3 would necessitate legislative reform in the acquis.

The conclusion of the analysis is that a substantial part of individuals’ online non-commercial activity is restricted by an exclusive right, or at least tainted by legal uncertainty. Looking forward, the trend is to reinforce the status quo and extend exclusivity to acts that, in the offline world, would be unencumbered by copyright. In no small part, these conclusions result from the priority of “private choice” over “public choice” in the application of copyright to online use, resulting from the InfoSoc Directive and its interpretation by the CJEU. The tension between public and private choice at the intersection of rights and limitations leads to a normative insight: the current legal framework, as interpreted by the Court, is partly inconsistent with the objectives of EU copyright law, as extrapolated from the InfoSoc Directive and the Court’s interpretation.

If the current regime is inconsistent with the acquis, reform through ACS should strive for a better alignment of the legal rules with the objectives of the law. In this respect, the dissertation identifies the following main obstacles to the wholesale legalisation of the mass online use of works by individuals: the territorial and substantive fragmentation of copyright; the difficulties in ensuring the participation of rights holders in voluntary models of collective rights management; and the significant uncertainty as to the legal status of the online use. To overcome these obstacles, it is suggested that a future ACS relies on a legalisation model that ensures aggregation of rights across the EU territory and legal certainty for the types of online use covered. The best legal solution in this regard is a limitation-based statutory licence applying to non-commercial online acts of reproduction and communication to the public by individuals. The legal admissibility of such a licence rests on its ability to comply with the three-step test. A maiore ad minus, if such a statutory licence passes the test, so should a legalisation model based on mandatory collective management, as it would arguably be less restrictive of the exclusive right.

Chapter 5 is the heart of the dissertation. It is divided into two main parts, which analyse the doctrinal and normative aspects of the dissertation’s main research questions. The first part of the chapter builds on the previous analysis which determined that a statutory licence ACS offers the greatest promise for regulation of non-commercial use, while dealing with complex issues of substantive and territorial fragmentation of copyright in the EU. However, such a licence entails the adoption of one or more limitations to the exclusive rights of reproduction and
communication to the public. Therefore, it must pass the three-step test. In this light, the chapter inquires: to what extent is a statutory licence ACS for non-commercial online use by individuals admissible under EU copyright law, namely the three-step test? Answering this question helps to elucidate the space available in the acquis for the adoption of a limitation-based ACS. It also clarifies important normative issues, as the test is used to conduct a fair balancing exercise between the interests of creators, rights holders and the public, including the respect of users and intermediaries’ fundamental rights.

The analysis supports the tentative admissibility under EU copyright law of an ACS for mass non-commercial online use of works by individuals based on a statutory licence and compensated limitation to the exclusive rights of reproduction and communication to the public. This conclusion, however, hinges on careful delimitation of the scope of the limitation and a flexible reading of the concept of “normal exploitation of works”, which turns on complex legal and empirical questions. Whereas this dissertation addresses the legal issues, resolution of the crucial empirical questions is outside its scope. In this light, the dissertation resorts to the toolbox developed in the ACS taxonomy to explore two flexibility mechanisms that have the potential to assist in overcoming conflicts with the normal exploitation of works: embargo periods and opt-out rules. However, the balance of arguments suggests that, absent compelling evidence to that effect, the coupling of either mechanism with a statutory licence ACS would not be decisive in overcoming a conflict with the normal exploitation of works.

Ultimately, the admissibility of a limitation-based statutory licence ACS rests on fundamental normative choices for EU policy makers on the regulation of non-commercial use of works. A choice for such a legalisation model is a choice for flexible over strict interpretation, for access and remuneration over exclusivity and enforcement, for public over private ordering. Furthermore, a public ordering approach requires recognition of the internal effect of fundamental rights in determining the scope of copyright protection. Both choices are possible and have their merits and drawbacks. Whether we favour one over the other will in essence turn on our normative view of EU copyright law and where its fair balance should be struck in the regulation of this type of use.

The second part of the chapter turns to the key normative question of this dissertation: whether and to what extent is a model of access and remuneration, such as an ACS, consistent with the general aims of copyright and the particular objectives of EU copyright law? This inquiry is made in light of the prevailing rationales of copyright and the objectives of the acquis, recasting the normative insights gained throughout the dissertation. In light of these elements, it is argued that EU copyright law can and should regulate non-commercial individual online use through a right of access and remuneration.

First, the chapter establishes that it is possible to accommodate a model of access and remuneration congruent with dominant theories in the European legal tradition: the natural rights theory (especially Locke’s fairness theory), and the utilitarian theory. Second, it concludes that such a model is coherent with the human and fundamental rights characterisation of copyright, including its property right status in certain legal instruments (e.g. the UDHR, ECHR, ICESCR, and the Charter). It is clear from the study that copyright protection is not absolute, and by extension neither is the exclusive dimension of the right. Rather, copyright protection has at its core dimensions of access (the availability of works and cultural participation), and remuneration (securing the material interests of authors).
It is suggested that restrictions to copyright are justified by its social function, and that the scope of protection, including the objectives and conditions of exercise, should be drawn in light of the public interest. Translating these considerations into the regulation of mass non-commercial online use of works by individuals, there are strong normative arguments to accept the replacement of the exclusive right with a limitation-based statutory licence ACS.

Finally, the last stage of the normative analysis explores whether and to what extent the proposed legalisation model is consistent with the objectives of EU copyright law, derived from the recitals of the copyright directives and CJEU case law. The seven objectives identified are: fair balance between the rights and interests of authors and the rights of users; high level of protection for copyright holders; adequate compensation or appropriate reward; circulation of culture; resolution of legal uncertainty; technological development, including the promotion of the information society; and harmonisation of copyright law to achieve a functioning internal market. The analysis concludes that a statutory licence ACS for non-commercial online use by individuals, subject to the delimitations arising out of the three-step test analysis, is more consistent with these objectives than the current regime.

Chapter 6 offers conclusions and a proposal for how EU copyright law ought to incorporate an ACS. The first part of the chapter summarises the main findings of the study and teases out its descriptive and normative conclusions. The second part advances a reform proposal for the regulation of non-commercial online acts by end-users through a model of remunerated access. It advances a blueprint for a limitation-based statutory licence ACS for non-commercial individual use that is consistent with EU copyright law. The blueprint identifies the relevant beneficiaries, the subject matter and substantive rights scope of the licence, the design of the fair compensation right under the system, the articulation of the limitation with contract, and the basic operation of the system. Following the pragmatic approach of the study, that blueprint is susceptible of adaptation to less stringent collective rights management models, supplemented by a soft law approach (a Commission recommendation), which may be politically more feasible in the short to medium-term.
Samenvatting

Van oorsprong heeft het auteursrecht als doel het commerciële gebruik van auteursrechtelijk beschermde werken door zakelijke gebruikers te reguleren. In die context was het verbodsrecht als middelpunt van het wettelijke regime grotendeels te billijken. Door de jaren heen heeft het landschap waarin het auteursrecht opereert zich echter langzaam getransformeerd door toedoen van technologie, sociale normen en de markt. De exploitatie en gebruik van auteursrecht is beïnvloed en gevormd door dit krachtenveld.

Wetgevers hebben hierop gereageerd door het onderwerp en de materiële rechten van het auteursrecht uit te breiden, waardoor het nu ook alle soorten digitale inhoud en verschillende vormen van online gebruik omvat. In het internationale en Europese auteursrecht is deze expansie terug te vinden in de diverse herzieningen van de Berner Conventie, en in de totstandkoming van het TRIPS-verdrag en de WIPO “Internet-verdragen”, die het internationale kader hebben aangepast aan de digitale omgeving. Eveneens komt dit duidelijk naar voren in de meerdere EU-richtlijnen inzake het auteursrecht, en metname in de Auteursrechtrichtlijn en de interpretatie ervan door het HvJEU.

Door de technologische evolutie kunnen individuen in toenemende mate toegang krijgen tot werken en deze gebruiken voor niet-commerciële doeleinden, waardoor het nu ook alle soorten digitale inhoud en verschillende vormen van online gebruik omvat. In het internationale en Europese auteursrecht is deze expansie terug te vinden in de diverse herzieningen van de Berner Conventie, en in de totstandkoming van het TRIPS-verdrag en de WIPO “Internet-verdragen”, die het internationale kader hebben aangepast aan de digitale omgeving. Eveneens komt dit duidelijk naar voren in de meerdere EU-richtlijnen inzake het auteursrecht, en metname in de Auteursrechtrichtlijn en de interpretatie ervan door het HvJEU.

Door de technologische evolutie kunnen individuen in toenemende mate toegang krijgen tot werken en deze gebruiken voor niet-commerciële doeleinden, waar dan ook en tegen lage kosten. Deze verruiming van de werkingssfeer van het auteursrecht heeft er echter toe geleid dat dergelijk gebruik, grotendeels voor eigen consumptie en persoonlijke expressie, kan worden beperkt. Aldus regelt het auteursrecht niet alleen primair professionele verhoudingen, maar strekt het zichmede uit tot de activiteiten van individuele gebruikers in de private of niet-commerciële sfeer, hoofdzakelijk middels exclusieve rechten. De toepassing van dit regime op massaal online gebruik van werken heeft een enorme kloof veroorzaakt tussen het recht en de sociale normen die zijn beïnvloed door de technologie. Deze discrepantie leidt tot een kostbaar maatschappelijk conflict, dat de legitimiteit van het auteursrecht negatief beïnvloedt en de zoektocht naar een alternatieve wettelijke oplossing om online gebruik te vergoeden bij voorbaat uitsluit.

Bovendien is er maar weinig bewijs dat erop lijkt te duiden dat strikte handhaving de ongeautoriseerde filesharing effectief afschrikt, ondanks de inspanningen van wetgevers en auteursrechthouders. Veeleer is het duidelijk geworden dat strikte handhaving een serieuze bedreiging vormt voor de fundamentele rechten en vrijheden. Daarnaast is het huidige juridische regime niet in staat om een afdoende en passende vergoeding voor het massale online gebruik van werken te genereren.

Om deze problemen aan te pakken onderzoekt dit proefschrift herzieningsvoorstellen, bestaande uit modellen van betaalde toegang tot auteursrechtelijk beschermde werken in de online omgeving. Deze modellen worden aangeduid onder de overkoepelende term “Alternative Compensation Systems” (‘alternatieve vergoedingssystemen’) of kortweg “ACS”. ACS nemen simpelweg de noodzaak weg om online gebruik van werken (zoals downloaden en uploaden) door individuen toe te staan op basis van exclusieve (verbods)rechten, en vervangen deze door een licentiemodel dat dergelijk gebruik autoriseert en zorgdraagt voor vergoeding voor rechthebbenden, of in ieder geval de makers.

Empirisch onderzoek suggereert dat een ACS niet alleen aanvaardbaar is voor eindgebruikers, maar vanuit economisch opzicht ook veelbelovend is voor rechthebbenden. De mogelijke voordelen van een welvaart verhogende ACS zijn legio. Voor rechthebbenden zal het een verhoogde omzet en besparingen op handhavingskosten kunnen betekenen. Ook makers zullen

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kunnen profiteren indien het systeem gepaard gaat met een wettelijke aanspraak op een billijke vergoeding. Dit zal de vergoedingsproblemen die de makers ervaren door een contractueel onbalans bij de digitale exploitatie van exclusieve rechten kunnen verzachten.

Eindgebruikers zullen minder risico lopen inbreuk te maken, zij zullen meer rechtszekerheid met betrekking tot hun online activiteiten en een beter online toegang krijgen tot werken. Op de lange termijn zal ACS de verspreiding van cultuur en technologische ontwikkeling in de informatiemaatschappij kunnen bevorderen. Al met al belooft ACS een rechtvaardige balans te vinden tussen de belangen van rechthebbenden en gebruikers. Dit zijn sterke argumenten om de verenigbaarheid van ACS met het Europese auteursrecht te onderzoeken.


Hoofdstuk 2 onderzoekt de vraag of ACS een volledig nieuw fenomeen is of dat er precedenten zijn in de geschiedenis van het auteursrecht waarvan we kunnen leren. Hiertoe worden de volgende vragen gesteld: Welke historische voorbeelden van regulering binnen het auteursrecht kunnen worden gekwalificeerd als ACS? Hoe zijn zij juridisch vormgegeven? Welke rechtvaardigingen liggen ten grondslag aan de implementatie ervan? Het doel hiervan is om lessen te trekken uit het verleden om gelijksoortige modellen in de online omgeving te onderzoeken. Het hoofdstuk bestudeert twee invloedrijke auteursrechtelijke rechtsfiguren die kunnen worden gekwalificeerd als ACS: de wettelijke licentie voor het vervaardigen van privékopieën en die voor dwanglicenties bij het uitzenden. Het doel is om de juridische kenmerken en rechtvaardigingen voor de implementatie ervan bloot te leggen.

Uit de analyse van dit tweede hoofdstuk blijkt dat het verbodsrecht niet onschendbaar is. Het is veeleer een juridisch instrument voor auteursrechtelijke bescherming die is onderworpen aan het publieke belang. Zodra een conflict tussen het verbodsrecht en het publieke belang zich manifesteert, bieden wettelijke licenties en verplicht collectief beheer een oplossing om tegenstrijdige belangen met elkaar te verenigen en af te wegen, waardoor de vergoeding in het middelpunt van auteursrechtelijke bescherming komt te staan. Tevens benadrukt het hoofdstuk de kracht van de retoriek in auteursrechtbeleid, en toont het aan dat debatten uit het verleden lijken op de discussies over filesharing vandaag de dag. Dit is zeker waar op het punt van de argumenten die worden gebruikt in het voordeel van een sterke bescherming en striktere handhaving. Door de onjuistheid van die argumenten en het succes van toegangs- en vergoedingsgerichte benaderingen aan te tonen, biedt de analyse inzichten die nuttig kunnen zijn voor de huidige beleidsdiscussies over wat de beste manier is om online-activiteiten voor persoonlijke consumptie en uitingen te reguleren.

Het "Europese auteursrecht" verwijst in deze samenvatting naar het auteursrecht zoals dat is geharmoniseerd op het niveau van de Europese Unie.
Hoofdstuk 3 onderzoekt hoe wetgevingsvoorstellen en hun eigenschappen in het licht van het Europese auteursrecht kunnen worden geconceptualiseerd; anders gezegd, hoe deze voorstellen moeten worden begrepen op een juridisch samenhangende wijze die het mogelijk maakt om hun aard, kenmerken en effecten te bestuderen in samenhang met elkaar en met het EU-recht. De vragen die in dit hoofdstuk worden behandeld zijn: Welke juridische modellen zijn gangbaar voor wetgevingsvoorstellen? Hoe kunnen deze modellen worden gekwalificeerd in het licht van het Europese auteursrecht? Wat is hun aard en effect op het exclusieve recht? Wat zijn hun basiskenmerken? Het hoofdstuk ontwerpt een conceptueel kader dat verschillende soorten wetgevingsvoorstellen en hun kenmerken systematisert, terwijl deze tegelijkertijd in verband worden gebracht met het acquis, hetgeen de taxonomie vormt voor ACS. De analyse richt zich op verschillende modellen van collectief beheer (vrijwillige, verruimde, en wettelijk verplichte), van wettelijke licenties, en van stelsels die uitgaan van overheidsbekostiging. Het hoofdstuk verklaart de reikwijdte en effecten van legaliseringsvoorstellen, alsmede de centrale rol van cbo’s daarbij. Dit vormt het decor voor de navolgende verenigbaarheids- en normatieve analyse van de legaliseringsvoorstellen in het licht van het Europese recht.

De analyse bevestigt, en draagt bij aan, de bevindingen in deze studie naar precedenten, door aan te tonen dat de wetgevingsvoorstellen niet radicaal afwijken van de status quo. In plaats daarvan zijn zij een uitbreiding en aanpassing van bestaande auteursrechtelijke regimes. Inspiratie is hoofdzakelijk geput uit voorbeelden van collectief rechtenbeheer en wettelijke of dwanglicenties, teneind een model van toegang en vergoedingen in een online omgeving te realiseren. Zodoende kunnen we de taxonomie van ACS beschouwen als een toolbox ten behoeve van interoperabele modellen en eigenschappen om de flexibiliteit van het Europese auteursrecht te verkennen, in de zoektocht naar levensvatbare hervormingsvarianten.

Vervolgens brengt Hoofdstuk 4 de speelruimte in kaart die het acquis biedt ten aanzien van niet-commercieel online gebruik door individuen, hetgeen dient als middel om de potentiële reikwijdte van een ACS te bepalen. Hierbij is de belangrijkste vraag: hoe moet de bundel exclusieve rechten met bijbehorende beperkingen in het acquis worden toegepast op niet-commercieel online gebruik door individuen? De analyse resulteert in een overzicht van wat het recht is in het licht van de interpretatie door het HvJEU. Het zet als eerste een typologie uiteen van online gebruik door individuen, met inbegrip van browsing, downloaden, streamen, vastleggen van een stream, uploaden, hyperlinking, en digitale bewerking. Vervolgens wordt deze typologie tegen het licht gehouden van de exclusieve rechten van reproductie en mededeling aan het publiek in het acquis. Voor een gebruik dat onder een exclusief recht valt gaat dit hoofdstuk na of er desalniettemin een uitzondering of beperking daarop van toepassing is, in het bijzonder die voor tijdelijke reproducties, privékopieën, citaten, incidentele verwerkingen in een ander werk, en voor karikaturen, parodieën of pastiches. Omdat het Hof doorgaans kiest voor een teleologische interpretatie, en soms ook een beroep doet op fundamentele rechten om de reikwijdte van de verbodsrechten en beperkingen te bepalen, is het juridisch onderzoek in dit hoofdstuk zowel descriptief als normatief. Het hoofdstuk verklaart de juridische status van massaal online gebruik en de mate waarin de verschillende ACS-typen die zijn vastgesteld in Hoofdstuk 3 een herziening van de regelgeving in het acquis vereisen.

De conclusie van de analyse is dat een aanzienlijk deel van de niet-commerciële online-activiteiten door individuen valt onder een exclusief recht, of ten minste worden overschaduwd door rechtsonzekerheid. Er is een trend waar te nemen van versterking van de status quo en van uitbreiding van de exclusiviteit tot handelingen die in de offline-wereld niet worden gehinderd.
door het auteursrecht. Voor een niet te verwaarlozen deel vloeien deze conclusies voort uit de voorkeur van “private keuzes” boven “publieke keuzes” bij het toepassen van auteursrecht op online gebruik, wat het resultaat is van de Auteursrechtstafelijk en de interpretatie ervan door het HvJEU. De spanning tussen keuzes in de publieke en privésfeer op het snijvlak van rechten en beperkingen leidt tot een normatief inzicht: het huidige, juridische kader, zoals dat is uitgelegd door het Hof, is deels onverenigbaar met de doelstellingen van het Europese auteursrecht, zoals deze kunnen worden geëxtrapoleerd uit de Auteursrechtstafelijk en de uitleg ervan door het Hof.

Indien het huidige systeem niet verenigbaar is met het acquis, zullen hervormingen in de richting van een ACS moeten mikken op wettelijke regels die beter in lijn zijn met de doelstellingen van het recht. In dit verband onderkent dit proefschrift als belangrijkste obstakels voor een allesomvattende legalisering van massaal online-gebruik van werken door individuen: de territoriale en materiële versnippering van het auteursrecht; de moeilijkheid om rechthebbenden te laten deelnemen in stelsels van vrijwillig collectief handelen; en de aanzienlijke onzekerheid over de juridische status van online gebruik. Om deze belemmeringen te overwinnen is een nieuw ACS voorgesteld, dat is gebouwd op een model van legalisering waarin wordt verkregen dat rechten over het gehele territorium van de EU worden gebundeld en waarin rechtszekerheid wordt geboden voor alle soorten van online gebruik die het ACS behelst. In dit opzicht bestaat de beste juridische oplossing uit een wettelijke licentie op basis van een beperking die van toepassing is op niet-commerciële reproductie- en mededelingen aan het publiek door individuen. Of een dergelijke licentie juridisch toelaatbaar is, hangt af van de vraag of zij kan voldoen aan de driestappentoets. Als zo’n wettelijke licentie deze toets doorstaat, zal – a maiore ad minus - ook een legaliseringsmodel gebaseerd op verplicht collectief rechtenbeheer de toets doorstaan, daar dat waarschijnlijk een geringer beperking van het exclusieve recht oplevert.

Hoofdstuk 5 vormt de kern van het proefschrift. Het is verdeeld in twee delen waarin de dogmatische resp. normatieve aspecten van de centrale onderzoeksvragen in dit proefschrift worden geanalyseerd. Het eerste deel van het hoofdstuk bouwt voort op de voorgaande analyse waaruit blijkt dat een ACS in de vorm van een wettelijke licentie de veelbelovendste optie is om niet-commercieel gebruik te reguleren, waarbij tegelijkertijd de complexe vraagstukken rond de materiële en territoriale versnippering van het auteursrecht in de EU worden meegenomen. Wel impliceert een dergelijke licentie het opnemen van een of meer beperkingen op het exclusieve reproductierecht en op het uitsluitende recht inzake mededeling aan het publiek. Om die reden moet de licentie de driestappentoets kunnen doorstaan. In dat kader wordt in het hoofdstuk de vragen behandeld of en in hoeverre een ACS in de vorm van een wettelijke licentie voor niet-commercieel gebruik door individuen toelaatbaar is onder het Europese auteursrecht, en met name of zij de driestappentoets doorstaat. Het beantwoorden van deze vragen biedt gelegenheid om de speelruimte binnen het acquis voor het aannemen van een op beperkingen gebaseerde ACS nader toe te lichten. Voorts worden daarbij normatieve issues verduidelijkt, daar de toets wordt gebruikt om de belangen van makers, rechthebbenden en het publiek met elkaar in balans te brengen, waarbij ook de fundamentele rechten van gebruikers en tussenpersonen worden geëerbiedigd.

De analyse ondersteunt de hypothetische toelaatbaarheid onder Europees auteursrecht van een ACS voor massaal niet-commercieel online-gebruik van werken door individuen, als deze berust op een wettelijke licentie met een gecompenseerde beperking van de exclusieve rechten inzake et reproduction resp. mededelen aan het publiek. Deze conclusie hangt wel af van een zorgvuldige
afbakening van de reikwijdte van deze beperking en van een flexibele invulling van het begrip “normale exploitatie van werken”, hetgeen complexe juridische en empirische vragen oproept. Omdat dit proefschrift alleen de juridische aspecten behandelt, blijft de oplossing van het cruciale empirische vraagstuk buiten de kader van dit onderzoek. In dit verband neemt dit proefschrift zijn toevlucht naar de toolbox die is ontwikkeld in de ACS-taxonomie om twee flexibiliteitsmechanismes te verkennen die wellicht kunnen helpen om conflicten met de normale exploitatie van werken te overwinnen: embargo periodes en een opt-out regeling. Een afweging van verschillende argumenten wijst er evenwel op dat, zonder overtuigend bewijs van dat effect te hebben, koppeling van een van beide mechanismen aan een wettelijke ACS licentie doorslaggevend zou kunnen zijn in het overwinnen van een conflict met de normale exploitatie van werken.

Uiteindelijk hangt de toelaatbaarheid van een ACS, als een op een beperking gebaseerde wettelijke licentie, af van de fundamentele normatieve keuzes die de Europese beleidsmakers maken om het niet-commercieel gebruik van werken te reguleren. Een keuze voor zo’n model van legaliseren is een keuze voor een flexibele in plaats van een stricte enge uitlegging, voor toegang en vergoeding in plaats van exclusiviteit en handhaving, en voor publieke in plaats van private ordening. Bovendien vereist een benadering van publieke ordening de erkenning van het interne effect van fundamentele rechten bij het afbakenen van de reikwijdte van auteursrechtelijke bescherming. Beide keuzes zijn mogelijk en hebben hun voor- en nadelen. Of we de ene of de andere keuze prefereren hangt in essentie af van onze normatieve kijk op het Europese auteursrecht en van waar het rechtvaardige evenwicht wordt gevonden bij het reguleren van deze vormen van gebruik.

Het tweede deel van het hoofdstuk grijpt terug op de belangrijkste normatieve vraag in dit proefschrift of en in hoeverre een model van toegang en vergoeding, zoals een ACS, in overeenstemming is met de algemene doelstellingen van het auteursrecht, en meer specifiek met die van het Europese auteursrecht? Dit onderzoek is gedaan in het licht van de heersende ratio van het auteursrecht en de doelstellingen van het acquis, waarbij de normatieve inzichten die zijn opgedaan in dit gehele proefschrift worden herschikt. In het licht van deze elementen is betoogd dat het Europese auteursrecht niet-commercieel individueel online gebruik van werken kan en zou moeten reguleren middels een toegangs- en vergoedingsrecht.

Als eerste stelt het hoofdstuk vast dat het mogelijk is om te voorzien in een toegangs- en vergoedingsmodel dat in overeenstemming is met de heersende theorieën binnen de Europese rechtstraditie: de theorie van het natuurrecht (in het bijzonder de billijkheidstheorie van Locke), en de theorie van het utilisme. Ten tweede trekt het de conclusie dat een dergelijk model klopt met de mensenrechtelijke en fundamenteelrechtelijke kwalificatie van het auteursrecht, met inbegrip van de status van het eigendomsrecht in verschillende juridische instrumenten (zoals de UVRM, het EVRM, het IVESCR en het Handvest). Uit het onderzoek komt duidelijk naar voren dat auteursrechtelijke bescherming niet absoluut is, en in het verlengde daarvan geldt dat ook voor het exclusieve karakter van het recht. Veeleer heeft auteursrechtelijke bescherming in de kern aspecten van toegang (de beschikbaarheid van werken en cultuurparticipatie) en van vergoeding (waarborgen van de materiële belangen van makers).

Erop is gewezen dat beperkingen op het auteursrecht gerechtvaardigd worden door hun maatschappelijke functie en dat de omvang van bescherming, inclusief de doelstellingen en voorwaarden bij de uitoefening van het auteursrecht, zou moeten worden afgebakend in het licht van het publieke belang. Door deze overwegingen te vertalen naar regulering van massaal niet-
commercieel online gebruik van werken door individuen zijn er sterke, normatieve argumenten voor de aanvaarding van een vervanging van het exclusieve recht door een op beperkingen en wettelijke licentie gebaseerd ACS.

Tenslotte verkent de laatste stap van de normatieve analyse de vraag of en in hoeverre het voorgestelde model van legalisering aansluit op de doelstellingen van het Europese auteursrecht, zoals afgeleid uit de overwegingen in de EU-richtlijnen inzake het auteursrecht en uit de rechtspraak van het HvJEU. De zeven doelstellingen die zijn vastgesteld zijn: een rechtvaardig evenwicht tussen de rechten en belangen van makers en de rechten van gebruikers; een hoog beschermingsniveau voor auteursrechthebbenden; een billijke compensatie of passende beloning; verspreiding van cultuur; wegnemen van rechtsonzekerheid; technologische ontwikkeling, waaronder mede begrepen de bevordering van de informatiemaatschappij; en harmonisatie van het auteursrecht om een functionerende interne markt te verwezenlijken. De analyse concludeert dat een op een wettelijke licentie gebaseerd ACS voor niet-commercieel online-gebruik door individuen, met inachtneming van de begrenzingen die voortvloeien uit de analyse van de driestappentoets, beter aansluit op deze doelstellingen dan het huidige regime.

Hoofdstuk 6 bevat de conclusies en een voorstel voor de wijze waarop een ACS deel zou moeten uitmaken van het Europese auteursrecht. Het eerste deel van het hoofdstuk geeft een samenvatting van de belangrijkste bevindingen van het onderzoek en ontwart de descriptieve en normatieve conclusies. Het tweede deel draagt een voorstel tot hervorming aan voor het reguleren van niet-commerciële online handelingen van eindgebruikers middels een model van toegang tegen een vergoeding. Het oppert een blauwdruk voor een ACS, een op beperkingen gebaseerde wettelijke licentie voor niet-commercieel individueel gebruik die verenigbaar is met het Europese auteursrecht. Deze blauwdruk identificeert de relevante begunstigden, het onderwerp en de inhoudelijke omvang van de licentierechten, de inrichting van een recht op een billijke vergoeding in dit systeem, het formuleren van de beperking in contracten, en de basiswerking van het systeem. In aansluiting op de pragmatische insteek van dit onderzoek kan deze blauwdruk worden aangepast ten behoeve van minder vergaande modellen van collectief beheer, hetgeen wordt aangevuld met een soft law-benadering die op de korte of middellange termijn politiek gezien wellicht meer realiseerbaar is.