Copyright in the age of online access

Alternative compensation systems in EU copyright law

de Miranda Branco Tomé Quintais, J.P.

Publication date
2017
Document Version
Other version
License
Other

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.[1] Most individuals aged between 16 and 74 years use the Internet, a number that will only rise over time.[2] 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.[3]

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.[4]

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.[5] 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.[6] 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.[7] 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

---

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.

4 On the qualification of copyright as property, see: Art. 1 Protocol No. 1 ECHR; Art. 17(2) Charter; Recital 9 InfoSoc Directive; Recital 32 Enforcement Directive; Follow-Up Green Paper 1996, p. 8.

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".

7 Gervais, 2009, pp. 845–848, 851, 869–870.

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]

---

8 Pereira, 2008, p. 8.

9 Liu, 2001, p. 1255.

10 The relevant directives are: the Software Directive (1991, amended and codified 2009); the SatCab Directive (1993); the Term Directive (1993, amended 2011); the Database Directive (1996); the Rental Right Directive (1996, amended and codified 2006); the InfoSoc Directive (2001); the Resale Right Directive (2001); Enforcement Directive (2004); the Orphan Works Directive (2012); the CRM Directive (2014).

11 P. Bernt Hugenholtz, 2009a, p. 17. On the process of harmonisation in EU copyright law, see Eechoud, Hugenholtz, Gompel, Guibault, & Helberger, 2009; P. Bernt Hugenholtz, 2009a, 2013a.

12 See Lessig, 2008, describing the shift from a "Read/Only" to a "Read/Write" culture. In this article, "digital content" refers to data produced and supplied in digital form. Cf. Art. 2(11) Consumer Rights Directive.

13 Gervais, 2009, pp. 845–857, 869–870.

14 Benkler, 2006, p. 385–ff; Boyle, 2003; Lessig, 2001, 2004; Palfrey, 2010.

The application of this legal regime to "mass" online use by individuals created a mismatch between the law and technology-influenced social norms.[15] 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.[16] 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.[17] 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.[18] The latter include P2P software providers and Internet Service Providers (**ISPs**) supplying the infrastructure for data flows.[19]

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[20], blocking[21], and disclosure of information in relation to allegedly infringing subscribers.[22] 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,

---

15 P. Bernt Hugenholtz, 2013b, p. 26.

16 Lessig, 2008, p. 253–ff, arguing for a legal reform that deregulates amateur creativity (i.e. transformative uses), "decriminalizes copies" (and instead focuses on "uses"), and decriminalises file sharing via compulsory/statutory licensing or voluntary collective licensing. See also: Benkler, 2006, p. 278, 383-; Zittrain, 2008, pp. 192–193.

17 The term "file sharing" is used in this study to mean the online exchange of copyright-protected material without the authorisation rights holder, also referred to as "unauthorised file sharing," "illegal file sharing," and "online piracy". Cf. Poort & Weda, 2015a, p. 63 (n.1).

18 The demand/supply-side description is taken from Poort, Leenheer, van der Ham, & Dumitru, 2014.

19 Giblin, 2014b. On the fundamental rights-based restrictions on the implementation of said systems in Europe, see *infra* 5.3.3.6. On their general ineffectiveness, see Geiger, 2014a; HADOPI DREV - Département Recherche Etudes et Veille, 2013.

20 In simple terms, filtering consists of "content-control software applications designed to automatically block the display or downloading of selected material on a web browser or other Internet application". See Christina Angelopoulos, 2009, p. 2, citing Council of Europe Recommendation CM/Rec(2008)6. A similar broad definition is used by Palfrey, 2010, pp. 10–11.

21 "Blocking" refers to the prevention of access to websites, P2P networks, or accounts of infringing users. For example, website blocking injunctions can take the form of DNS and IP address blocking or deep packet inspection. See DLA Piper, 2009, p. 22.

22 See DLA Piper, 2009, p. 22, providing examples of national case law. Website blocking injunctions, in particular, became a widely used enforcement measure in many EU jurisdictions. See C. Angelopoulos, 2014; Husovec, 2013; Husovec & Peguera, 2015. Reporting on the increase in use of website blocking injunctions in Europe, see Meale, 2013; E. Rosati, 2015.

sanctions are applied, including "suspension and termination of service, capping of bandwidth, and blocking of sites, portals and protocols".[23]

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.[24] 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.[25]

Despite this multi-layered strategy, there is little causal evidence that enforcement is effective in significantly reducing online infringement.[26] 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.[27] Empirical evidence suggests that litigation has at best a short-term deterrent effect before demand and supply relapse into infringing practices through alternative channels.[28] Furthermore, complex enforcement approaches, like graduated-response systems, are costly and inefficient.[29]

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.[30] The Court's jurisprudence requires that a "fair balance" is reached between the protection of the right of property in

---

23 Yu, 2010, p. 1374.

24 Geiger, 2014a; Giblin, 2012, pp. 58–59, 115; IFPI, 2013, 2015. See also *infra* note 1730, 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.

29 See Geiger, 2014a, pp. 5–11, 2014c, pp. 134–138, Giblin, 2014a, 2014b; HADOPI DREV - Département Recherche Etudes et Veille, 2013; Lescure, 2013.

30 See *infra* 4.4.1.4 and 5.3.3.6.

copyright and competing fundamental rights, sometimes giving primacy to the latter.[31] At the legislative level, similar considerations have led to the rejection of graduated-response systems.[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.[33] Thus, private ordering can address to some extent unmet demand as one of the causes of online infringement.[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.[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.[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.[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.[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.[39] Still, collective rights management schemes and

---

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.

32 See Art. 1(3)(a) Framework Directive. On fundamental rights concerns with graduated response systems, see *infra* 5.3.3.6.

33 Vallbé, Bodó, Handke, & Quintais, 2015, p. 2 with references to empirical studies, including Poort & Weda, 2015a. See also Giblin, 2014a, 2014b, p. 210.

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.

35 Kantar Media, 2012; Poort & J. Leenheer, 2012; Vallbé et al., 2015.

36 See Ricolfi, 2007, p. 300, making a similar argument. See also Grece, Lange, Schneeberger, & Valais, 2015, pp. 132–133, and Communication on Modern European Copyright Framework 2015, p. 4 (noting the problems caused by territoriality).

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)

38 Flowers, 2015; Vallbé et al., 2015, pp. 1–4.

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.

---

40 See i*nfra* 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.[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.[46]

In 2011, the European Parliament commissioned a study on "content flat-rates".[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.[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".[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).[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**).[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.[52]

---

45 See Chapter 3 for further analysis of these proposals.

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.

47 Modot et al., 2011.

48 See EP Resolution Private Copying Levies 2014, and Castex Report 2013, ¶30.

49 See Castex Report 2013, ¶27. The suggestion was dropped in the final version of the document.

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.

51 Handke et al., 2015.

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. [53]

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.[54]

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. [55] 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.

---

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.[56]

This dissertation is concerned with Internet users that engage in "non-commercial" online use of works.[57] 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.[58]

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.[59]

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*.[60] 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".[61]

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

---

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.

58 See Collová, 1991, pp. 35–149; P. Bernt Hugenholtz, 2012a, pp. 180–191; J. Reinbothe, 1981, pp. 36–49.

59 Fisher, 2010, pp. 1433–1436 & n.97. See also Lohmann, 2014.

60 See, generally, Schlag, 1985.

61 See Perzanowski & Schultz, 2014, p. 1545, making a similar distinction in relation to prospective legislation of digital exhaustion.

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".[62] 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.[63]

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.[64]

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.[65]

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".[66] 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".[67]

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.[68] The dissertation asks *what the law is* in order to assess *what the law ought to be*,[69] 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.[70] 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.[71]

---

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.

68 Van Gestel, Micklitz, & Maduro, 2012, p. 2.

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.[72] 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.[73]

"Primary" law consists of the Treaties (TEU and TFEU) and the Charter—which has "the same legal value as the Treaties"[74]—together with fundamental or general principles of EU law developed by the Court, "including the requirement to protect fundamental rights".[75] 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[76], 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.[77] The most relevant acts for this dissertation are the multiple directives on copyright and related rights.[78] 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.[79]

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.[80] The study also excludes areas of EU law outside copyright that

---

72 EUROFUND, *Industrial Relations Dictionary, Acquis Communautaire,* http://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/acquis-communautaire (accessed 30.04.2016).

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.

78 The relevant directives are: Software Directive (1991, amended and codified 2009); SatCab Directive (1993); Term Directive (1993, amended 2011); Database Directive (1996); Rental Right Directive (1996, amended and codified 2006); InfoSoc Directive (2001); Resale Right Directive (2001); Enforcement Directive (2004); Orphan Works Directive (2012); CRM Directive (2014). N.B. that the Enforcement Directive applies also to other intellectual property rights.

79 "Unilateral acts" include those typified in Article 288 TFEU (decisions, opinions and recommendations) and those considered "atypical", exemplified in the text. See EUR-LEX, *Sources of European Law*, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:l14534 (accessed 30.04.2016)

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.[81]

EU law is an autonomous body of law largely independent from national law.[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.[83] Since 2009, there have been frequent references for a preliminary ruling on the interpretation of open concepts in the *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".[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.[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.[86] The InfoSoc Directive, in particular, is used as a horizontal harmonisation instrument, with its recitals playing the role of veritable harmonisation guides.[87]

---

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.

82 Rösler, 2012, p. 979.

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".

84 See Eechoud, 2012; Marcella Favale, Kretschmer, & Torremans, 2015, pp. 31–32; P. Bernt Hugenholtz, 2013a, pp. 513–521; Leistner, 2014, pp. 560–561. This practice does not seem common in other areas of EU secondary law. See Rösler, 2012, p. 979.

85 Marcella Favale et al., 2015, pp. 37, 53–55. In its copyright jurisprudence, it is notable that the Court often refers back to its previous case law in support of its legal reasoning, but never explicitly reverses previous judgments. *Ibid*., pp. 56–57. See also Rösler, 2012, p. 979, noting that the common objective of interpretation is its effectiveness (*effet utile)*.

86 See Geiger & Schönherr, 2014b, pp. 554–556.

87 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 *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

---

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 & 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.

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; Senftleben, 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.[95] 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.[96] 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.[97] Finally, many authors refrain from designing potentially viable legal models.[98] When they do, some of the proposals are purely theoretical, or wholly unrealistic.[99]

This dissertation addresses these lacunae by undertaking in-depth research on ACS under EU copyright law.[100] 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.[101] The findings of that project provide empirical justifications for the legal inquiry into ACS, and are embedded into key parts of the analysis.[102]

The societal relevance of this dissertation was illustrated in section 1.1. The large majority of the EU population uses the Internet.[103] 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

---

95 Chapter 3 contains a systematic analysis of the literature and proposals on ACS.

96 See, e.g., Fisher, 2004; Litman, 2004; Lohmann, 2004, 2008; Netanel, 2003

97 See, e.g., Goldstein & Hugenholtz, 2013, pp. 275–281, 371–376.

98 Among these exceptions, see Fisher, 2004; Netanel, 2003.

99 Eckersley, 2004, 2012.

100 Some existing literature partially analyses ACS against the background of the EU copyright Directives. See Bernault & Lebois, 2005; Colin, 2011a, 2011b; Séverine Dusollier & Colin, 2011; Frosio, 2011; Quintais, 2012; von Lewinski, 2005.

101 INSTITUTE FOR INFORMATION LAW (IViR), *Research, Copyright in an Age of Access: Alternatives to Copyright Enforcement*, http://www.ivir.nl/onderzoek/acs?lang=en (accessed 30.04.2016).

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.