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Alternative compensation systems in EU copyright law

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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.

¹⁰⁵ See Handler, 2013, p. 95; Ibbetson, 2005, p. 878; Rose, 2010, pp. 14, 38. For copyright and technology, see Brad Sherman & Wiseman, 2012, pp. 2, 6.

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 rights¹⁰⁸, the compulsory licence for mechanical reproduction of phonograms,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*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

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.

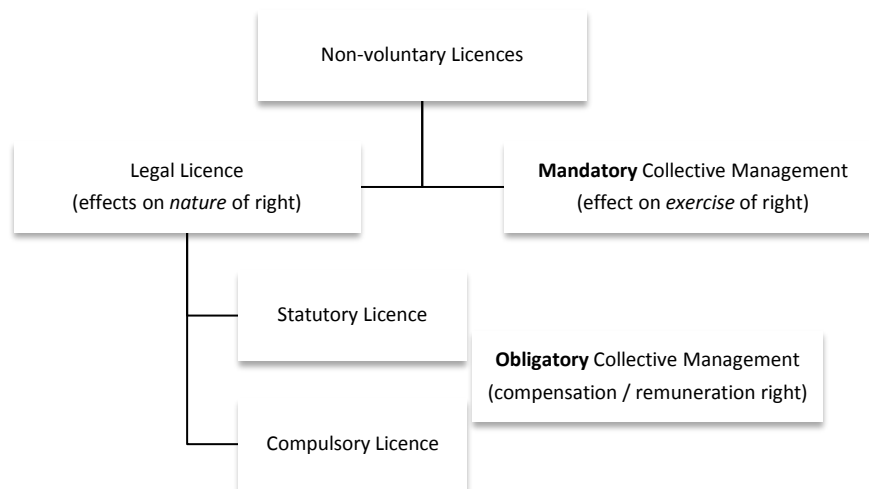


Figure 1. Non-voluntary Licences

“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

¹¹⁷ von Lewinski, 2008, pp. 55–56.

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).¹²⁰ 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.¹²¹ (Chapter 3 explores the rationale for this distinction and its implications. Importantly, not all authors categorise mandatory collective management as a non-voluntary licence.¹²²)

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.¹²³ Equitable remuneration rights are directly provided in “international copyright and related rights norms, and in national copyright laws, as a right to such remuneration”.¹²⁴

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.¹²⁵ 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.¹²⁶

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.¹²⁷

¹²⁰ See *infra* 3.3.4.2, for discussion on the legal nature and effects of mandatory collective management.

¹²¹ Arts 8–12 SatCab Directive. See *infra* 2.4.4 and 3.3.4.

¹²² See, e.g., Depreeuw, 2014, p. 297.

¹²³ Mihály Ficsor, 2010, pp. 44–46; von Lewinski, 2008, p. 55.

¹²⁴ Ficsor, 2003b, p. 307.

¹²⁵ Arts 11*bis* BC and 12 RC. See *infra* 2.4.2 and 2.4.3.

¹²⁶ Respectively, Arts 5, 6 and 8(2) Rental Right Directive.

¹²⁷ See, e.g., Arts 11*bis*(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.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.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.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.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.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

¹²⁸ See, concerning Art.8(2) Rental Right Directive: CJEU, *Sena*, ¶¶36–37; CJEU, *Lagardère*, ¶50.

¹²⁹ CJEU, *Sena*, ¶46. See also CJEU, *Kanal 5 and TV4*, ¶¶37, 41.

¹³⁰ See, respectively, Arts 5(2)(a), (b) and (e) InfoSoc Directive, and 6(5) Orphan Works Directive.

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.

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 law¹³⁴ 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

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.

¹³⁷ See: BGH, 18.05.1955, I ZR 8/54 (“Grundig Reporter I”); BGH, 18.05.1955, I ZR 10/54 (“Grundig Reporter II”); BGH, 22.01.1960, I ZR 41/58 (“GEMA-Hinweis”); BGH, 29.05.1964, I ZR 4/63 (“Personalausweise”).

¹³⁸ P. Bernt Hugenholtz, 2012b, p. 179; J. Reinbothe, 1981, p. 36.

steady expansion of levy targets to encompass multiple reproduction technologies and related supports.¹³⁹

German levy schemes were influential in other European countries' laws and throughout the world.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.¹⁴¹ Article 5(2)(b) InfoSoc Directive allows Member States to provide limitations to the Article 2 reproduction right:

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.

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.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.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.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

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.

¹⁴⁰ On the general significance of the German Act as a model of international copyright law, see Cornish, 1995, p. 804.

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.

¹⁴² P. Bernt Hugenholtz, 2012b, pp. 192–193.

¹⁴³ Boytha, 1993, pp. 295–296.

¹⁴⁴ P. Bernt Hugenholtz, 2012b, p. 181. See also Green Paper on Copyright and the Challenge of Technology 1988, p. 101.

works.¹⁴⁵ 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).¹⁴⁶

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”.¹⁴⁷ Its reaction was to propose that every device owner pay a monthly amount as consideration for the authorisation for home taping.¹⁴⁸ 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.¹⁴⁹ (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”.¹⁵⁰ As Hugenholtz points out, this scheme is at the inception of the 1965 statutory levy system.¹⁵¹

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.¹⁵² 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.¹⁵³ 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.¹⁵⁴

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”.¹⁵⁵

¹⁴⁵ BGH, 18.05.1955, I ZR 8/54 (“Grundig Reporter I”), 493 *apud*. P. Bernt Hugenholtz, 2012b, p. 181.

¹⁴⁶ P. Bernt Hugenholtz, 2012b, p. 181.

¹⁴⁷ P. Bernt Hugenholtz, 2012b, p. 182 citing the reaction in 1950 from Dr. Eric Schulze, General Director of GEMA

¹⁴⁸ P. Bernt Hugenholtz, 2012b, p. 182.

¹⁴⁹ P. Bernt Hugenholtz, 2012b, p. 182.

¹⁵⁰ P. Bernt Hugenholtz, 2012b, pp. 182, 189.

¹⁵¹ P. Bernt Hugenholtz, 2012b, p. 189.

¹⁵² P. Bernt Hugenholtz, 2012b, p. 183. On the rules in the 1901 Act, see Collová, 1966, p. 100–ff.

¹⁵³ P. Bernt Hugenholtz, 2012b, p. 183; Mac, 1973, p. 107.

¹⁵⁴ P. Bernt Hugenholtz, 2012b, p. 183; J. Reinbothe, 1981, p. 38.

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

¹⁵⁶ P. Bernt Hugenholtz, 2012b, p. 183; J. Reinbothe, 1981, p. 37.

¹⁵⁷ J. Reinbothe, 1981, p. 37.

¹⁵⁸ J. Reinbothe, 1981, p. 38.

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.

¹⁶⁰ Geller, 1991, p. 13.

¹⁶¹ J. Reinbothe, 1981, p. 38.

¹⁶² P. Bernt Hugenholtz, 2012b, p. 185; J. Reinbothe, 1981, p. 39.

¹⁶³ BGH, 18.05.1955, I ZR 8/54 (“Grundig Reporter I”), 497, *apud*. P. Bernt Hugenholtz, 2012b, p. 185; J. Reinbothe, 1981, p. 39.

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”.¹⁶⁵ Thus framed, the scope of the exclusive reproduction right included home taping acts and left no freedom to make private copies under German law.¹⁶⁶

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”.¹⁶⁷ 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.¹⁶⁸ Pursuant to these justifications, the enforceability of the right was immaterial to the recognition of its existence.¹⁶⁹

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.¹⁷⁰ 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.¹⁷¹

Predictably, the reaction of device manufacturers was to cease advertising infringing uses, in an effort to escape liability and the GEMA-notice requirement.¹⁷² 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.¹⁷³

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.¹⁷⁴ 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.¹⁷⁵ To

¹⁶⁵ J. Reinbothe, 1981, p. 39.

¹⁶⁶ P. Bernt Hugenholtz, 2012b, p. 185 citing BGH, 18.05.1955, I ZR 8/54 (“Grundig Reporter I”), 496.

¹⁶⁷ BGH, 18.05.1955, I ZR 8/54 (“Grundig Reporter I”), 498, *apud.* P. Bernt Hugenholtz, 2012b, p. 186.

¹⁶⁸ See J. Reinbothe, 1981, p. 39; Senftleben, 2004, p. 54. See also BGH, 18.05.1955, I ZR 8/54 (“Grundig Reporter I”), 498-499, *apud.* P. Bernt Hugenholtz, 2012b, p. 186.

¹⁶⁹ J. Reinbothe, 1981, p. 39. See also BGH, 18.05.1955, I ZR 8/54 (“Grundig Reporter I”), 499, *apud.* P. Bernt Hugenholtz, 2012b, p. 186.

¹⁷⁰ P. Bernt Hugenholtz, 2012b, p. 186.

¹⁷¹ See Collová, 1966, p. 108; J. Reinbothe, 1981, p. 39, noting vis-à-vis damages the absence of defendant’s negligence due to the unsettled nature of the legal issue; P. Bernt Hugenholtz, 2012b, p. 186.

¹⁷² P. Bernt Hugenholtz, 2012b, pp. 186–187.

¹⁷³ Collová, 1966, p. 110; P. Bernt Hugenholtz, 2012b, p. 187 & nn.35&36. The case against Grundig was BGH, 22.01.1960, I ZR 41/58 (“GEMA-Hinweis”).

¹⁷⁴ P. Bernt Hugenholtz, 2012b, p. 187. See also Collová, 1966, p. 111 with references to cases against individuals.

¹⁷⁵ J. Reinbothe, 1981, p. 39; Senftleben, 2004, p. 54.

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

¹⁷⁶ P. Bernt Hugenholtz, 2012b, p. 187.

¹⁷⁷ Collová, 1966, pp. 116–117; P. Bernt Hugenholtz, 2012b, p. 189; J. Reinbothe, 1981, p. 39; Mac, 1973, pp. 109–111.

¹⁷⁸ Collová, 1966, pp. 108–110; P. Bernt Hugenholtz, 2012b, p. 187.

¹⁷⁹ P. Bernt Hugenholtz, 2012b, p. 189; J. Reinbothe, 1981, p. 39; Senftleben, 2004, pp. 54–55.

¹⁸⁰ P. Bernt Hugenholtz, 2012b, p. 188 noting that the Court suggests a “one-time lump sum payment”. See also Mac, 1973, p. 109.

¹⁸¹ Collová, 1966, pp. 116–118; Mac, 1973, pp. 109–111; Senftleben, 2004, p. 55.

¹⁸² Collová, 1966, p. 119; J. Reinbothe, 1981, p. 40; Mac, 1973, pp. 111–113.

¹⁸³ Mac, 1973, p. 111.

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 rights¹⁹³, was to be carried out by a sole CMO.¹⁹⁴

Nordemann, 1980, p. 51, noting limitations in recording devices at the time, which caused copying to remain “in reasonable frames” and reduced the need to also levy recording tapes.

¹⁸⁵ Collová, 1966, pp. 118–120; J. Reinbothe, 1981, p. 40.

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.

¹⁸⁸ Collová, 1966, p. 114; Dietz, 1986; Senfleben, 2004, p. 55.

¹⁸⁹ Collová, 1966, pp. 114–115, 119–120, 1991, p. 42; J. Reinbothe, 1981, p. 41.

¹⁹⁰ Collová, 1966, pp. 114–115, 120–121, 1991, pp. 42–44; J. Reinbothe, 1981, p. 41.

¹⁹¹ J. Reinbothe, 1981, pp. 41–42.

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).

¹⁹⁴ Collová, 1991, p. 43; J. Reinbothe, 1981, p. 42 & n.22.

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

¹⁹⁵ See: Mac, 1973, p. 117; J. Reinbothe, 1981, pp. 42–43, explaining the functioning of the collection and distribution system in detail. See also Dietz, 1986, pp. 255–256, identifying other CMOs involved, and P. Bernt Hugenholtz, 2012b, p. 190.

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”).

¹⁹⁷ P. Bernt Hugenholtz, 2012b, p. 190; J. Reinbothe, 1981, p. 47.

¹⁹⁸ Collová, 1991, p. 48; Dietz, 1986, p. 254–; Senfleben, 2004, p. 55 & n.280. See also P. Bernt Hugenholtz, 2012b, pp. 190–191 & n.190; J. Reinbothe, 1981, pp. 46–47, relating this extension to the decrease in price of recording equipment.

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

²⁰¹ ALAI, 1987, pp. 199–235, 254–258.

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.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.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.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.

2.3.2 A Legal Chronology of International Developments

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".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".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.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")

²⁰² See Dietz, 1986; Françon, 1986, pp. 213–217, 221–222. See also ALAI, 1987, pp. 261–283 (interventions of Ziegler, Freegard, Moller, Kerever, Uchtenhagen, Stewart, Clark and Françon).

²⁰³ See, e.g., ALAI, 1987, pp. 265, 274–275, 280–281 (interventions of Moller, Uchtenhagen and Françon).

²⁰⁴ See: Mac, 1973, p. 99 reporting increases between 1965 and 1970; Dietz, 1986, p. 257, reporting numbers for the second semester of 1985; J. Reinbothe, 1981, p. 46; P. Bernt Hugenholtz, 2012a, p. 190. *Contra*, W. Nordemann, 1980, p. 51ff., arguing that they 1965 system was not "elastic enough" to adjust to technical developments, worked against authors, and that an exclusive right would provide a better solution.

²⁰⁵ Collová, 1991, pp. 36–38.

²⁰⁶ Collová, 1991, pp. 36–38.

²⁰⁷ Senftleben, 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 Propriete Intellectuelle (BIRPI)*.²⁰⁸ 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.²⁰⁹

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”.²¹⁰

Nevertheless, national laws contained an array of exceptions “in various public and cultural interests”, including for private use.²¹¹ 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”.²¹²

The BIRPI report considered a provision of this type a superior option to an exhaustive list of exceptions.²¹³ 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”.²¹⁴

At the Stockholm conference, the Main Committee I discussed the right of reproduction in Articles 9, 10 and *10bis* BC.²¹⁵ 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).²¹⁶ 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.²¹⁷

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)*

²⁰⁸ BIRPI, 1965. For context and details, see Van Nus, 1967. N.B. in Stockholm BIRPI became WIPO.

²⁰⁹ BIRPI, 1965, pp. 8, 46–52; Van Nus, 1967, pp. 153–155.

²¹⁰ BIRPI, 1965, p. 47.

²¹¹ BIRPI, 1965, p. 47 & n.23.

²¹² BIRPI, 1965, pp. 48–49.

²¹³ BIRPI, 1965, p. 49 & n.24.

²¹⁴ BIRPI, 1965, p. 49.

²¹⁵ Records BC Stockholm 1967, pp. 851–862, 1142–1150.

²¹⁶ *Ibid.*, pp. 851–856, 1142–1144.

²¹⁷ *Ibid.*, p. 1143–1144.

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.

²²⁰ Records BC Stockholm 1967, pp. 624-625, 629, 634, 682, 704-705, 1144 (docs. S/13, S/18, S/67, S/70, S/81, and S/67). See also Collová, 1991, p. 86.

²²¹ Records BC Stockholm 1967, pp. 624-625 (doc. S/13).

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

²²³ *Ibid.*, pp. 640 (doc. S/13), 710 (doc. S/81), 737 (doc. S/238).

²²⁴ *Ibid.*, pp. 757-762, 771-772, 1145-1146. For an early criticism of the vagueness of the formula, see Rouart, 1967, p. 299-ff.

²²⁵ Collová, 1991, p. 84; Senftleben, 2004, pp. 55-56.

number of copies is made, photocopying may be permitted without payment, particularly for individual or scientific use.²²⁶

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.²²⁷ 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.²²⁸ 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”.²²⁹

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”.²³⁰ 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.²³¹

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.²³² 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.²³³ (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

The national debate on levies initially evolved at a slow pace.²³⁴ That changed once tape recording technology matured and became consumer-ready. The technological evolution led to a viral spread of the German blueprint through continental Europe in the 1980s and early 1990s. National private copying levy systems were adopted in Austria (1980), Norway (1981), Sweden (1982), Hungary (1982), Finland (1984/1985), France (1985), Portugal (1985), Spain (1987), the

²²⁶ Records Stockholm 1967, p. 758 (doc. S/721).

²²⁷ *Ibid.*, p. 624, 704, 1146 (docs S/13, S/67).

²²⁸ Senftleben, 2004, pp. 55–58. See Records Stockholm 1967, pp. 624–625, 682, 705 (docs. S/13, S/18, S/75).

²²⁹ Collová, 1991, p. 88.

²³⁰ Ulmer, 1986, p. 712.

²³¹ Senftleben, 2004, p. 58.

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).²³⁵

As noted by the EU Commission, “the compact cassette marked a revolution the in 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.²³⁶

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”.²³⁷

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.²³⁸ At the same time, several countries outside Europe were seriously considering the implementation of similar systems.²³⁹ In some cases and with varying scopes of implementation—like in the US, Japan and Russia—those intentions materialised in the 1990s.²⁴⁰

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.²⁴¹ 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.²⁴² 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

²³⁵ See: Green Paper on Copyright and the Challenge of Technology 1988, pp. 102–103, 103ff.; Collovà, 1991, pp. 46–52, 106–107, stressing that Austria was the first country to target reproduction media; P. Bernt Hugenholtz, 2012a, pp. 191–192. On the French model, levy implementation followed the abandonment of a “parafiscal” tax approach. 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.

²³⁷ Cornish, 1993, p. 312.

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

²³⁹ Burger, 1988a, p. 321 & n.6.

²⁴⁰ See: Audio Home Recording Act of 1992, Pub. L. No. 102-563, 106 Stat. 4237 (1992) (codified in Sections 1001–1010 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 Collovà, 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; Collovà, 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

²⁴³ Records WIPO Treaties 1996, p. 161.

²⁴⁴ *Ibid.*, pp. 161–162.

²⁴⁵ Ficsor, 2002c, pp. 390–391.

²⁴⁶ WIPO Document BCP/CE/I/3, p. 13 (¶¶ 97–98).

²⁴⁷ *Ibid.*, pp. 13–15.

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 InfoSoc Directive.

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 the Challenge of Technology 1988, pp. 99–142.

²⁵⁵ Green Paper on Copyright and the Challenge of Technology 1988, p. 99.

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.

²⁶² *Ibid.*, pp. 126–128, 136.

²⁶³ *Ibid.*, pp. 129–143.

²⁶⁴ Collová, 1991, pp. 64–66.

²⁶⁵ Follow-up Green Paper 1990, pp. 11–13.

“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.

²⁶⁹ Green Paper on Copyright and Related Rights in the Information Society 1995.

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.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”.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.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.”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.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.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.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.

²⁷⁹ Proposal InfoSoc Directive 1997.

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”.²⁸²

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.²⁸³

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.²⁸⁴

The proposal was subject to numerous amendments by the European Parliament on first reading,²⁸⁵ 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.²⁸⁶

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.²⁸⁷

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”.²⁸⁸ 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.²⁸⁹

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.

²⁸⁵ See EP Resolution Proposal InfoSoc Directive (1st reading) 1999. See also von Lewinski & Walter, 2010, p. 1018.

²⁸⁶ Amended Proposal InfoSoc Directive 1999, ¶¶2(1), 2(2) and III.(Comment to Art. 5(2)(ba)).

²⁸⁷ Common Position (EC) No 48/2000.

²⁸⁸ Proposal InfoSoc Directive – Adoption by Commission of opinion on EP amendments on 2nd reading, COM/2001/0170 final, p. 3.

²⁸⁹ See WIPO & Stichting de Thuiskopie, 2016, pp. 3, 6. On the UK provision, see High Court of Justice of England and Wales, 17.07. 2015, Case No. CO/5444/2014, [2015] EWHC 2041 (Admin).

examined in the subsequent chapters.²⁹⁰ 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.²⁹¹ In 2013, Commission-appointed mediator António Vitorino presented his recommendations on private copying and reprography levies.²⁹² 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.²⁹³

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.²⁹⁴ The following year, a European Parliament Resolution returned to the topic, albeit without adding much in the way of detail.²⁹⁵ Private copying levies remain on the Commission’s agenda to this very day as an “on-going initiative”.²⁹⁶

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

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, Copyright and Neighbouring Rights, Private copying levies*, http://ec.europa.eu/internal_market/copyright/levy_reform/index_en.htm, (accessed 30.04.2016). See also Communication IPR Strategy 2011, pp. 12–13, 23, and Communication on Content in the Digital Single Market 2012, p. 4, for a subsequent, less comprehensive, approach to copyright levies.

²⁹² Vitorino, 2013.

²⁹³ Public Consultation on the review of the EU copyright rules, launched 5 December 2013, available at http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/ (Accessed 30.04.2014), pp. 31–33 (Questions 64-71), Report Public Consultation on the Review of the EU Copyright Rules 2014, pp. 72–77.

²⁹⁴ EP Resolution Private Copying Levies 2014. On the private copying issues of cloud-based services, see Senftleben, 2013a, pp. 91–93. On stakeholders’ concerns surrounding the interaction between cloud services and private copying, see Report Public Consultation on the Review of the EU Copyright Rules 2014, pp. 72–77.

²⁹⁵ See EP Resolution Implementation InfoSoc Directive 2015, ¶¶57–60.

²⁹⁶ Eechoud et al., 2009, p. 7; Poort & Quintais, 2013. See also EUROPEAN COMMISSION, *The EU Single Market, Copyright and Neighbouring Rights, Private copying levies*, http://ec.europa.eu/internal_market/copyright/levy_reform/index_en.htm, (accessed 30.04.2016).

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.

²⁹⁷ Geller, 1991, pp. 33–35. See also R. Hilty & Nérison, 2012, p. 62, noting that “[c]onsideration of privacy and the weak feasibility of any control in such an area explains the fact why lawmakers authorized the private copy”.

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.

²⁹⁹ Proposal InfoSoc Directive 1997, pp. 13, 19–20, 43 (proposed Recital 34). On the privacy justification of private copying, see also Helberger & Hugenholtz, 2007, pp. 1068–1069.

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 than they do with private copying.

The focus is on the compulsory licence of Article 11*bis*(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.³⁰⁰ 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.³⁰¹

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.³⁰² 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.³⁰³

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 1897.³⁰⁴ In the early 1890s, the German scientist Heinrich Hertz discovered electromagnetic or “Hertzian” waves, initially used

³⁰⁰ See Arts 8 and 10 Rental Right Directive, and Art. 4 SatCab Directive.

³⁰¹ See Dreier, 2010, p. 434 referring to Art. 15(2) RC. See also Art. 1(2) InfoSoc Directive. See *infra* 2.4.4.

³⁰² See Ricketson, 1987, p. 435. When such artificial means are used, the transmission in question can be called a “cable retransmission”.

³⁰³ Pool, 2009a, pp. 2, 8–9, 113–116. See also Benkler, 2012a, on issues of spectrum regulation.

³⁰⁴ See G. Austin, 2012, noting that both men held patents on the technology in the US and UK.

to “communicate the telegraphs dots and dashes”; around that period, the first reports surface of use of radio signals by the US navy.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”.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.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.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.³⁰⁹ By 1924, more than a thousand broadcast stations existed and over two million broadcast-ready radio sets had been sold.³¹⁰

Across the Atlantic, the development of broadcasting suffered an interruption during World War I (1914–1918).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.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.³¹³ In Germany, the first radio stations went on air in Berlin in 1932.³¹⁴ By the 1930s, however, radio challenged the influence of film and had become the “dominant form of entertainment”.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”.³¹⁶ Radio, in these early days, became “the technological vehicle that allowed synchronized communication to a new audience”.³¹⁷

³⁰⁵ G. Austin, 2012; Wu, 2011a, p. 34.

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”.

³⁰⁷ See, generally, G. Austin, 2012; Pool, 2009b; Wu, 2011b.

³⁰⁸ Wu, 2011b.

³⁰⁹ Benkler, 2012b.

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.

³¹¹ WIKIPEDIA, *History of Broadcasting*, https://en.wikipedia.org/wiki/History_of_broadcasting (accessed 30.04.2016).

³¹² van de Donk et al., 2005, p. 29.

³¹³ Lord Windlesham, 1980, pp. 18–23; Wu, 2011b.

³¹⁴ WIKIPEDIA, *History of Broadcasting*, https://en.wikipedia.org/wiki/History_of_broadcasting (accessed 30.04.2016).

³¹⁵ G. Austin, 2012; Wu, 2011b.

³¹⁶ Depreeuw, 2014, pp. 268–269.

³¹⁷ G. Austin, 2012.

The rise of radio broadcasting saw three general regulatory and funding models emerge. Whereas the US favoured a commercial model,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”.³¹⁹ A similar model was in place in pre-Nazi Germany.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.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.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.³²³

Broadcasting also had a profound effect on copyright, mainly because protected works constituted a significant portion of the content transmitted.³²⁴ The programming of radio broadcasting, for example, primarily consisted of phonograph musical recordings.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).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”.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?”³²⁸ (This question could easily apply to the Internet as a means of disseminating works, and to the regulation of non-commercial online use.)

³¹⁸ On the development of US federal regulation of radio, see G. Austin, 2012; Benkler, 2012b; Pool, 2009b.

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.

³²⁰ WIKIPEDIA, *History of Broadcasting*, https://en.wikipedia.org/wiki/History_of_broadcasting (accessed 30.04.2016). Pre-Nazi Germany had a radio broadcasting system supervised by the Post Office, which charged a listening fee of two *reichmark* per receiver, and limited radio frequencies.

³²¹ G. Austin, 2012. On the German model, see Wu, 2011b.

³²² Pool, 2009b.

³²³ Ricketson, 1987, p. 435.

³²⁴ Ricketson, 1987, pp. 436–437.

³²⁵ G. Austin, 2012, p. 121.

³²⁶ G. Austin, 2012, pp. 122–123.

³²⁷ Wu, 2011b.

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 day³³¹ 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

³²⁹ G. Austin, 2012, pp. 123–128.

³³⁰ Ginsburg, 2001, pp. 1620–1621.

³³¹ G. Austin, 2012, pp. 127–128.

³³² See e.g. Lohmann, 2004, 2008; Quintais, 2012. See *infra* 3.3.2.2.

³³³ Ricketson, 1987, pp. 434–435.

³³⁴ Depreeuw, 2014, p. 267 & n.65; Ricketson, 1987, p. 437.

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.

³³⁹ Ricketson, 1987, p. 437.

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 11*bis*(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.

³⁴² Ricketson, 1987, p. 440.

³⁴³ Records BC Brussels 1948, p. 265.

³⁴⁴ Ricketson, 1987, pp. 436–437. See also G. Austin, 2012.

³⁴⁵ Depreeuw, 2014, pp. 264–265, 273, 280–282.

³⁴⁶ Explanatory Memorandum SatCab Directive, pp. 9–13, describing the application of Art. 11*bis* 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, 11*bis*, 11*ter* and 14(1)(ii).

Article 11*bis*(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 11*bis*(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

³⁴⁸ The exception is Art. 11*bis*(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.

³⁵⁰ Dreier, 2006, p. 52; von Lewinski, 2008, p. 149 at 149. See also Ficsor, 2003b, p. 74–ff; Ricketson, 1987, p. 439–ff; Ricketson & Ginsburg, 2006, pp. 717, 741–742, discussing the evolution of the interpretation of the concept of broadcast under different communication and emission theories.

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

³⁵² Depreeuw, 2014, p. 301. See Ficsor, 2003b, p. 77–ff; Ricketson, 1987, p. 449; Ricketson & Ginsburg, 2006, pp. 733, 735, 740–742; von Lewinski, 2008, p. 150, noting that this provision does not cover cable originated programmes or original wired webcast transmissions (included in Arts 11(1)(ii), 11*ter*(1)(ii), 14(1)(ii) and 14*bis*(1) BC).

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 11*bis*(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 *allowing*, but not requiring, domestic legislators to subject the exclusive acts listed in Article 11*bis*(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:

- (i) broadcasting of sounds and images, including by satellite;
- (ii) rebroadcasting of broadcasts of works where this is done by an organization other than the original one, including by satellite;
- (iii) 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);
- (iv) 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

³⁵³ See Arts 11, 11*bis*, 11*ter*, 14(1)(ii) and 14*bis* 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.

³⁵⁴ Ficsor, 2002c, pp. 272, 275, 2003b, p. 79. See also Explanatory Memorandum SatCab Directive, p. 16. Similarly, although not mentioning collective rights management, see Ricketson, 1987, p. 525; Ricketson & Ginsburg, 2006, pp. 822–823; von Lewinski, 2008, p. 166. On the concept of non-voluntary licences, see *supra* 2.2.3.

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.

³⁵⁶ See Ricketson, 1987, p. 526; Ricketson & Ginsburg, 2006, pp. 823–824; von Lewinski, 2008, p. 166.

Beyond the respect of moral rights, the main condition for the admissibility of compulsory licences is that authors receive “equitable remuneration”.³⁵⁷ The remuneration is fixed by agreement between authors and commercial users (typically broadcasting organisations) or, where that fails, by the competent national authority.³⁵⁸ 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.³⁵⁹ 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.³⁶⁰

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 11*bis*(3) BC.³⁶¹ 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 11*bis*(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.³⁶² This exemption *may* be subject to equitable remuneration.³⁶³

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 11*bis*(2) BC.³⁶⁴ Consequently, as a matter of international law, it is arguable that compulsory licences granted under Article 11*bis*(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.

³⁵⁸ Ricketson, 1987, pp. 521, 527.

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. 11*bis*(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”.

³⁶² Ficsor, 2002c, p. 277; Ricketson & Ginsburg, 2006, pp. 827–830; von Lewinski, 2008, pp. 164–165.

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. 11*bis*(2)”.

where a country has joined the WCT and recognised its general exclusive right of communication to the public.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.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.³⁶⁷

Regardless of their appeal and consistency with international law, these interpretations are difficult to apply to the *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.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.)

2.4.2.2 Justifications

Article 11*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*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”.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”.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.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.³⁷² The records of the 1928 Rome

³⁶⁵ See von Lewinski & Walter, 2010, p. 979.

³⁶⁶ Ricketson & Ginsburg, 2006, pp. 748–749 (emphasis added).

³⁶⁷ 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. 11*bis*(2).”

³⁶⁸ On the unequivocal inclusion of broadcasting in the scope of the right, see Recital 23 InfoSoc Directive. See also *infra* 4.3.2.1.

³⁶⁹ Records BC Rome 1928, p. 255 (General Report).

³⁷⁰ *Ibid.*

³⁷¹ Ricketson & Ginsburg, 2006, p. 819.

³⁷² 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.

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.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.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.”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”.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”.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”.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.”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’”.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).”³⁸¹

³⁷³ Records BC Rome 1928, p. 248 (General Report). The other main achievement was the recognition of the protection of moral rights in Art. 6bis BC.

³⁷⁴ *Ibid.*, p. 248 (General Report).

³⁷⁵ *Ibid.*, p. 230 (Sub-committee on Broadcasting).

³⁷⁶ *Ibid.*

³⁷⁷ *Ibid.*, p. 231.

³⁷⁸ *Ibid.*

³⁷⁹ Depreeuw, 2014, p. 296.

³⁸⁰ Depreeuw, 2014, p. 296.

³⁸¹ Depreeuw, 2014, p. 297.

The 1948 Brussels Act extended the scope of the exclusive right in Article 11*bis*(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.³⁸² 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.³⁸³ 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.³⁸⁴

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.³⁸⁵ 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”.³⁸⁶

The expansion of Article 11*bis*(1) was an attempt to trace technological developments by covering new forms of exploitation, including television and its potential future improvements.³⁸⁷ 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”.³⁸⁸ 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”.³⁸⁹

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.³⁹⁰ 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.³⁹¹ The discussions suggest that the allowance of compulsory licensing was viewed as a flexible middle ground to regulate an evolving technology.

³⁸² Depreeuw, 2014, pp. 278, 280

³⁸³ See Explanatory Memorandum SatCab Directive, p. 16.

³⁸⁴ Records BC Brussels 1948, pp. 263-264 (General Report).

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.

³⁹² Records Stockholm 1967, pp. 710, 1168, making reference to the proposal from Working Group on the regime of cinematographic works proposed (Doc. S/195). See also Ficsor, 2002c, p. 273.

³⁹³ Records BC Stockholm 1967, pp. 1168, 1181–1182. See also Van Nus, 1967, p. 163 on the preparatory works for this provision. The 1971 Paris revision Act of Berne adopted in block Arts 1-20 as amended by the Stockholm Act. On the Paris Act, see Ulmer, 1970, 1971.

³⁹⁴ Records WIPO Treaties 1996, p. 187.

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 11*bis*(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 11*bis* 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

⁴⁰¹ See *supra* 1.1 and *infra* 5.3.3 (on the three-step test’s balancing exercise).

⁴⁰² Records WIPO Treaties 1996, p. 763 (Delegation of Portugal).

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.

⁴⁰⁶ See Records RC 1961, p. 47, clarifying the meaning of the term. See also Ficsor, 2003b, pp. 151–152; C. Masouyé, 1981, p. 46.

⁴⁰⁷ Records RC 1961, pp. 162, 265.

⁴⁰⁸ *Ibid.*, pp. 158ff. See: C. Masouyé, 1981, p. 46–ff; von Lewinski, 2008, p. 212.

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 services⁴¹⁵—broadly rejected, including by the EU delegation⁴¹⁶—but also an ACS-type proposal. The latter consisted of a mandatory remuneration right for types of

RC 1961, pp. 48-49 (General Report), 113-114, 129-131 (Summary of Proceedings), 158ff (Working Party No. II), 266.

⁴¹⁰ See: Ricketson, 2003, pp. 44–45; Ricketson & Ginsburg, 2006, p. 1218; von Lewinski, 2008, pp. 220–221. Noting that this would exclude analogous compulsory licences to those provided for in Arts 11*bis*(2) and 13 BC, see Ficsor, 2003b, p. 155; W. Nordemann, Vinck, Hertin, & Meyer, 1990, p. 441; Ricketson & Ginsburg, 2006, p. 1218; von Lewinski, 2008, p. 220.

⁴¹¹ Records RC 1961, p. 46. See also Ficsor, 2003b, p. 153; Ricketson, 2003, p. 45; Ricketson & Ginsburg, 2006, p. 1218.

⁴¹² See Ficsor, 2002c, p. 298; C. Masouyé, 1981, p. 59; Ricketson, 2003, p. 45; von Lewinski, 2008, p. 220. N.B. the provision preceded the Berne three-step test by six years. See also Records RC 1961, pp. 144–145, for a surfacing of this concern in the discussion of Art. 7(2) (Working Party No. II).

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 Nérison, 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 11*bis* 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

⁴¹⁷ See: Ficsor, 2002c, pp. 638–640, 2003b, pp. 252–254, 297. See also Records WIPO Treaties 1996, pp. 429, 760-770.

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 María 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.

⁴²¹ In this sense, see Carlos María Correa, 2007, p. 167; Morgan, 2010, pp. 390–391 (noting the unsettled nature of this assertion in legal scholarship); Proposal InfoSoc Directive 1997, p. 15. *Contra* Basso, 2000, pp. 196–197; Watal, 2001, p. 225.

⁴²² Gervais, 2008, p. 206 (n.296).

⁴²³ Gervais, 2008, p. 206 (n.296); UNCTAD-ICTSD, 2005, pp. 208–212.

⁴²⁴ Depreeuw, 2014, p. 366.

⁴²⁵ Art. 2 SatCab Directive.

⁴²⁶ See Explanatory Memorandum SatCab Directive, pp. 3–4, 9–15, 21–22.

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 11*bis*(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

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.

⁴³⁰ Depreeuw, 2014, p. 393; P. Bernt Hugenholtz, 2006, p. 279.

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 11*bis*(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

⁴³⁴ P. Bernt Hugenholtz, 2006, p. 280. Art. 10 SatCab Directive contains the exemption for broadcasting organisations.

⁴³⁵ Depreeuw, 2014, pp. 403–404.

⁴³⁶ Depreeuw, 2014, p. 406.

⁴³⁷ Explanatory Memorandum SatCab Directive, p. 32.

⁴³⁸ Depreeuw, 2014, pp. 402–403; Rósen, 2014, pp. 234–235. See also Explanatory Memorandum SatCab Directive, p. 20, 24, 32.

⁴³⁹ Explanatory Memorandum SatCab Directive, p. 32.

⁴⁴⁰ *Ibid.*, p. 43. See also P. Bernt Hugenholtz, 2006, pp. 278–279; Rósen, 2014, p. 231.

⁴⁴¹ See *infra* 3.3.4.

⁴⁴² Depreeuw, 2014, pp. 396, 406; P. Bernt Hugenholtz, 2009b, p. 13.

⁴⁴³ Report SatCab Directive 2002, pp. 14–15.

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 11*bis*(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.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.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.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”.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.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

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”.

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.

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.

⁴⁴⁸ Amended proposal Rental Right Directive 1992, pp. 3, 12, discussing the insertion of a new Art. 6*bis*, 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.

⁴⁴⁹ Amended Proposal Rental Right Directive 1992, p. 13.

test.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”.⁴⁵¹ (Naturally, the private use limitation would not apply to acts of broadcasting, understood as *communication to the public*.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.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 *acquis*.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.

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

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.

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.

⁴⁵² CJEU, *PPI*, ¶¶70–77.

⁴⁵³ Dreier, 2010, p. 434.

⁴⁵⁴ Art. 1(2) InfoSoc Directive. N.B. Art. 3(2) InfoSoc Directive implements Arts 10 and 14 WPPT.

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.⁴⁵⁵ 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 11*bis*(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 11*bis*(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.⁴⁵⁶

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

⁴⁵⁵ See Lucie Guibault, 2002, pp. 56–68, identifying “regulation of industry practice and competition” as a justification behind copyright limitations. Guibault exemplifies with compulsory licences for the broadcasting and recording of musical works.

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

⁴⁵⁷ For discussions on the article, see Records RC, pp. 48–49 (General Report), 113–114, 118 – 121, 158 ff., 161, 165, 222–224, 265 ff. See also C. Masouyé, 1981, p. 46–ff; W. Nordemann et al., 1990, p. 349; von Lewinski, 2008, p. 212.

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.

⁴⁵⁹ *Ibid.*, pp. 49, 163. See also C. Masouyé, 1981, p. 48; von Lewinski, 2008, p. 214.

⁴⁶⁰ See, e.g., C. Masouyé, 1981, p. 48; von Lewinski, 2008, p. 26.

⁴⁶¹ On Art. 15 RC, see C. Masouyé, 1981, p. 59; Ricketson, 2003, p. 45; von Lewinski, 2008, p. 220. See also Records RC, pp. 144 – 145, for an expression of this concern in the discussion of Art. 7(2) RC. Regarding Art. 14(6) TRIPS and its aim to align limitations to copyright and related rights, see Ficsor, 2002c, p. 642; UNCTAD-ICTSD, 2005, pp. 208–212; WIPO, 1996.

⁴⁶² Records RC, pp. 142–144, 173–175.

⁴⁶³ *Ibid.*, pp. 167–168. See also C. Masouyé, 1981, p. 54.

⁴⁶⁴ See J. Reinbothe & von Lewinski, 2002, pp. 375–380; Ricketson & Ginsburg, 2006, p. 1267. For discussions of the provision in the preparatory works, see Records WCT/WPPT (1996), pp. 288–291, 312–315, 526–527, 684–691, 769–776, 781.

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.⁴⁶⁵ In conformity with international law, this licence can extend to non-interactive digital broadcasting.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

⁴⁶⁵ On which, see *supra* 2.2.4.

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 rationale. 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.⁴⁶⁸

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."⁴⁶⁹

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.