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### Copyright in the age of online access

*Alternative compensation systems in EU copyright law*

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## 4 Between Rights and Limitations: Mapping the Space for the Legalisation of the Online Use of Copyright Works

### 4.1 Introduction

Legal reform is a normative proposition. In this dissertation, the proposition is to improve the *acquis* and define what the law should be for the regulation of mass online use of copyright-protected works. The assessment requires clarification of *what the law is* in this respect. That is the task of the present chapter, which examines the following research question:

How does the bundle of exclusive rights and corresponding copyright limitations in the *acquis* apply to unauthorised mass online use of works by individuals?

The question aims to be technology neutral, meaning that the online use of works it refers to includes all modes and acts of dissemination, transmission, communication or making available of works online. To prevent technological obsolescence of the analysis, these acts are categorised in a typology of online uses that attempts to trace CJEU case law on application of exclusive rights and limitations to digital networks. The legal analysis refers to this typology.

The aim of the question is not only to define the baseline legal status for these non-commercial online use of works, but also to clarify whether the current framework can accommodate an ACS and, if not, what the future scope of legalisation should be. The chapter examines rules that apply to online uses, with an emphasis on the InfoSoc Directive's exclusive rights and limitations (Articles 2 to 5) and their interpretation by the CJEU. The directive implements the WIPO Treaties, which include by reference multiple provisions of the BC; hence, these international treaties are briefly mentioned in order to shed light on the origin, context, meaning, and purpose of some provisions in the *acquis*.

Orbiting around the issue of the legal qualification of online uses are several elements central to the overall theme of this dissertation. Chief among those are considerations on possible flexibilities in the interpretation of exclusive rights and limitations, as well as the autonomous concept of fair compensation. Doctrinal discussion of these topics is infused with normative considerations on the desirable scope of rights and breathing space provided by limitations in the *acquis*. Where relevant to the study of ACS, such arguments are highlighted and woven into the examination of the legal provisions, making this chapter partly normative.<sup>820</sup>

The analysis proceeds as follows. After this introduction, section 4.2 advances a typology of forms of online use by individuals. This typology is then subject to legal analysis against the regimes of the harmonised rights of reproduction (4.3.1) and communication to the public (4.3.2). The analysis demonstrates that the majority of online acts by end-users, even if non-commercial, trigger the application of one or more overlapping exclusive rights and that many of the uses are subject to legal uncertainty. Section 4.4 then examines the limitations that might exempt some of the acts covered by exclusive rights. After providing background and context to the framework of limitations in the *acquis* (4.4.1), it tests the application of several limitations to previously identified uses, namely: the mandatory limitation for transient copying (4.4.2); the

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<sup>820</sup> The three-step test, only briefly mentioned here, takes centre stage in Chapter 5.

optional limitation for private copying (4.4.3); and the optional limitations susceptible of application to digital adaptations, namely quotations, incidental inclusion and parodies (4.4.4). The analysis shows that, despite the existence of relevant breathing spaces, a plethora of restricted acts by Internet users are not privileged by limitations. Therefore, it is in respect of such uses that the need for an ACS-type of copyright reform is more pressing. Section 4.5 summarises the chapter's findings and offers conclusions.

## 4.2 Typology of Online Uses

ACS proponents traditionally focus either on discrete acts (e.g. downloading, uploading, webcasting, sharing), or on bundles of acts triggered by specific technologies.<sup>821</sup> The acts are then abstracted into substantive rights under the relevant applicable law. The present chapter uses a similar method, but first clusters different acts into a typology of online uses.

This section selects and categorises the types of use carried out by end-users in the online environment, and flags the corresponding legal issues, providing a basis for subsequent legal analysis. The selection takes into account CJEU case law on the application of the InfoSoc Directive's exclusive rights and limitations in the digital environment, thus aligning the typology with existing law at EU level. From the perspective of Internet users, the types of use involved in digital content sharing are the following: browsing, downloading, streaming, stream capture, uploading, and digital adaptations. The following paragraphs analyse each of these in turn.

### 4.2.1 Browsing

Web browsers are software applications whose function is to retrieve, present and traverse information resources (such as Uniform Resource Identifiers or Uniform Resource Locators Identifiers) on the Internet.<sup>822</sup> End-users resort to these applications to navigate the web.

The mere action of viewing a website does not cause Internet users to download content. However, the technical process of browsing requires the automatic making of on-screen and cached copies. The copies are made without human intervention beyond that of accessing the website. Moreover, the copies are retained solely for the normal duration of the user's session and deleted automatically after a certain period of time. That period varies according to the "capacity of the cache and the extent and frequency of internet usage by the internet user concerned".<sup>823</sup>

Both on-screen and cache copies are essential and universal technical features of browsing technology, necessary for the proper and efficient functioning of the Internet.<sup>824</sup> Therefore, unless a user sets out to download or print a protected work he is viewing, the copies in question are "merely the incidental consequence of the use of his computer to view a website".<sup>825</sup>

The legal question raised by browsing is whether on-screen and cache copies qualify as copyright reproductions by the end-user.

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<sup>821</sup> Cf. *supra* 3.4.2.

<sup>822</sup> WIKIPEDIA, *Web browser*, [http://en.wikipedia.org/wiki/Web\\_browser](http://en.wikipedia.org/wiki/Web_browser) (accessed 30.04.2016).

<sup>823</sup> CJEU, *Meltwater*, ¶15.

<sup>824</sup> CJEU, *Meltwater*, ¶16.

<sup>825</sup> *Ibid.*, ¶17.

## 4.2.2 Downloading

Downloading involves the initiation, reception and saving of data—for more than transitory duration—transferred from a remote system or server (whether web, File Transfer Protocol, email or other).<sup>826</sup> In the context of mass online use of works, the data in question would correspond to a file that includes a protected work. Examples of relevant acts are downloading and storing films, e-books, and sound recordings from authorised and unauthorised sources on the Internet (e.g. websites, cyberlockers or P2P systems), and making subsequent copies thereof. The result of downloading is that the end-user makes a permanent downstream copy of the work.

Online service providers usually allow their subscribers to make downstream reproductions in a “mixed form”, between streaming and downloading. This model is characterised by the potential to access works offline during the period of subscription (e.g. as happens with Spotify premium playlists) for longer than a short period of time, typically subject to access and use restrictions through TPMs. Such a hybrid model—sometimes presented as an offer of “lending” services—is more akin to (temporary) downloading than streaming, even where the user does not, strictly speaking, make a “permanent” copy.<sup>827</sup>

The legal issue at stake with downloading is when and to what extent it is covered by an exclusive right and, if so, whether it is privileged by the private copying limitation.

## 4.2.3 Streaming

Streaming can be defined as “a method of transmitting data packets so that the earlier packets can be reassembled and processed before the entire file is downloaded, allowing for immediate display or playback”.<sup>828</sup> In essence, streaming involves downloading a file and subsequently causing the downloaded data to become inaccessible. This feature has caused some technologists to define streaming as a subset of downloading that is “an implausible and inefficient use of wireless bandwidth”.<sup>829</sup>

It is possible to divide streams into non-interactive/linear and interactive/on-demand. Non-interactive streams are comparable to broadcasts, as they are only available and accessible at a specified time. They include simulcasting, understood as the “unaltered and simultaneous online retransmission of a TV or radio broadcast”, and certain types of linear online streaming in webcasting.<sup>830</sup> For end-users receiving a live stream, the same will be “split (copied) and sent to multiple consumers through a multicast system”.<sup>831</sup> In contrast, interactive streams are available on demand at a time and place chosen by the end-user; they include, for example, certain forms of on demand streaming of films and phonograms (e.g. Netflix and Spotify).<sup>832</sup>

In either case, the streamed copy/performance received is transient and unique to the final user; its later use is dependent upon the availability of the work at the transmitting party or uploader’s

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<sup>826</sup> WIKIPEDIA, *Download*, [http://en.wikipedia.org/wiki/Download#cite\\_note-main-1](http://en.wikipedia.org/wiki/Download#cite_note-main-1) (accessed 30.04.2016).

<sup>827</sup> Discussing these mixed forms, see Depreeuw & Hubin, 2014, pp. 70, 77; Jutte, 2015.

<sup>828</sup> Anderson, 2011, p. 168.

<sup>829</sup> Doctorow, 2009.

<sup>830</sup> SWD CRM Directive 2012, p. 12 (fn. 51), using this terminology.

<sup>831</sup> Anderson, 2011, p. 166.

<sup>832</sup> Anderson, 2011, p. 166. See also SWD CRM Directive 2012, p. 12 (fn. 51).

end.<sup>833</sup> It disappears after the transmission and is retained in a memory medium only as long as required for enjoyment or, depending on the software set-up and the temporary memory capacity of the receiving device, it may be retained for longer than the user’s specific “session”.<sup>834</sup> The legal issue here is whether in these cases a copyright-significant reproduction has occurred.

The implications are different for the individual or service *providing* or *transmitting* the stream. Depending on the technical set-up, linear streams may or may not produce more than transient copies of the content transmitted. In contrast, interactive streams likely require permanent copies in cloud storage, from which content is “recalled” by end-users, whereupon a unique stream/copy is produced.<sup>835</sup> The legal issues are twofold and relate to whether there are independent copyright-significant (1) reproductions and (2) transmissions in connection to the provision of the stream.

#### 4.2.4 Stream Capture or Ripping

Stream capture or ripping technology works by using a software tool to “capture, aggregate, and save all streaming data”; it is the “Internet audio analog of VCR and DVR technology”.<sup>836</sup> Users employing this technology will retain a permanent copy of the protected content streamed. In this way, a stream is turned into a download, giving rise to similar legal issues plus a further issue: the extent to which this technology conflicts with legally protected forms of copy control TPMs.

#### 4.2.5 Uploading

In contrast to downloading, uploading refers to the process of sending or transferring data from a local to a remote system—either a server or a different client—for the purpose of storage of that data.<sup>837</sup> Uploading involves making an upstream permanent reproduction of a work on a remote storage medium, which may be accessible only to the user or a close circle of family and friends (e.g. a cloud locker such as Dropbox), or to the public, as happens with YouTube or most P2P systems. The latter enable technologically sophisticated forms of uploading. For instance, the popular file sharing protocol BitTorrent used by The Pirate Bay platform functions in such a way that a final downloaded version of a file constitutes a combination of contributions from different versions of an identical file uploaded by different users.<sup>838</sup>

The main legal issue with uploading is the legal qualification of the acts of (1) making a copy on the server and (2) subsequent provision of access to protected works, bearing in mind that the purpose of the first is usually to enable the second.

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<sup>833</sup> Depreeuw & Hubin, 2014, p. 43 (and fn.116), defining “uploader” as the “person performing the acts of upload that leads to the work being accessible to a public.”

<sup>834</sup> Anderson, 2011, p. 166.

<sup>835</sup> Anderson, 2011, p. 166.

<sup>836</sup> Anderson, 2011, pp. 167–168, providing examples of stream capture services and products. See also Jutte, 2015, pp. 2–3, discussing “stream ripping”.

<sup>837</sup> WIKIPEDIA, *Upload*, <http://en.wikipedia.org/wiki/Upload> (accessed 30.04.2016).

<sup>838</sup> See: Rodrigues & Druschel, 2010, for a technical description of P2P systems; Quintais, 2012 (Annex I), for a description of P2P copyright issues; Giblin, 2011, for an analysis of a decade of P2P copyright litigation; and Edstrom & Nilsson, 2009, pp. 483–484, for a description of The Pirate Bay service.

## 4.2.6 Hyperlinking

Hyperlinking is an umbrella term encompassing similar types of references and means of access to other sources on the web. Hyperlinking can be characterised according to the different techniques employed and includes modalities such as “deep-linking, framing, inline linking and embedded linking”.<sup>839</sup>

“Standard” hyperlinks are clickable pointers, like text, a thumbnail or other format. Once clicked, the pointers cause the web browser to redirect or “push” the user to a different “target” or “destination” page. A link to a main or homepage is called “surface” linking, while a link to a sub-page or resource is referred to as “deep” linking.<sup>840</sup>

“Inline” or “embedded” links are links where the “browser transparently fetches material (e.g. image or another web page) and displays it as part of the current page”. In other words, the link does not push the user from the source to the target page. Instead, the content stored in another website is “pulled” and embedded in the source website, where it appears to users.<sup>841</sup>

In “framing” links, the original web page address is preserved even when linking to external pages. The content is displayed in such a way as to appear part of the linking site, within a “frame” (e.g. a pop-up window) and without the need to open a new browser window.

Standard hyperlinks are therefore “push” links, while the remaining techniques (inline, embedded and framing) are “pull” links. Because all hyperlinks operate as means to refer to and access other sources online, they constitute essential reference tools for programmers, online service providers and end-users. These tools are central to the functioning of the Internet.

At the same time, hyperlinks provide an indirect means to make works available online, meaning that they may qualify as a communication to the public under copyright law. The legal status of hyperlinks and the desirability of subjecting them to the copyright regime are debated topics in academia, having given rise to several CJEU judgments and preliminary references.<sup>842</sup>

## 4.2.7 Digital Adaptations

The making and sharing of adapted versions of works is a daily part of the online practices of end-users.<sup>843</sup> The results of these activities receive different and partially overlapping labels, such as derivative works, “mash-ups”, “remixes”, or “user created/generated content” (UGC).<sup>844</sup>

UGC is a controversial concept to define and regulate in EU copyright law.<sup>845</sup> It can be defined as content “published in a specific context that required a certain creative effort and was

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<sup>839</sup> Headdon, 2014, pp. 662–668, 662. See also: Arezzo, 2014, pp. 526–527; Savola, 2014, p. 280 & n.10; Tsoutsanis, 2014, pp. 495–509, 496–497.

<sup>840</sup> Such links are addressed by the CJEU in *Svensson*.

<sup>841</sup> This type of linking to a YouTube video is at stake in CJEU, *BestWater*.

<sup>842</sup> See *infra* 4.3.2. For discussions in academia, see, e.g., ALAI, 2014, 2015; Arezzo, 2014; European Copyright Society, 2013; Ginsburg, 2014c; Savola, 2014; Tsoutsanis, 2014.

<sup>843</sup> Dougherty, 2006, pp. 430–432; Netanel, 2003, p. 3.

<sup>844</sup> On UGC, the “remix” culture, and their legal, social, and cultural implications, see Borgne-Bachschmidt et al., 2008; Lessig, 2008; McLeod & DiCola, 2011; Sinnreich, 2010. See also: Gervais, 2009 attempting a taxonomy of UGC divided into user-authored content, user-derived content, and user-copied content; and Triaille et al., 2013, pp. 447–545, for an in depth study of UGC against the EU legal framework.

produced outside of the professional routines and practices”<sup>846</sup> in which “a pre-existing work is taken by a user as a starting point for his/her own expression... [and is] modified in one way or another to then be made available online”.<sup>847</sup>

There are different types of UGC, across a variety of platforms and distribution models, such as social network sites, wikis, blogs, P2P systems, music and video sharing sites, etc.<sup>848</sup> Among the types of UGC are remixes or mash-ups, terms that usually refer to creative new works produced “through changing and combining portions of existing works”.<sup>849</sup>

In this chapter, all these terms are included under the shorthand “digital adaptations”. The concept includes the use of pre-existing works and their manipulation—modification, changing and combination—through software editing tools, leading to the creation of a new and distinguishable digital object (which may qualify as a protected derivative work or adaptation), and its subsequent making available over the Internet. Furthermore, only digital adaptations made by individuals for non-commercial purposes are considered in this context.

The degree of distinction or transformation of the pre-existing work in an adaptation varies. As used herein, the concept requires a low threshold of creativity and includes “merely adding, subtracting or associating some pre-existing content with other pre-existing content”.<sup>850</sup> Furthermore, while in some adaptations the pre-existing work (or part thereof) is easily recognisable, in others the copyright inputs are difficult to discern.

The purpose of the adaptation may also vary, including personal enjoyment, caricature, parody, pastiche, criticism, commentary, creative expression, quotation, etc.<sup>851</sup> Mere technical adaptations, such as “format-shifting” are outside the concept and fall squarely within the scope of the right of reproduction.<sup>852</sup>

The issues that arise regarding this type of use relate to the legal qualification of the acts involved in digital adaptations: the reproduction of the borrowed pre-existing works; the adaptation and preparation of derivatives from those works; and the follow-on making available of the works to the public via online platforms (e.g. YouTube or Vimeo).

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<sup>845</sup> European Commission, 2013, pp. 28–29, describing the setting up of a specific Working Group on this issue in the framework of the “Licences for Europe” stakeholder dialogue, on which “[n]o consensus was reached among participating stakeholders on either the problems to be addressed or the results or even the definition of UGC... In any event, practical solutions to ease user-generated content and facilitate micro-licensing for small users were pledged by rightholders across different sectors as a result of the ‘Licences for Europe’ discussions”. See also European Commission, 2014, pp. 67–71, on the responses to the public consultation regarding UGC.

<sup>846</sup> OECD, Vickery, & Wunsch-Vincent, 2007. Wider definitions encompass smaller contributions which require less creative effort, such as “posting to a blog or uploading a self-made photo to a website”. See Esmeijer, Nieuwenhuis, Mijs, & Versloot, 2012.

<sup>847</sup> Triaille et al., 2013, p. 452, excluding from the definition works created without basis on a pre-existing work (“creation from scratch”) and the mere online dissemination of pre-existing works (“mere upload case”).

<sup>848</sup> Triaille et al., 2013, pp. 453–454.

<sup>849</sup> The Department of Commerce and Internet Policy Task Force, 2013, p. 28.

<sup>850</sup> Triaille et al., 2013, p. 455, making this clarification in order to draw a distinction with other UGC definitions which require a high degree of creativity.

<sup>851</sup> For an in depth analysis of the music UGC, remix and mash-up genre, see: Borgne-Bachschmidt et al., 2008; Menell, 2015b.

<sup>852</sup> Triaille et al., 2013, p. 453.

### 4.3 How Does the Bundle of Exclusive Rights in the *Acquis* Apply to Mass Online Use of Works by Individuals?

International and EU law define broad exclusive rights that extend to online use. The BC sets forth minimum standards for the economic rights of translation, reproduction, public performance, broadcasting, public recitation, and adaptation.<sup>853</sup> Online acts by end-users might call into question the application of the BC rights of reproduction, communication to the public (i.e. public performance and recitation), and adaptation, as incorporated or adapted to the digital age by the WCT and WPPT.

The latter treaties include, under the purview of the public communication right, the so-called making available right, which applies in the context of interactive, on demand situations.<sup>854</sup> In what has been termed the “umbrella solution”, treaty members have flexibility as to the manner of implementation of this right.<sup>855</sup>

The WIPO Treaties were implemented in the EU by the InfoSoc Directive, which harmonised several economic rights and adapted them to the digital age.<sup>856</sup> The harmonised rights are reproduction, communication to the public, making available to the public, and distribution.<sup>857</sup> The most significant right not harmonised at EU level is the right of adaptation, although different manifestations of the same can be found in the BC and national laws.<sup>858</sup>

In EU law, and with the exception of distribution, these rights are susceptible of application to mass online use of copyright-protected works by individuals. The distribution right solely controls “distribution of the work incorporated in a tangible article” and is subject to exhaustion under Article 4(2) InfoSoc Directive.<sup>859</sup> Hence, as a rule, this right does not apply online.

There is at least one derogation to this general rule. In its landmark *UsedSoft* judgment, the CJEU recognised the possibility of exhaustion in relation to computer programs in specific circumstances.<sup>860</sup> The Court ruled that the right of distribution of a copy of a software program is exhausted if the copyright holder who authorised the downloading of that copy from the Internet onto a data carrier also conferred a licence to use that copy for an unlimited period. The first lawful acquirer can rely on that exhaustion to resell their copy and unlimited licence to a subsequent acquirer. However, each reseller must make their own copy unusable at the time of its resale. Maintaining the copy would constitute an unauthorised reproduction.<sup>861</sup>

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<sup>853</sup> See, respectively, Arts 8, 9, 11, 11*bis*, 11*ter* and 12 BC.

<sup>854</sup> Arts 8 WCT, 10 and 14 WPPT.

<sup>855</sup> Ficsor, 2003b, p. 209; P. Masouyé, 2009, pp. 217–221. For the situation in the US, see, e.g., U.S. Copyright Office, 2014.

<sup>856</sup> Recital 15 InfoSoc Directive.

<sup>857</sup> Arts 2, 3, and 4 InfoSoc Directive.

<sup>858</sup> P. Bernt Hugenholtz & Senftleben, 2011, pp. 26–27. Manifestations of the right of adaptation can be found in Arts 8, 12 and 14 BC. In US law, this right is equivalent to the right to prepare derivative works (a work based on or derived from one or more pre-existing works), protected under sections 101 and 106(2) US Copyright Act. On which, see Menell, 2011; Samuelson, 2013.

<sup>859</sup> See recitals 28 and 29, Art. 3(3) InfoSoc Directive, barring exhaustion of the right of communication to the public of works and right of making available to the public other subject-matter.

<sup>860</sup> See CJEU, *UsedSoft*.

<sup>861</sup> CJEU, *UsedSoft*, ¶¶70–72, 88.



There has been much academic debate on the potential extension of *UsedSoft* to other subject matter, in particular e-books.<sup>862</sup> In a recent opinion in the *VOB* case, AG Szpunar contributed to this debate by stating that the public lending right “includes the making available to the public of electronic books by libraries for a limited period of time.”<sup>863</sup> In his view, online lending of books by libraries should be allowed, provided the making available of the e-book was first authorised by the rights holder and the book was obtained from lawful sources.<sup>864</sup>

However, even if the CJEU follows the AG in *VOB*, it is doubtful that this logic applies outside the realm of the specific subject matter of software or the lending of electronic books. In fact, another recent judgment in *Art & Allposters* clarified that the right of distribution in Article 4 InfoSoc Directive can only be exhausted in relation to the tangible support of a work, and is not subject to digital exhaustion.<sup>865</sup> This same conclusion is supported by the AG in *VOB*, who interprets the concept of public lending as separate from the right of distribution and the commercial rental of subject matter other than books.<sup>866</sup> In this light, the present chapter does not further examine the right of distribution.<sup>867</sup>

Having identified the relevant harmonised rights, the next step is to apply them to the typology of online uses developed in the previous section. The analysis focuses first on the right of reproduction (4.3.1) and then on the right of communication to the public (4.3.2).

### 4.3.1 Uses Covered by the Right of Reproduction

#### 4.3.1.1 Legal Framework

International copyright law provides for an exclusive reproduction right with broad application in the digital environment. The right arguably includes all forms of incidental, transient or technical copies.<sup>868</sup> Article 9(1) BC grants authors the exclusive right of authorising the reproduction of works “in any matter or form”.<sup>869</sup> Article 1(4) WCT stipulates that the “Contracting Parties shall comply with Articles 1 to 21 and the Appendix of the Berne Convention”, and the corresponding Agreed Statement qualifies “the storage of a protected work in digital form in an electronic medium” as a reproduction within the meaning of Article 9 BC.<sup>870</sup>

This represents a paradigm shift for Internet users as compared to the physical world. Because the nature of communication networks and devices technically requires acts of reproduction and transmission, most consumptive uses of works—like acts of personal enjoyment—are now

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<sup>862</sup> See, e.g., Leistner, 2014, pp. 574–585; Linklater, 2014; Rubí Puig, 2013.

<sup>863</sup> *Opinion AG in VOB*, ¶80. Art. 2(1)(b) Rental Right Directive defines “lending” as the “making available for use, for a limited period of time and not for direct or indirect economic or commercial advantage, when it is made through establishments which are accessible to the public.”

<sup>864</sup> *Opinion AG in VOB*, ¶88.

<sup>865</sup> CJEU, *Art & Allposters*, paras ¶¶34–40.

<sup>866</sup> *Opinion AG in VOB*, ¶¶74–78.

<sup>867</sup> N.B. this exclusion is applicable to EU law. The matter may be different under other national laws, such as in the US, where the WCT/WPPT umbrella solution enabled the application of distribution to on-demand downloads. See U.S. Copyright Office, 2014.

<sup>868</sup> von Lewinski, 2005, p. 5.

<sup>869</sup> In the context of related rights, the reproduction right is provided for in Arts 7, 10 and 13 RC.

<sup>870</sup> The Agreed Statements to Arts 7 and 11 WPPT contain similar provisions for performances and phonograms.

potentially subject to copyright, unless privileged by a limitation. The same conclusion applies to acts of online service providers.

In the EU, the InfoSoc Directive has implemented the WIPO Treaties as part of the so-called “Digital Agenda”, with the express aim of horizontally harmonising several economic rights and adjusting them to the digital age, thus improving “the means to fight piracy worldwide”.<sup>871</sup> The implementation, consistent with an international trend, contemplates in Article 2 a broad reproduction right for authors and related rights owners: performers, phonogram producers, film producers, and broadcasting organisations.<sup>872</sup>

Performers and broadcasters have a specific right of first fixation, meaning that the general reproduction right applies only to the reproductions of those fixations.<sup>873</sup> This distinction should not affect the assessment of the activities of Internet users, as they generally relate to digital copies of first fixations.

The scope of the right is comprehensive. It includes the prohibition of any direct or indirect, temporary or permanent reproduction by any means and in any form, in the whole or in part, of the works or subject matter of rights holders, with the exception of software and databases.<sup>874</sup> This generous scope results in part from the letter of the provision and the related recitals, which require a broad definition of the acts covered by the right. It also results from the CJEU’s expansive reading of Article 2—in cases like *Infopaq I*, *Infopaq II*, *Murphy*, and *SAS*—and strict reading of exceptions (more on which below).<sup>875</sup>

As a result, the right increasingly applies to online dissemination of content, of which reproduction is an essential constituent. In fact, the current understanding of the right is technical, meaning “in practice... a reproduction in the technical sense, a ‘copy’, is equated to a reproduction in the legal sense”<sup>876</sup>, irrespective “of the function or the economic value of the copy”.<sup>877</sup> Importantly, some of the activities that trigger the exclusive right may be covered by a limitation to that right under Article 5 InfoSoc Directive.

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<sup>871</sup> Recital 15 InfoSoc Directive. See Ohly, 2009, pp. 212, 214, noting that “vertical harmonization” of the reproduction right had occurred for specific subject matter in the context of Arts 4(a) Software Directive, 5(a) Database Directive, and Art. 7 of the repealed 1992 version of the Rental Right Directive (in respect of related rights).

<sup>872</sup> Art. 2 InfoSoc Directive. See Ohly, 2009, p. 217, noting that recitals 9 and 11 InfoSoc Directive seem to favour a “in dubio pro autore” interpretation of the right.

<sup>873</sup> Under Art. 7 Rental Right Directive (“fixation right”). See Ohly, 2009, pp. 214–215, raising formal and substantive objections to this legislative technique.

<sup>874</sup> See Art. 1(a) and (e) InfoSoc Directive. Arts 2–5 of this directive do not apply to software and databases, which are subject to special provisions in Arts 4–6 Software Directive and 5–6 Database Directive.

<sup>875</sup> See recital 21 InfoSoc Directive and Leistner, 2014. For examples of CJEU interpretation, see e.g.: CJEU, *Infopaq I*, applying such a broad interpretation; CJEU, *Infopaq II*, narrowly interpreting exemptions for temporary acts of reproduction; CJEU, *Murphy*, interpreting the reproduction right in Art. 2(a) InfoSoc Directive as extending to transient fragments of the works within the memory of a satellite decoder and on a television screen, although exempting such acts under Art. 5(1); CJEU, *SAS*, interpreting Art. 2(a) “as meaning that the reproduction, in a computer program or a user manual for that program, of certain elements described in the user manual for another computer program protected by copyright is capable of constituting an infringement of the copyright in the latter manual if... that reproduction constitutes the expression of the intellectual creation of the author of the user manual for the computer program protected by copyright”.

<sup>876</sup> Triaille et al., 2013, p. 120.

<sup>877</sup> Depreeuw & Hubin, 2014, p. 41.

### 4.3.1.2 Application to Activities of Internet users

In light of this broad scope, the question is what types of use trigger the reproduction right? It is possible to divide these into uses clearly covered by the right and uses for which there is no legal certainty.

In the first group—clear cases—are all those that involve a permanent copy: downloading, stream capture, permanent copies made for the provision of interactive streams, uploading to the cloud, and uploading to a publicly accessible server. As noted in Table 3 below, some of these reproductions may be covered by a limitation, namely private copying in Article 5(2)(b) InfoSoc Directive.

The second group refers to legal uncertainty cases. These cases include, first, online activities of end-users that involve the making of temporary copies, such as browsing and copies made during the reception of linear or on-demand streams. These activities, as we shall see later in this chapter, may be covered by the mandatory limitation for temporary and transient copying in Article 5(2)(b) InfoSoc Directive (see Table 3).

A second set of unclear cases involves online activities of end-users that may trigger not only the right of reproduction, but also other exclusive rights, giving rise to issues of *overlap* between different rights. These overlaps raise the question of which right or rights apply to the individual use at stake. One such issue relates to the overlap between the rights of reproduction and making available, and is visible in activities such as uploading of a file containing a work to a publicly accessible server.<sup>878</sup> Another issue relates to overlaps between the right of reproduction and the non-harmonised right of adaptation, and comes into play when assessing the legal status of digital adaptations, such as UGC. In the latter cases, it is possible that the use in question is privileged by copyright limitations to the reproduction right susceptible of application to certain types of adaptations, namely quotation, incidental use, or parody, in Article 5(2)(d), (i) or (k) InfoSoc Directive.

Table 3 provides a summary of the acts of Internet users covered by the exclusive right of reproduction pursuant to this categorisation. Section 4.4 below analyses which of these uses may be covered by exceptions and limitations to the exclusive right, such as those for temporary and transient copying (4.4.2) and private copying (4.4.3), and those applicable to reproductions made during the course of preparation or dissemination of digital adaptations (4.4.4).

**Table 3. Scope of Online Reproduction Right and Legal Certainty Issues**

Type of Online Use	Reproduction Right	Legal Certainty Issues
Downloading	Yes	Application of limitation in Article 5(2)(b) InfoSoc Directive
Stream capture	Yes	Application of limitation in Article 5(2)(b) InfoSoc Directive

<sup>878</sup> For a study on the relationship between these exclusive rights, see Depreeuw & Hubin, 2014, pp. 40–106. This dissertation does not deal with issues of overlap between exclusive rights.

Type of Online Use	Reproduction Right	Legal Certainty Issues
Copying for provision of interactive <b>streams</b>	Yes	Overlap with making available right
<b>Uploading</b> file to Cloud locker or server not accessible to the public	Yes	Application of limitation in Article 5(2)(b) InfoSoc Directive
Browsing	?	Application of limitation in Article 5(1) InfoSoc Directive
Reception of linear or on-demand <b>stream</b>	?	Application of limitation in Article 5(1) InfoSoc Directive
<b>Uploading</b> to a publicly accessible server	Yes	Overlap with making available right
Copies made in the preparation or making available of a <b>digital adaptation</b>	Yes	Overlap with making available right. Application of limitations in Article 5(2)(d), (i) or (k) InfoSoc Directive

### 4.3.2 Uses Covered by the Right of Communication to the Public

#### 4.3.2.1 Legal Framework

At the international level, the BC divides the right of communication to the public into specific rights to perform, broadcast and recite.<sup>879</sup> Article 8 WCT extends the BC’s subject matter and scope to the right of making works available to the public “in such a way that members of the public may access these works from a place and at a time individually chosen by them”, thus effectively including interactive and on-demand transmissions under copyright’s umbrella.<sup>880</sup>

Article 3(1) InfoSoc Directive implements the WCT by granting authors a broad exclusive right to

authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

The right, which must be interpreted broadly, covers online and offline acts.<sup>881</sup> According to recital 23 InfoSoc Directive, it includes the “transmission or retransmission of a work to the public by wire or wireless means, including broadcasting”, but “should not cover any other acts”. To this effect, the CJEU has clarified that the provision cannot be construed as allowing Member States to give “wider protection to copyright holders by laying down that the concept of

<sup>879</sup> Goldstein & Hugenholtz, 2013, pp. 317–318.

<sup>880</sup> Goldstein & Hugenholtz, 2013, p. 318. Arts 10 and 14 WPPT respectively contain identical provisions for performers and phonogram producers.

<sup>881</sup> See recital 23 InfoSoc Directive. See: CJEU, *ITV Broadcasting*, ¶20 (and case-law cited therein); CJEU, *OSA*, ¶23; CJEU, *SBS*, ¶14; CJEU, *Reha Training*, ¶36.

communication to the public includes a wider range of activities than those referred to in that provision”.<sup>882</sup>

Article 3(2) InfoSoc Directive gives related rights holders a narrower right of “making available”. This is because the InfoSoc Directive’s right does not affect categories of communication to the public regulated elsewhere in the *acquis*, such as broadcasting of programmes by satellite, and cable retransmission.<sup>883</sup> However, the provision does not prevent national legislation from extending the exclusive right as regards (linear) acts of communication to the public online, “provided that such an extension does not undermine the protection of copyright”.<sup>884</sup>

As a whole, Article 3 InfoSoc Directive covers communication at a distance, thus excluding from the scope of the right direct representation or performance.<sup>885</sup> The “making available” prong refers to interactive “on-demand” services. It does not require simultaneous reception of the work by the public and is independent of whether, where and how often the work is accessed. Hence, the right applies to access by users to a website, even if at a different time and place from the original communication.<sup>886</sup> Importantly, neither the right of communication nor making available is subject to exhaustion.<sup>887</sup>

There is a vast CJEU jurisprudence on the right of communication to the public in the InfoSoc, SatCab and Rental Right Directives.<sup>888</sup> From these judgments it has emerged that “communication to the public” is an autonomous concept of EU law.<sup>889</sup> Consequently the concept should be given the same meaning and interpreted according to the same criteria whether it is used in the context of the InfoSoc Directive (in connection to an exclusive right) or the Rental Right Directive (in connection to a remuneration right).<sup>890</sup> The concept of communication to the public involves a wide array of activities. These include the transmission of broadcasts in hotel rooms, spas, circuses, public places, and dental practices, as well as different aspects of communication to the public by satellite.<sup>891</sup>

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<sup>882</sup> CJEU, *Svensson*, ¶¶37, 41. To go above this ceiling would undermine the directive’s objectives of remedying legislative differences and legal uncertainty vis-à-vis copyright protection, in a way that adversely affects the functioning of the internal market.

<sup>883</sup> See Art. 4 SatCab Directive and Art. 8 Rental Right Directive, which remain applicable by virtue of Art. 1(2)(b) and (c) InfoSoc Directive.

<sup>884</sup> See CJEU, *C More Entertainment*, ¶¶22–37, referring to broadcasts of sporting fixtures made live on the Internet under Art. 3(2)(d) InfoSoc Directive.

<sup>885</sup> See recital 23 InfoSoc Directive and Common Position (EC) No 48/2000. See also Ohly, 2009, p. 225.

<sup>886</sup> Recital 25 InfoSoc Directive. See e.g. CJEU, *SCF*, ¶59; *C More Entertainment*, ¶26.

<sup>887</sup> Art. 3(3) and Recital 29 InfoSoc Directive. N.B. since the judgements in *Coditel I* and *II*, the CJEU has considered communication to the public to be a service and, therefore, not subject to exhaustion.

<sup>888</sup> These cases are, in chronological order: *EGEDA I*, *Lagardère*, *SGAE*, *Airfield*, *Organismos Sillogikis*, *Murphy*, *Circul Globus*, *PPI*, *ITV Broadcasting*, *Svensson*, *OSA*, *BestWater* (Order), *Sociedade Portuguesa de Autores* (Order), *C More Entertainment*, *SBS*, and *Reha Training*. Regarding the admissibility of Orders in the context of references for preliminary ruling, see Art. 99 of the Rules of Procedure of the Court of Justice.

<sup>889</sup> CJEU, *SGAE*, ¶31.

<sup>890</sup> CJEU, *Reha Training*, ¶¶27–34.

<sup>891</sup> On transmissions in hotels, see: CJEU, *EGEDA I*; CJEU, *SGAE*; CJEU, *Organismos Sillogikis*; CJEU, *PPI*; CJEU, *Sociedade Portuguesa de Autores*. On transmissions in a circus, see CJEU, *Circul Globus*. On transmissions in a spa establishment, see CJEU, *OSA*. On transmissions in the premises of a rehabilitation centre, see *Reha Training*. On

Several recent judgments elucidate the scope of the right in the online environment. They refer to activities such as the “live streaming” or broadcasting by a third party over the Internet of signals from commercial television broadcasters (*ITV Broadcasting*), the provision of “clickable links” giving access to protected works (*Svensson*), the provision of framing links to protected works (*BestWater*), and the direct broadcast of a sporting fixture on an Internet site (*C More Entertainment*). In addition, a number of preliminary references address the application of Article 3(1) InfoSoc Directive to different hyperlinking scenarios (*GS Media, Filmspeler, Stichting Brein v Ziggo*).<sup>892</sup>

Taken together, these judgments and references illustrate how the concept of communication to the public follows the evolution of modes of exploitation of works and subject matter, and grows ever more intricate.<sup>893</sup> They also allow the identification of the three main criteria used to assess the concept in EU law.<sup>894</sup> First, the existence of an act of communication. Second, whether the communication is made to the public, including the assessment of the concepts of “new public” and “separate technical means”.<sup>895</sup> Third, the profit-making nature of the communication. The first two criteria are essential and cumulative.<sup>896</sup> The third criterion, as explained below, does not appear to be determinative in the eyes of the Court. Despite their different relative weight, these criteria have been classified as “complementary”; “not autonomous” but “interdependent”.<sup>897</sup>

The following paragraphs explain each criterion to the extent required to understand the scope of the right in the online environment. The focus is on the InfoSoc Directive and the authors’ right of communication to the public. As a preliminary remark, it is noted that the CJEU sometimes relies on international treaties for the interpretation of different communication to the public rights in the *acquis*. Illustrations of this method are patent in *SGAE* (interpreting Article 3(1) InfoSoc Directive in light of Article 11*bis*(1)(ii) BC), *Murphy* (relying on Article 11*bis* BC), *Circul Globus* (explaining the concept of communication at a distance through Article 11(1) BC) and *SCF* (excluding direct effect of international treaties due to their lack of precision).<sup>898</sup>

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transmissions in a public place (a pub), see CJEU, *Murphy*. On transmissions in a dental practice, see CJEU, *SCF*. Judgments involving different aspects of communication to the public by satellite include: CJEU, *Lagardère*; CJEU, *Airfield*; CJEU, *SBS*.

<sup>892</sup> See CJEU, Reference for Preliminary Ruling, Case C-160/15, *GS Media*, and *Opinion AG GS Media*; CJEU, Reference for Preliminary Ruling, Case C-527/15, *Filmspeler*, and CJEU, Reference for Preliminary Ruling, Case C-610/15, *Stichting Brein v Ziggo*.

<sup>893</sup> See Lucie Guibault & Quintais, 2014.

<sup>894</sup> On the need for an “individual assessment” of the concept in Article 8(2) Rental Rights Directive see CJEU, *PPI*, ¶29 (and case law cited). On the notion that the concept has the same scope in the InfoSoc Directive, see CJEU, *Reha Training*, ¶33.

<sup>895</sup> N.B. AG Bot identifies four criteria as he considers the “new” character of the public and an independent third criterion. See *Opinion AG Reha Training*, ¶44.

<sup>896</sup> See e.g. CJEU, *Svensson*, ¶16; CJEU *ITV Broadcasting*, ¶¶21, 31; CJEU, *SBS*, ¶15. See, by analogy regarding Art. 3(2) InfoSoc Directive, CJEU, *C More Entertainment*, ¶25; CJEU, *Reha Training*, ¶37.

<sup>897</sup> CJEU, *SCF*, ¶79; CJEU, *Reha Training*, ¶35; *Opinion AG Reha Training*, ¶¶29–35.

<sup>898</sup> See, respectively, *SGAE*, ¶35, *Murphy*, ¶¶200–203, *Circul Globus*, ¶¶35–36, and *SCF*, ¶¶46, 48. For an early reference to the principles of the BC in the interpretation of this exclusive right in the *acquis*, see *Opinion AG in EGEDA I*, ¶¶5–7, 15.

#### 4.3.2.1.1 An “Act of Communication”

The InfoSoc Directive does not define the notion of “communication”, but some CJEU cases help to clarify its meaning. The Court’s view largely relies on a broad interpretation of the exclusive right in light of the objective of a “high level of protection”. The result is the inclusion of a comprehensive variety of acts within the notion of communication.<sup>899</sup>

In essence, a communication occurs when a work is transmitted or made available in such a way that members of the public may access it. This seems to imply two elements: first, an intentional intervention by the user to make the communication and, second, the sufficiency of transmitting or making the work available, as opposed to requiring its actual and subsequent reception or access.

The first aspect—intentional intervention—means that a user (the person or entity using a means of communication) will carry out an act of communication when they knowingly intervene to provide their customers access to a work, for example through a broadcast. Without that intervention, the customers, although physically within the area covered by the broadcast, would not otherwise be able to enjoy the broadcast work.<sup>900</sup> In other words, to qualify as a “communication” the intervention must be more than a mere technical means that ensures or improves the communication.<sup>901</sup>

The Court uses this notion of intervention in a flexible and far-reaching manner, applying it to the activities of users in diverse settings. These include the transmission of football matches in a pub on a television screen (*Murphy*), and the broadcasting of films or music in hotel rooms (*SGAE, PPI*), in a circus (*Circul Globus*), or in the waiting room of a dental practice (*SCF*).

An example of the Court’s extensive approach is evident in *ITV Broadcasting*. The case analysed whether an Internet retransmission qualifies as a “communication”. The Court considered that the service provided by TV Catch-up amounts to a separate act of transmission or retransmission of a work through a specific technical means. In supporting this conclusion, the Court argued that TV Catch-up’s “intervention” goes beyond the provision of a mere technical means to ensure or improve reception of the original transmission in its catchment area.<sup>902</sup>

On the other hand, a communication occurs independently of whether the public actually receives or accesses the work. In *SGAE*, for example, this meant that a communication to the public occurred even if customers did not switch on the television and had not actually accessed the works.<sup>903</sup> In *Svensson*, the Court considered that the provision of direct access to the work via a link from one website to another constitutes an act of “making available” and, therefore, a “communication to the public”.<sup>904</sup>

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<sup>899</sup> Recitals 9, 10, and 23 InfoSoc Directive. Confirming this broad interpretation of the concept of “communication to the public”, see: CJEU, *SGAE*, ¶36; CJEU, *Murphy*, ¶186; CJEU, *Circul Globus*, ¶33; CJEU, *ITV Broadcasting*, ¶20; CJEU, *Svensson*, ¶17; CJEU, *OSA*, ¶23; CJEU, *SBS*, ¶14.

<sup>900</sup> CJEU, *SGAE*, ¶42; CJEU, *Organismos Sillogikis*, ¶38; CJEU, *Murphy*, ¶195; CJEU, *SCF*, ¶82; CJEU, *PPI*, ¶31.

<sup>901</sup> CJEU, *SGAE*, ¶42; CJEU, *Murphy*, ¶194.

<sup>902</sup> CJEU, *ITV Broadcasting*, ¶¶28–30.

<sup>903</sup> See, e.g., CJEU, *SGAE*, ¶43.

<sup>904</sup> CJEU *Svensson*, ¶¶19–20.

On this point, the AG in *GS Media* disagreed with *Svensson*. He argued that where a link points to a freely accessible work it is merely facilitating the access thereto; the “actual ‘making available’ was the action by the person who effected the initial communication”.<sup>905</sup> The key to establishing an act of communication, he continued, is whether the intervention of the linker is “vital or indispensable in order to benefit from or enjoy works”.<sup>906</sup> Because the work is already freely accessible, the link does not constitute an indispensable intervention and is therefore not an act of communication to the public.<sup>907</sup>

Whether an act of “transmission” of the work is required for there to be a communication seems to hinge on the interactive or linear nature of the act. Thus, *Svensson* does not require that a transmission occurs for there to be an act of communication, which is consistent as a matter of law with the making available prong of the right of communication to the public.<sup>908</sup> It has been argued that such a view is also consistent with a broad interpretation of the right, aimed at providing a high level of protection to rights holders and ensuring that the concept of “act of communication” retains sufficient flexibility to survive technological obsolescence.<sup>909</sup>

However, this approach is not followed by the CJEU in relation to non-interactive/linear acts of communication, whether or not over the Internet. In fact, judgments involving these types of communication appear to require a “transmission” of the protected works, irrespective of the technical means or process used.<sup>910</sup>

#### 4.3.2.1.2 Communication to the “Public”

The second cumulative criterion is that an act of communication is made to the “public”. The CJEU considers that this concept must be construed similarly across the InfoSoc, SatCab and Rental Right Directives.<sup>911</sup>

The Court interprets “public” as including an “indeterminate” and “fairly large number” of recipients as potential beneficiaries of the communication.<sup>912</sup> The concept further contains a *de minimis* threshold, which rules out groups of persons that are too small or insignificant.<sup>913</sup> To

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<sup>905</sup> *Opinion AG in GS Media*, ¶54.

<sup>906</sup> *Ibid.*, ¶¶55–57 (cit. ¶57). On this point, the Advocate general relied on CJEU, *Murphy*, ¶¶195–196.

<sup>907</sup> *Opinion AG in GS Media*, ¶¶58–62, noting that this interpretation makes the analysis of the new public criterion unnecessary.

<sup>908</sup> See Leistner, 2015, pp. 632–633: “the mere possibility of access for members of the public will suffice even if they do not specifically make use of that opportunity”. *But see* Computer & Communications Industry Association, 2016a; European Copyright Society, 2013, arguing on the basis of the *travaux préparatoires* of the InfoSoc Directive for the necessity of an act of “transmission” for the copyright qualification of the use.

<sup>909</sup> *Opinion AG in GS Media*, ¶¶48–52.

<sup>910</sup> CJEU, *Murphy*, ¶193, CJEU, *ITV Broadcasting*, ¶¶28–30; CJEU, *OSA*, ¶25, CJEU, *SBS*, ¶16; CJEU, *Reha Training*, ¶¶37–39.

<sup>911</sup> CJEU, *Murphy*, ¶¶187–188: “...given the requirements of unity of the European Union legal order and its coherence, the concepts used by that body of directives must have the same meaning, unless the European Union legislature has, in a specific legislative context, expressed a different intention”.

<sup>912</sup> CJEU, *Mediakabel*, ¶30, CJEU, *Lagardère*, ¶31 *SGAE*, ¶38, CJEU, *SCF*, ¶84; CJEU, *ITV Broadcasting*, ¶32; CJEU, *OSA*, ¶27; CJEU, *SBS*, ¶22; CJEU, *Reha Training*, ¶41. In applying this definition, the Court has found the concept of public to exclude “persons who can receive the signals from the satellite only if they use professional equipment” (in *Lagardère*), and transmissions from a broadcasting organisation to specified signal distributors without potential viewers being able to access those signals (in *SBS*). Cf. CJEU, *Lagardère*, ¶31; CJEU, *SBS*, ¶¶22–23.

<sup>913</sup> CJEU, *SCF*, ¶84; CJEU, *Reha Training*, ¶43.



determine that threshold, it is necessary to consider the “cumulative effects of making works available to potential audiences”, taking into consideration the number of persons having access to the same work at the same time and in succession.<sup>914</sup> Clearly, this threshold filters out communications of a work or subject matter that are “private”, in the sense that they occur within a delimited circle of family or friends.<sup>915</sup> Whether the concept of private encompasses all non-public acts is unclear.

As noted, the exclusive right only includes communications to a public at a distance, i.e. not present at the place of origin of the act.<sup>916</sup> Beyond that distance element, the Court sometimes requires that the public must be “targeted by the user and receptive, in one way or another, to that communication, and not merely ‘caught’ by chance”.<sup>917</sup>

Finally, as a derogation to the principle that the concept of “public” should have a similar construction in copyright and related rights, *SCF* establishes a distinction between these two fields. This case established that the “public” does not include patients in a waiting room of a dental practice. To explain the exclusion, the Court states rather opaquely that those patients, albeit forming “a very consistent group of persons and thus... a determinate circle of potential recipients”, are in reality a “very limited” or “insignificant” number of persons; as such, they do not meet the standard of “persons in general” required to qualify as a “public”.<sup>918</sup>

As explained below, this conclusion must be understood in light of the “profit-making nature” criterion and the type of right it applies to: a non-exclusive right of equitable remuneration. This much is confirmed in *OSA*, where the Court justifies the different treatment of related rights on the nature of the right.<sup>919</sup> For some authors, this pronouncement is both a blessing and a curse. A blessing, because it limits the effects of the questionable interpretation in *SCF*. A curse, as it leads to unequal treatment of related rights holders.<sup>920</sup>

Having explained the definition of “public”, the CJEU then adds two alternative sub-criteria to define whether there is a communication to the public. According to the first sub-criterion, the right applies if a work is communicated to a “new public”.<sup>921</sup> Alternatively, the second sub-criterion provides that the “new public” requirement is waived if the communication of a work is made through separate or different technical means as compared to the original communication.<sup>922</sup> Both sub-criteria are relevant for the application of the exclusive right in the online environment, and therefore deserve further scrutiny. However, it is worth noting in

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<sup>914</sup> CJEU, *SGAE*, ¶39; CJEU, *PPI*, ¶35; CJEU, *ITV Broadcasting*, ¶33; CJEU, *OSA*, ¶28; CJEU, *Reha Training*, ¶44.

<sup>915</sup> See *infra* 4.4.3.1, for the definition of “private use”. See also CJEU, *SCF*, ¶86, and CJEU, *Reha Training*, ¶42, excluding from the concept communications of works to “specific individuals belonging to a private group”.

<sup>916</sup> CJEU, *Murphy*, ¶¶200, 203. CJEU, *Circul Globus*, ¶¶36, 37, 40.

<sup>917</sup> CJEU, *SCF*, ¶91; CJEU, *PPI*, ¶37. *But see Opinion AG in Reha Training*, ¶¶66–68, giving less weight to this aspect.

<sup>918</sup> CJEU, *SCF*, ¶¶84–85, 95–96.

<sup>919</sup> CJEU, *OSA*, ¶¶34–35. See also CJEU, *SCF*, ¶74. See *infra* 4.3.2.1.3.

<sup>920</sup> Leistner, 2015, pp. 633–637.

<sup>921</sup> CJEU, *SGAE*, ¶¶37–38, 40, 42.

<sup>922</sup> CJEU, *ITV Broadcasting*, ¶39.

advance the remarkable fact that neither sub-criterion has a clear basis in international or EU copyright law. Instead, they are creations of the Court.<sup>923</sup>

### *New Public*

The term “new public” refers to a public not taken into account by the copyright holder when they authorised the initial communication to the public. The concept was first used in *SGAE* and is now a staple of the CJEU’s judgments on the interpretation of the right of communication to the public.<sup>924</sup>

In *SGAE*, the Court traced the criterion back to Article 11*bis*(1)(ii) BC and the 1987 Guide to the Berne Convention.<sup>925</sup> Curiously, the Guide referred to that criterion in relation to Article 11*bis*(1)(iii) BC, which raises doubts as to the validity of the Court’s analysis on this point. This is because subparagraph (ii) of the BC provision relies instead on the criterion of an “organisation other than the original one”, i.e. a “new communicator” rather than a “new public”.<sup>926</sup>

Regardless, from the application in the offline world to acts of communication in public places (*Murphy*), hotels rooms (*SGAE*), spa establishments (*OSA*), rehabilitation centres (*Reha Training*), and in the context of satellite broadcasting (*Airfield*), the new public criterion has gained extraordinary relevance for the interpretation of Article 3(1) InfoSoc Directive in the online environment. This relevance is due especially to its use by the Court in hyperlinking cases, starting with *Svensson*.<sup>927</sup> Hence, the criterion is of particular importance for the study of ACS.

*Svensson* involved a Swedish company (Retriever Sverige AB) operating a website that provided clients with links to articles published on other websites. The applicants in the main proceedings (all journalists, among them Mr. Svensson) claimed compensation from Retriever for harm suffered as a result of the inclusion on its website of hyperlinks redirecting users to freely accessible press articles in which the former hold copyright. The main question before the Court was whether the provision on a website of links to protected works “freely accessible” on another website constitutes a restricted act of communication to the public under the InfoSoc Directive.

First, the CJEU considered that the provision of direct access to the works via a link from one website to another constitutes an act of “making available” and, therefore, “communication to

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<sup>923</sup> Cf. ALAI, 2014, arguing that both criteria are contrary to international law, and Velze, 2015, pp. 71–72, concluding similarly vis-à-vis the “new public” criterion.

<sup>924</sup> CJEU, *SGAE*, ¶¶37–38, 40, 42; CJEU, *Murphy*, ¶197; CJEU, *Organismos Sillogikis*, ¶38; CJEU, *Airfield*, ¶76; CJEU, *Svensson*, ¶¶21, 24; CJEU, *OSA*, ¶¶32; CJEU, *Reha Training*, ¶45. For in-depth analysis of this criterion, see Velze, 2015, noting that the same is already used prior to *SGAE* in *Opinion AG in EGEDA I*. See also ALAI, 2014, concluding that the criterion is in conflict with international law.

<sup>925</sup> CJEU, *SGAE*, ¶41.

<sup>926</sup> Velze, 2015, pp. 36–37.

<sup>927</sup> The preliminary reference in *Svensson* and its aftermath polarised European copyright scholarship. See, e.g., ALAI, 2013, 2014, 2015, European Copyright Society, 2013, 2014a. For commentary on the debate, see Ginsburg, 2014c; Lucie Guibault & Quintais, 2014; Savola, 2014; Tsoutsanis, 2014.

the public”.<sup>928</sup> Second, because the link is aimed at all potential users of the website (an “indeterminate and fairly large number of recipients”) works are indeed communicated to a public.<sup>929</sup> However, for such a communication to trigger Article 3(1) InfoSoc Directive it “must also be directed at a new public”, meaning a “public... not taken into account by the copyright holders when they authorised the initial communication to the public”.<sup>930</sup>

In this case, there was no communication to a new public. The initial communication targeted all potential visitors to the website in question, consisting of “all internet users”, as access to the works was not subject to “restrictive measures”. Accordingly, Retriever’s website users were part of the public taken into account by the applicants when they first authorised the making available of their works.<sup>931</sup>

Therefore, even if there is an “act of communication” to the “public”, no authorisation is required because it is not to a “new public”. The conclusion remains valid even if the link causes the work to appear “in such a way as to give the impression that it is appearing on the site on which that link is found, whereas in fact that work comes from another site”.<sup>932</sup>

The focus of the analysis is therefore on whether a work is “freely accessible” online and not on the linking technique. This approach was confirmed later in *BestWater*. In that case, the Court considered that hyperlinking through “framing” of a YouTube video did not constitute a communication to a new public because the link pointed to a work freely available online.<sup>933</sup> Crucially, the Court in *BestWater* did not rule on whether it is relevant for the assessment of the right that the video is question was uploaded *with or without the consent* of the copyright holders.

A different conclusion applies if a link allows users to circumvent restrictions put in place by the linked website in order to limit access to subscribers of the same. The circumventing link “constitutes an intervention without which those users would not be able to access the works transmitted”; in such cases, those users are considered a new public (not targeted by the initial communication) and authorisation from the copyright owner is required.<sup>934</sup>

It can be said that the introduction and development of a new public criterion for online communication to the public in *Svensson* and its progeny follow a “more technical-objective approach towards interpreting Article 3(1) InfoSoc Directive”. This approach is inconsistent with an “economic user-related overall assessment” of the right, which would warrant differentiated solutions for other types of link (e.g. pull links) susceptible of affecting the exploitative potential of the work.<sup>935</sup>

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<sup>928</sup> CJEU, *Svensson*, ¶¶19-20.

<sup>929</sup> *Ibid.*, ¶25.

<sup>930</sup> *Ibid.*, ¶24.

<sup>931</sup> *Ibid.*, ¶¶27-28.

<sup>932</sup> *Ibid.*, ¶29.

<sup>933</sup> CJEU, *BestWater* ¶¶16-19, citing CJEU, *Svensson*, ¶¶29-30.

<sup>934</sup> CJEU, *Svensson*, ¶¶31. On the different interpretative approach of AG Wathelet in his opinion in *GS Media*, see *infra* 4.3.2.3.

<sup>935</sup> Leistner, 2015, p. 636. See also *infra* 4.3.2.3.

### Specific Technical Means

Even if a communication does meet the new public criterion, it may still be restricted under the exclusive right if it is made through a “specific technical means”. In essence, this criterion is meant to safeguard situations where the act of communication of works to the public is made through different technologies, regardless of whether it reaches a new public. For example, where a primary communication of a work occurs through satellite broadcasting and the secondary communication over the Internet, the targeted public may be the same but the technical means not. Conversely, “on the internet all potential and different forms of communication appear to constitute the same technical means in the opinion of the CJEU.”<sup>936</sup> The criterion first appears in *ITV Broadcasting* and is restated in *SBS*.

The first judgment concerned the distribution of television broadcasts over the Internet, substantially in real time. TV Catchup offered a service allowing users to receive through the Internet “live” streams of free-to-air television broadcasts, including those transmitted by ITV. However, users could only access content which they were legally entitled to watch under a UK television licence.<sup>937</sup>

The Court first determined the Internet retransmission to be an “act of communication” because TV Catchup’s service amounts to a separate act of transmission or retransmission of a work through a specific technical means. TV Catchup’s intervention went beyond the provision of a mere technical means to ensure or improve reception of the original transmission in its catchment area.<sup>938</sup>

Second, this communication is to a “public”, understood as an indeterminate number of potential recipients, implying a fairly large number of persons, considering the number of persons who have simultaneous and successive access to the same work.<sup>939</sup> TV Catchup’s Internet retransmissions were aimed at all UK residents with an Internet connection and valid television licences. As these users could simultaneously access the live streaming of television programmes online, the Court considered there was a communication to the public.<sup>940</sup>

Because the Internet retransmission was a separate act requiring an independent authorisation—due to specific technical conditions, means and intended public—, it was not necessary to examine the new public requirement.<sup>941</sup> It was also not necessary, for the qualification of the act, to analyse other complementary *non-essential* elements, such as the profit-making nature of the activity or the level of competition between the third party and the original broadcaster.<sup>942</sup> *SBS* later unequivocally confirmed this interpretation when stating that “every transmission or

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<sup>936</sup> Leistner, 2015, p. 634, citing CJEU, *Svensson*, ¶24.

<sup>937</sup> CJEU, *ITV Broadcasting*, ¶¶9–13.

<sup>938</sup> *Ibid.*, ¶¶28–30.

<sup>939</sup> *Ibid.*, ¶¶32, 34; *SGAE*, ¶¶37–39 (and case law cited therein).

<sup>940</sup> CJEU, *ITV Broadcasting*, ¶35.

<sup>941</sup> *Ibid.*, ¶39. On this requirement see: CJEU, *SGAE*, ¶40; CJEU, *Murphy*, ¶197; CJEU, *Airfield*, ¶72. On the latter case, see Vousden, 2012.

<sup>942</sup> CJEU, *ITV Broadcasting*, ¶¶43–46. *But see* Klafkowska-Wasniowska, 2013, pp. 756–757, arguing that the profit making nature of the act may be determinative of its qualification under the communication to the public right of related rights holders.

retransmission of a work which uses a specific technical means must, as a rule, be individually authorised by the author of the work in question.”<sup>943</sup>

The Court in *ITV Broadcasting* and *SBS* took an economic approach and developed the “specific technical means” requirement to interpret the exclusive right in light of the “existence and degree of several interdependent criteria with regard to the person of the user (potential infringer) and the targeted public”.<sup>944</sup> The function of this approach is to safeguard, for rights holders, new technological avenues of exploitation with economic significance.<sup>945</sup>

#### 4.3.2.1.3 Profit-Making Nature of the Communication

Finally, the CJEU has sometimes resorted to a third criterion to determine if there is a copyright relevant communication to the public: whether the communication is of “a profit-making nature”.<sup>946</sup>

In relation to this criterion, as with the notion of “public”, the Court has to this point drawn a distinction between copyright and related rights.<sup>947</sup> For communications to the public of copyright-protected works, the Court considers this factor to be relevant but not a “necessary” or “essential” “condition for the existence of a communication to the public”.<sup>948</sup> Hence, the criterion does not appear to be determinative of the exclusive right in Article 3(1) InfoSoc Directive.<sup>949</sup>

A different conclusion may be reached in relation to communication to the public of subject matter protected by related rights. This is clearly seen in *SCF* and *PPI*, which deal with the *remuneration right* in Article 8(2) Rental Right Directive, as well as in the subsequent judgment in *Reha Training*.<sup>950</sup> The Court states that Article 8(2) “requires an individual interpretation of the concept of communication to the public” as the right in question “is essentially financial in nature”.<sup>951</sup> To make this individual assessment of the remuneration right, the Court considers it relevant to examine the profit-making nature of a communication.<sup>952</sup> This criterion, it seems, is used to qualify the intervention that communicates the work to the public and, in particular, whether the same aims to attract additional customers and revenue.<sup>953</sup>

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<sup>943</sup> CJEU, *SBS*, ¶17, citing CJEU, *ITV Broadcasting*, ¶24.

<sup>944</sup> Leistner, 2014, pp. 569–570, commenting on *ITV Broadcasting*.

<sup>945</sup> Leistner, 2014, pp. 569–572.

<sup>946</sup> CJEU, *SGAE*, ¶44; CJEU, *Murphy*, ¶204, CJEU, *ITV Broadcasting*, ¶¶42–43; CJEU, *SCF*, ¶¶79, 88, 97; CJEU, *Reha Training*, ¶49.

<sup>947</sup> Nérison, 2015b, p. 390, noting that the bifurcated approach is justified on the different nature of the rights in question (exclusive v. remuneration) and that it may rely on the sectorial nature of the Rental Right Directive, as opposed to the “copyright common law” status of the InfoSoc Directive.

<sup>948</sup> CJEU, *SGAE*, ¶44; CJEU, *Murphy*, ¶204, CJEU, *ITV Broadcasting*, ¶¶42–43; CJEU, *Reha Training*, ¶49.

<sup>949</sup> CJEU, *OSA*, ¶35. Cf. also the reported position of Judge Malenovský in Marcela Favale, 2016.

<sup>950</sup> CJEU, *Reha Training*, ¶49, where it is stated that the profit-making nature of the communication is relevant for the qualification of a transmission as a communication to the public “in particular, for the purpose of determining any remuneration due in respect of that transmission”.

<sup>951</sup> CJEU, *SCF*, ¶¶76–78.

<sup>952</sup> *Ibid.*, ¶¶79, 88, 89. See also CJEU, *PPI*, ¶36.

<sup>953</sup> CJEU, *SCF*, ¶90, citing CJEU, *SGAE*, ¶44, and CJEU, *Murphy*, ¶205. See also CJEU, *Reha Training*, ¶¶48–51.

In *SCF*, which dealt with the communication to the public of phonograms broadcast by radio in a dental practice, the Court concluded that the activity in question could not be reasonably expected to “have an impact on the income of that dentist”.<sup>954</sup> That conclusion was reinforced by the fact that the dentist’s clients are not receptive to the communication nor have an active choice in the same.<sup>955</sup> As a result, the activity in question is not a communication to the public for the purposes of Article 8(2) Rental Right Directive.

Conversely, the *PPI* Court considered that “the guests of a hotel may be described as ‘targeted’ and ‘receptive’.”<sup>956</sup> By allowing its customers access to the broadcast works, the hotel provided “an additional service which has an influence on the hotel’s standing and, therefore, on the price of rooms”.<sup>957</sup> Consequently, the hotel operator’s broadcasting of phonograms is of a profit-making nature, leading to the conclusion that the operator makes a communication to the public pursuant to Article 8(2) Rental Right Directive.<sup>958</sup> A similar line of reasoning was followed by the Court in *Reha Training*, which considered that the broadcasting of television programmes by the operator of a rehabilitation centre “has a profit-making nature, capable of being taken into account in order to determine the amount of remuneration due, where appropriate, for such a broadcast”.<sup>959</sup>

The above analysis suggests the “profit-making” is of greater relevance the determination of the existence of a communication to the public in relation to the right of equitable remuneration in Article 8(2) Rental Right Directive.<sup>960</sup> However, because the criterion is also available for the assessment of the concept of communication to the public in relation to exclusive rights, it cannot be excluded that the CJEU relies on it for the determination of the legal status of certain types of online use of works. Of course, whether such application of the criterion is advisable or contributes to resolving legal uncertainty in this field is questionable.

#### 4.3.2.2 Application to Activities of Internet Users

How does the analysis of the legal framework of the right of communication to the public apply to the previously defined types of online use? To answer the question, this paragraph analyses linear uses (live streaming) and interactive uses (on-demand streaming, uploading and hyperlinking) involving the right of communication to the public.

The case of live streaming appears straightforward. If a user makes an Internet retransmission of broadcasts for non-commercial purposes, they are communicating the work to the public through a new “specific technical means”, in the sense of *ITV Broadcasting*.<sup>961</sup> Therefore, unauthorised retransmissions of this type qualify as copyright infringement.

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<sup>954</sup> CJEU, *SCF*, ¶97.

<sup>955</sup> Cf. CJEU, *SCF*, ¶¶98–100.

<sup>956</sup> CJEU, *PPI*, ¶43.

<sup>957</sup> *Ibid.*, ¶44.

<sup>958</sup> *Ibid.*, ¶¶45–46.

<sup>959</sup> CJEU, *Reha Training*, ¶64

<sup>960</sup> *Opinion AG in Reha Training*, ¶¶55, 68. Cf. also Leistner, 2015, p. 633, and position of Judge Malenovský reported in Marcela Favale, 2016.

<sup>961</sup> The fact that the use is non-commercial does not affect this conclusion, especially in light of the lesser relevance of the “profit-making nature” criterion in the field of copyright. See *supra* 4.3.2.1.3.

The conclusion is valid for online (re)transmissions of works through different communication means. It might not apply to Internet retransmissions of an existing online transmission, due to the fact that the communication does not use a novel and separate “technical means”.<sup>962</sup> As many live Internet transmissions which rights holders wish to exploit commercially are subject to technological restrictions of some kind, it is probable that an online retransmission of the same by end-users constitutes a new technical act of communication or reaches a new public beyond that initially authorised by the rights holder. If it does, it will trigger the right of communication to the public and subject unauthorised users to liability for copyright infringement.

Interactive uses—on demand streaming, uploading and hyperlinking—require a more nuanced analysis. On the one hand, certain uses may not reach a “public”, notably in the context of uploading. In general, making an upstream copy to a cloud locker (and possibly to online personal video recorders) that is only accessible to the user making it, or to a close circle of family and friends, does not make the work accessible to the public. The act constitutes instead a reproduction and should be dealt with in the context of that exclusive right.<sup>963</sup>

Similarly, the provision and use of cloud services that merely allow individual users (or a close circle of family and friends) to make upstream copies of works on hosting servers and subsequently download or stream their material for private or personal use do not trigger the making available right.<sup>964</sup>

Less clear are uploads of works on social networking sites. These are intermediate cases with respect to the target audience. In these cases, the content is only available to a specific group of Internet users—consisting of a variable circle of family, friends and acquaintances—but not to the general Internet public.<sup>965</sup> Is such a group of users a “public”, or even a “new public”? The answer is unclear as it depends on the concrete definition of the *de minimis* threshold of public in specific cases.<sup>966</sup> Furthermore, the question may be pre-empted by the finding that the platform itself is making the work available to the public (if not simultaneously, at least in succession), thereby exempting the end-user from the requirement of authorisation.

A different situation arises when the upload file is made accessible to a wide number of people, for instance through a P2P network or on a publicly accessible website. Here, the work is made available on demand to other Internet users. In such cases, the relationship between the rights of reproduction and making available is not clear and has led to divergent case law in national courts. These cases either consider the “upload copy” to be consumed by the right of making available or qualify it simultaneously as an act of reproduction and making available, thereby

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<sup>962</sup> Arezzo, 2014, pp. 535–536; Klafkowska-Wasniowska, 2013, p. 756; Savola, 2014, pp. 279–288.

<sup>963</sup> Depreeuw & Hubin, 2014, pp. 70–71, noting cases where national courts did not find a “public” to exist in these technologies that allow for a more “individualised approach”.

<sup>964</sup> Triaille et al., 2013, pp. 45, 119.

<sup>965</sup> Senftleben, 2013a, p. 88, raising the issue.

<sup>966</sup> Velze, 2015, p. 85, applies an economic interpretation method to note that “[a]n example of the *de minimis* rule on the Internet is if a work is communicated within the internal network of a company, only made available to a small number of employees”.

calling into question both rights.<sup>967</sup> Regardless, placing the work on the Internet in such a way as to allow individualised on demand access to the same qualifies as a communication to the “public”.<sup>968</sup>

The same conclusion should apply where P2P protocols (e.g. BitTorrent) cause the uploaded file to be split into several parts during the transfer process in such a way that one specific peer only effectively “transmits” part of the work to be downloaded by subsequent users. Despite the technical differences, the situation is functionally identical to standard uploads. Given that the decisive activity of offering access to a protected work on a network for (individual) access has effectively occurred, the legal status of the uploading act in these systems should not change.<sup>969</sup>

If this was the entire story, the legal qualification of acts of uploading would be only relatively challenging. However, we might wonder how the criteria used by the CJEU to determine the existence of a communication to the public of works online—“specific technical means” (in *ITV Broadcasting*) or “new public” (in *Svensson*)—influence this qualification.

In the simplest scenario, the “upload copy” refers to a work not previously available over the Internet. Here, there is a communication to the public via a different technological means (i.e. the Internet), subject to the consent of rights holders.

But what if the “upload copy” is of a work already accessible online? This scenario invalidates the application of the “specific technical means” criterion and seems to push the analysis towards the “new public” test. Following *Svensson*, hyperlinks pointing to “freely accessible” content do not broaden the audience initially targeted. Therefore, they do not aim at a new public and do not constitute a communication to the public in the sense of Article 3 InfoSoc Directive.<sup>970</sup> Is the same conclusion applicable to the upload copy?

To answer the question, we need to take a step back and look at the first cumulative requirement of the exclusive right. Namely, what type of act of communication is at stake here and does it justify the analogy to hyperlinking?

From the technical standpoint, uploading is different from hyperlinking insofar as it involves a prior reproduction of a digital copy of the work for purposes of subsequent accessibility and transmission to third parties over the Internet (which acts involve a series of ephemeral and possibly permanent reproductions). This is the quintessential case of interactive transmission meant to be covered by the right of making available.<sup>971</sup>

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<sup>967</sup> Depreeuw & Hubin, 2014, p. 43. See also Eechoud et al., 2009, p. 91, on the challenges of distinguishing the making available right from that of broadcasting in the *acquis*. The authors stress the relevance of the distinction for related rights owners, which do not have a right to prohibit the broadcast of works but a mere remuneration claim.

<sup>968</sup> Eechoud et al., 2009, pp. 92–93.

<sup>969</sup> Huygen et al., 2009, fig. 52; Quintais, 2012, fig. I.3.a)-I.3.b).

<sup>970</sup> Moir, Montagnon, & Newton, 2014, p. 400. N.B. this might not prevent the possibility that injured parties avail themselves of unfair competition type of protection.

<sup>971</sup> Arezzo, 2014, p. 549.



In hyperlinking, the intentional intervention of the user is of a different nature. It is a reference or pointer to a file and does not involve previous storage of the same for the purposes of making available the work.<sup>972</sup> As Arezzo puts it,

an act of linking is, by definition, not an ‘uploading’ of content but the provision of a set of technical information about how such content may be reached, it goes without saying that linking always presupposes that the linked content already be made available on the net by someone else: this latter person being the actual infringer if the first act of uploading took place without the rightholder's consent.<sup>973</sup>

This characterisation clarifies that uploading involves a preliminary reproduction step and an *independent act* of communication to the public. The hyperlink to the upload copy would be a subsequent and separate act.<sup>974</sup> Because the act is different, and the exclusive right is not subject to exhaustion online, as a rule the uploading of works over the Internet should be subject to authorisation by the rights holder.<sup>975</sup>

Of course, if the upload copy was previously “freely accessible” online, the act of uploading (together with the ancillary reproduction) could be authorised by contract (including via collective licensing), a copyright limitation, or national doctrines of implied licence.<sup>976</sup> However, for the most part end-users will remain uncertain whether the work originates from an authorised source, which may affect its legal status.<sup>977</sup>

Interactive stream provision is similar to uploading and the same conclusions apply. Where an end-user provides unrestricted access to a work for download or through a stream over the Internet at a time and place chosen by the recipient, they are communicating the work to the public.<sup>978</sup>

As noted, the current jurisprudence of the CJEU is that hyperlinking only constitutes a restricted communication to the public in the sense of the InfoSoc Directive if it provides access to works not previously “freely accessible” online. Such a hyperlink is considered to broaden the original website’s audience to a new public by circumventing access restrictions.

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<sup>972</sup> CJEU, *Svensson*, ¶31.

<sup>973</sup> Arezzo, 2014, p. 551. Arezzo goes on to suggest that the right of making available could be clarified so as to comprise also the preliminary act of “technical act of storing copies for the purpose of making them available”, leading to the conclusion that linking would not qualify as a “form of communication of a work to the public”. Cf. Arezzo, 2014, p. 552.

<sup>974</sup> This distinction between the initial act of making available and subsequent hyperlinks to that upload copy is used by AG Wathelet to conclude that linking to freely accessible unlawful sources is not an act of communication to the public. See *Opinion AG GS Media*, ¶54.

<sup>975</sup> In this respect, the act of uploading could possibly be authorised under doctrines of implied consent, but not because of the new public criterion.

<sup>976</sup> See ALAI, 2015, discussing these options for hyperlinking. Influential applications of doctrines of implied consent are those of the Federal Court of Justice in: BGH, 29.04.2010, I ZR 69/08 (“Vorschaubilder”), on implied consent to use of freely accessible thumbnails by search engines; and BGH, 19.10.2011, I ZR 140/10 (“Vorschaubilder II”) on implied consent to use of images made available without authorisation of the rights holder by search engines. See Geiger & Schönherr, 2014b, pp. 458–459; Peukert, 2015, pp. 380–381. On implied licence and linking, see Pihlajarinne, 2012.

<sup>977</sup> The issue, as it relates to hyperlinking, is the focus of CJEU, Reference for Preliminary Ruling, Case C-160/15, *GS Media*. See *infra* 4.3.2.3.

<sup>978</sup> Depreeuw & Hubin, 2014, p. 29.

On this basis, some commentators draw a distinction between types of link. The ALAI, for example, argues that deep links and framing “make the referenced work available to the public” by making it “possible to bring the works directly to the computer or device screens of the user, or to download them directly to the computer or device, without further intermediation”. Therefore, these links are infringing unless authorised by the rights holder or privileged by a limitation.<sup>979</sup> Conversely, a standard surface link to freely accessible content hosted on another webpage “is not itself a communication of a specific work to the public because what is communicated is the homepage, not directly the work”; an additional step is required, thus only the site linked to is communicating the work to the public.<sup>980</sup>

Still, by relying on the criterion of the “new public” in hyperlinking cases, the CJEU introduced significant legal uncertainty as to the qualification of online use in the everyday practices of Internet users. This uncertainty is at the root of a slew of pending preliminary references to the Court (*GS Media*, *Filmspelers*, and *Stichting Brein v Ziggo*), which call into question the application of the right of communication to the public in the digital networked environment. The following section scrutinises these issues of legal certainty.

#### 4.3.2.3 Issues of Legal Certainty

According to the new public criterion in *Svensson*, the right of communication to the public does not apply to hyperlinking if the work is freely accessible online and the link does not circumvent access restrictions. Hence, a work that is “freely accessible” is a work available online without access restrictions or “restrictive measures”.<sup>981</sup> The use of these terms and the related term “circumvention” indicates that the restrictions in question are technological. (Some authors consider this wording to also include contractual restrictions.)<sup>982</sup>

If a link provides access to content that is subject to access control measures (e.g. subscription pay-walls or “session IDs”), it is infringing. For example, current geo-blocking measures used by broadcasters and service providers in the audio-visual sector would qualify as technical restrictions. Infringement would result from the fact that the content is not freely accessible and the link circumvents access requirements, resulting in a communication to a new public.<sup>983</sup> This would apply to content made available on demand, as well as to content originally streamed over the Internet (if subject to technical restrictions).

More problematic, however, is the possibility of the subsequent unavailability of a work which was initially freely accessible. In *Svensson*, the Court identifies such a scenario as one in which a link communicates the work to a new public:

This is the case, in particular, where the work is no longer available to the public on the site on which it was initially communicated or where it is henceforth available on that site only to

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<sup>979</sup> ALAI, 2015.

<sup>980</sup> ALAI, 2015.

<sup>981</sup> CJEU, *Svensson*, ¶¶18, 26, 31.

<sup>982</sup> ALAI, 2014, p. 27; Headdon, 2014, p. 665; Moir et al., 2014, p. 400. The example would be a link that provides access to content on freely accessible websites that impose restrictive terms and conditions, such as a notice on the webpage prohibiting embedded links to that content. *But see* Savola, 2014, pp. 282–283, arguing that *Svensson* does not prohibit linking in this scenario. See also Arezzo, 2014, pp. 541–542.

<sup>983</sup> Headdon, 2014, p. 655; Moir et al., 2014, p. 400; Tsoutsanis, 2014, p. 507.

a restricted public, while being accessible on another Internet site without the copyright holders' authorisation.<sup>984</sup>

For some commentators, this rationale implies a “duty to monitor” the freely accessible nature of the work by “linkers”.<sup>985</sup> This concern can only be properly understood in connection with the issue of lawfulness of the source of the link. Imagine the following situation. Film producer Universal makes one of its films freely accessible online on the *Universal Website*. Alice makes a copy of the film and posts it on her *Wonderland Website*. Internet user “Mad Hatter” then puts two links on his blog, one to the *Universal Website* (“link 1”) and the other to the *Wonderland Website* (“link 2”). One month later, Universal places access restrictions on its website, a fact to which Alice and Mad Hatter are oblivious. Link 1 stops working as a result of the restrictions. Link 2, on the other hand, remains operational.

Following the logic of *Svensson*, once the restrictions are imposed, link 2 is making the film available to a new public, and is therefore infringing, as is the upload copy on the *Wonderland Website*, which is now unequivocally an unauthorised source. In this scenario, the subsequent public unavailability of the work causes the activities of Alice and Mad Hatter to qualify as copyright infringement.

This scenario becomes even more problematic for end-users if hyperlinking to unauthorised sources is prohibited as a result of the application of the new public criterion. This is the issue at stake in *GS Media* and *Filmspeler*, and scholars are divided on the topic.

On the one hand, it is argued, if the rights holder did not consent to the original communication of a work to the general Internet public, the hyperlink that points to an unauthorised upload copy constitutes an act of communication to a new public. Thus, both the unauthorised upload and the hyperlink that points to it are infringing.<sup>986</sup> Some authors nuance this view by distinguishing between cases where the linker has knowledge of the unauthorised nature of the upload copy, in which case he is infringing (e.g. because he was notified of that fact by the rights holder and did not remove the link), and situations where he has no such knowledge, for which no liability arises.<sup>987</sup>

On the other hand, it is said that the legal qualification of linking should not depend on the authorisation of the rights holder or lawfulness of the source, because such elements are typically unknown to the linker. Indeed, the “reasonable awareness” or “constructive knowledge” criteria are foreign to the InfoSoc Directive and a hotbed for legal uncertainty. This is particularly so as it is near impossible for end-users to ascertain the legal status of the destination page in advance of linking.<sup>988</sup>

For proponents of this view, it would be preferable to judge infringement on the basis of secondary (rather than strict) liability, an area of law familiar with concepts of awareness and knowledge. Doing so would require, first, a determination of whether the reproduction and

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<sup>984</sup> CJEU, *Svensson*, ¶31.

<sup>985</sup> Arezzo, 2014, pp. 545–546; Headdon, 2014, p. 665.

<sup>986</sup> Headdon, 2014, p. 665, relying on Art. 3 and recital 29 InfoSoc Directive. Cf. also Leistner, 2015, p. 636.

<sup>987</sup> Velze, 2015, p. 42, reporting on the position of Visser.

<sup>988</sup> Computer & Communications Industry Association, 2016b; Velze, 2015, p. 42.

making available of the work on the third party website constitute copyright infringement. If so, the subsequent step would be to establish whether linking to that website gives rise to secondary liability, especially where the hyperlinker knowingly and systematically exploits or facilitates the unlawful uploads.<sup>989</sup> Furthermore, the existence of a framework for notice-and-takedown measures, consistent with the E-Commerce Directive, enables removal of the unlawful upload copy and automatic “breaking” of the link pointing to it.<sup>990</sup>

Another option would be to abolish or restrict the new public criterion. For example, it is possible to consider the criterion independently from the status of the upload copy, meaning that with the unrestricted appearance of a work online “the internet public has already been reached”; therefore, any subsequent hyperlinks do not target a new public or “amount to a secondary act of communication to the public”.<sup>991</sup>

In his Opinion in *GS Media*, AG Wathelet shares some of the above views, but adopts a different reasoning in their support. As noted, he focuses on the criterion of “act of communication”, rather than the “new public.”<sup>992</sup> In his view, hyperlinking to unauthorised sources that are “freely accessible” does not constitute an act of communication to the public because the link does not constitute an indispensable intervention to make the work available to Internet users. Rather, the actual making available results from the “initial” communication, which is the infringing act.<sup>993</sup> If there is no act of communication (a cumulative requirement to establish the application of the exclusive right), the linker’s motivation, knowledge, or awareness of the unauthorised nature of the source are irrelevant.<sup>994</sup>

In the alternative, the AG continues, the criterion of a new public “is applicable only where the copyright holder has authorised the initial communication to the public”, which is not the case if a link points to unauthorised sources.<sup>995</sup> As the criterion is not applicable, the authorisation of rights holders is not required to link to such websites.<sup>996</sup> Even if it was applicable, there is only a communication to the new public if the linker’s intervention was “indispensable” to reach that public. That is not the case where the works linked to were freely accessible, even if the link “facilitates or simplifies users’ access to the work in question”.<sup>997</sup> There will be a communication to the public only if the link allows Internet users to circumvent restrictions on third party websites that limit access to protected works, such as TPMs under Article 6 InfoSoc Directive.<sup>998</sup>

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<sup>989</sup> Savola, 2014, pp. 282–283. See also Arezzo, 2014, p. 545-; Computer & Communications Industry Association, 2016b.

<sup>990</sup> Computer & Communications Industry Association, 2016b.

<sup>991</sup> Computer & Communications Industry Association, 2016b.

<sup>992</sup> See *supra* 4.3.2.1.1.

<sup>993</sup> *Opinion AG in GS Media*, ¶¶48–64.

<sup>994</sup> *Ibid.*, ¶63.

<sup>995</sup> *Ibid.*, ¶67.

<sup>996</sup> *Ibid.*, ¶68 (citing CJEU, *Svensson*, ¶¶28, 30).

<sup>997</sup> *Ibid.*, ¶¶69–70, 74 (citing CJEU, *Svensson*, ¶27). N.B. this reasoning appears to conflate the two cumulative criteria of this right.

<sup>998</sup> *Ibid.*, ¶73 (fn. 43 referring to Art. 6 InfoSoc Directive; citing CJEU, *Svensson*, ¶31).

For the AG, the interpretation above also applies if the work linked to had not previously been made available to the public with the right holder’s consent. In essence, he believes that the scope of Article 3 InfoSoc Directive does not “cover the posting of hyperlinks to protected works freely accessible on another website”, a result that could only be achieved through “action to be taken by the European legislature.”<sup>999</sup> Crucial to this position is the view that any other interpretation of that provision would “significantly impair the functioning of the Internet”, undermine the InfoSoc Directive’s main objective of “the development of the information society in Europe” (recital 2), and distort the directive’s fair balance aim (recital 31).<sup>1000</sup> From the normative perspective, the AG adds that

as a general rule, internet users are not aware and do not have the means to check whether the initial communication to the public of a protected work freely accessible on the internet was effected with or without the copyright holder’s consent. If users were at risk of proceedings for infringement of copyright under Article 3(1) of Directive 2001/29 whenever they post a hyperlink to works freely accessible on another website, they would be much more reticent to post them, which would be to the detriment of the proper functioning and the very architecture of the internet, and to the development of the information society.<sup>1001</sup>

To this point, it is important to add a fundamental rights argument in support of delimiting the scope of Article 3 InfoSoc Directive. To the extent hyperlinks are essential to the operation of the Internet, including access and exchange of a vast trove of information available in this network, they are crucial for exercising the fundamental freedom of expression and information online.<sup>1002</sup> This freedom is protected by Article 11 Charter and must be balanced with copyright protection, as recognised in recital 3 InfoSoc Directive.<sup>1003</sup>

Naturally, the AG’s interpretation does not preclude other remedies available to rights holders to protect and enforce their copyright. It is possible to bring proceedings for direct infringement against the initial uploader, and to obtain injunctions against website operators hosting the unauthorised upload copies—as they qualify as “intermediaries” for the purposes of Article 8(3) InfoSoc Directive and Article 11 Enforcement Directive.<sup>1004</sup> The AG considers these injunctions “a direct and appropriate remedy” for the initial infringing communication to the public.<sup>1005</sup> It is also possible, at a national level and in certain circumstances, for the intermediary to be liable for the storage of the unauthorised works, namely if it fails to comply with the strict requirements of the E-Commerce Directive’s safe harbours.<sup>1006</sup>

Finally, a different solution to this issue is to adopt an economic interpretation method to determine the scope of the right of communication to the public. This approach focuses on protecting the economic exploitation of the right against unauthorised use that affects that

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<sup>999</sup> *Ibid.*, ¶¶75–79 (cit. ¶79), citing the “ceiling” imposed on the right in CJEU, *Svensson*, ¶41. See *infra* 4.3.2.1.

<sup>1000</sup> *Ibid.*, ¶77.

<sup>1001</sup> *Ibid.*, ¶78.

<sup>1002</sup> European Copyright Society, 2013.

<sup>1003</sup> See *supra* 5.3.3.6.1.

<sup>1004</sup> *Ibid.*, ¶¶80–83, referring also to recital 50 InfoSoc Directive and Art. 14 E-Commerce Directive.

<sup>1005</sup> *Ibid.*, ¶84.

<sup>1006</sup> *Ibid.*, ¶85–87, making reference to the interpretation of Art. 14 E-Commerce Directive in CJEU, *L’Oréal v eBay*, ¶119.

exploitation, rather than granting protection for technically defined acts of communication.<sup>1007</sup> Following this method, online acts of communication that are in direct or indirect competition with the exploitation of a work by rights holders are restricted. The method would entail the prohibition of unauthorised pull links but not mere push links, as only the first may affect the online exploitation of the work linked to (e.g. through online advertisement models), irrespective of whether the initial online availability was authorised.<sup>1008</sup>

The contrasting arguments highlight the uncertainty surrounding hyperlinking, which extends to the effect of imposing technical restrictions on originally freely accessible content.<sup>1009</sup> Therefore, online communication to the public remains a volatile legal area, where end-users are subject to non-negligible infringement risks.

Table 4 provides an overview of the online uses covered by the exclusive right and the related issues of legal certainty. The significant scope of the right and the areas of uncertainty for the non-commercial activities of Internet users highlight the need for a legal solution that, like an ACS, enhances legal certainty and promotes breathing space for acts of personal enjoyment and expression online.

**Table 4. Scope of Online Right of Communication to the Public and Legal Certainty Issues**

Type of Online Use	Right of Communication to the Public	Legal Certainty Issues
<b>Upload or Upstream streaming</b> of work to restricted group (e.g. within a group on social sharing website)	?	Definition of public
<b>Upload</b> of freely accessible work from lawful source on publicly accessible server (no express authorisation)	Yes	Potential application of doctrines of implied consent
<b>Upload</b> of freely accessible work from <u>unlawful</u> source on publicly accessible server (no express authorisation)	Yes	Potential application of doctrines of implied consent if unlawful source irrelevant
<b>Upstream streaming</b> (transmission or retransmission) of freely accessible work from lawful source (no express authorisation)	Yes	Potential application of doctrines of implied consent
<b>Upstream streaming</b> (transmission or retransmission) in circumvention of access restrictions	Yes	Potential application by analogy of new public criterion (in <i>Svensson</i> )
<b>Upstream streaming</b> (transmission or retransmission) of work originating from <u>unlawful</u> source	Yes	Potential application of doctrines of implied consent if unlawful source irrelevant
<b>Linking</b> to freely accessible work from lawful source	No ( <i>Svensson</i> )	—
<b>Linking</b> to freely accessible work from	?	<i>GS Media, Filmstjer</i>

<sup>1007</sup> Depreeuw, 2014, pp. 510–537; Velze, 2015, pp. 81–93.

<sup>1008</sup> Velze, 2015, pp. 86–90.

<sup>1009</sup> Debating this issue, see Arezzo, 2014, pp. 545–547.

Type of Online Use	Right of Communication to the Public	Legal Certainty Issues
unlawful source		Application of Article 5(2)(d) InfoSoc Directive <sup>1010</sup>
<b>Linking</b> to work in circumvention of access restrictions from lawful or unlawful source	Yes	—

## 4.4 What limitations Apply to Uses Covered by Exclusive Rights?

### 4.4.1 General Framework, Objectives and Interpretation of Copyright Limitations

#### 4.4.1.1 General Framework

The terms “limitations” and “exceptions” have multiple meanings and apply to a variety of legal mechanisms.<sup>1011</sup> In a broad sense, they include the concept of “negative rights”,<sup>1012</sup> exemptions from protected subject matter, conditions or limits on the scope and duration of protection, limitations and exceptions in the traditional sense, the minor exceptions doctrine, the three-step test, compulsory licences, and the doctrine of exhaustion (or first sale).<sup>1013</sup>

From a conceptual standpoint, the terms can be understood in many possible ways. On the one hand, an “exception” can refer to a permitted use that is unremunerated, a rule that provides immunity from liability, or a carve-out from the scope of an exclusive right. On the other hand, a “limitation” can mean a remunerated permitted use, a category of content excluded from copyright protection, or a boundary to exclusivity.<sup>1014</sup>

From a different perspective, “exceptions” can be seen as deviations from a broad principle of copyright exclusivity, which would otherwise apply without restriction. “Limitations”, in contrast, are limits to the exclusive right, which concern “the *definition* of the substance of the provision as such”, i.e. the scope of protection of the exclusive right.<sup>1015</sup> In this way, using the evocative metaphor of Geiger, the exclusive right is akin to “an island of exclusivity in a sea of freedom (freedom of expression and competition)”.<sup>1016</sup>

As shown in this section 4.4.1, although the EU legislature adopts a compromise between different legal traditions and uses both terms in the title of Article 5 InfoSoc Directive, systematic interpretation of the *acquis* in light of fundamental rights leans in favour of considering “exceptions and limitations” as “limitations”. It is submitted that this meaning is both descriptively—from the legal-technical standpoint—and normatively preferable to

<sup>1010</sup> See ALAI, 2015, pp. 7–8, discussing the application of the quotation limitation to hyperlinking.

<sup>1011</sup> See, e.g., P. Bernt Hugenholtz, 1997.

<sup>1012</sup> Art. 17 BC.

<sup>1013</sup> Lucie Guibault, 2002, p. 17, discussing possible meanings.

<sup>1014</sup> Christie & Wright, 2014, pp. 420–421, with a survey of influential literature. For terminology, see also Kur, 2008, pp. 5–8

<sup>1015</sup> Dreier, 2015, pp. 139, 146.

<sup>1016</sup> Geiger, 2010, p. 521. See also Geiger & Schönherr, 2014a, p. 112 (n.6). For an early reference to this conceptual distinction, see P. Bernt Hugenholtz, 1997, pp. 4–5.

“exceptions”.<sup>1017</sup> For that reason, the term “limitations” is preferentially used in this dissertation to mean the use permissions in Article 5.

Article 5 InfoSoc Directive contains the primary regulation for limitations at EU level. It applies to all copyright subject matter, except software and databases.<sup>1018</sup> Its first paragraph contains the directive’s sole mandatory limitation, applying to transient or incidental copies, the purpose of which is to facilitate the activities of ISPs or certain lawful uses.<sup>1019</sup> Articles 5(2) to (4) contain an exhaustive list of twenty optional limitations, applying to the otherwise exclusive rights of reproduction, communication to the public, and distribution.<sup>1020</sup> Where Member States choose to implement these, some are conditional upon the grant of fair compensation.<sup>1021</sup> For the others, Member States may nevertheless demand compensation in their national laws.<sup>1022</sup> Article 5(5) contains the directive’s version of the three-step test, which Chapter 5 discusses in depth.<sup>1023</sup>

Elsewhere in the *acquis*, the Rental Right Directive contains a list of optional limitations to related rights and allows Member States to apply in respect thereto limitations identical to those applicable to authors.<sup>1024</sup> Despite the overlap between the lists in both instruments, it is commonly accepted that Article 5 InfoSoc Directive also regulates related rights.<sup>1025</sup>

As noted, the InfoSoc Directive’s limitations do not apply to software or databases, meaning that reproduction or communication to the public thereof are restricted.<sup>1026</sup> Authorisation to perform these acts is required unless they are covered by the *lex specialis* limitations in the “vertical” Software and Database Directives.<sup>1027</sup>

The Software Directive exempts acts necessary by the “lawful acquirer”, the making of a back-up copy, use of the program to “observe, study or test” its functioning, and decompilation of the program for purposes of interoperability.<sup>1028</sup> The Database Directive contains a list of mandatory and optional limitations regarding copyright protected databases (Article 6) and those protected by the *sui generis* right (Article 9). For copyright protected databases, a mandatory limitation

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<sup>1017</sup> Cf. Dreier, 2015, pp. 139–140. See P. Bernt Hugenholtz, 1997, pp. 4–5, arguing similarly in relation to the legal nature of limitations in international law. See also Kur, 2008, p. 6, noting that both terminological choices are acceptable. The author further draws a distinction with “exclusions”, a term meant to identify provisions that *ab initio* exclude from protection certain subject matter.

<sup>1018</sup> Janssens, 2009, p. 328.

<sup>1019</sup> P. Bernt Hugenholtz et al., 2006, pp. 68–69.

<sup>1020</sup> On the exhaustive nature of the list in Art. 5, see recital 32 InfoSoc Directive. The list contains four optional limitations for reproduction in Art. 5(2), fifteen optional limitations for reproduction and/or public communication in Art. 5(3), and the possibility to extend the previous limitations (applying to reproduction) to the right of distribution in Art. 5(4). N.B. Art. 5(3)(o) contains a deviation from the exhaustive nature of the list by including a “grandfathering clause” for pre-existing analogue uses of minor importance (*de minimis*).

<sup>1021</sup> Namely, those in Art. 5(2)(a), (b) and (e) InfoSoc Directive.

<sup>1022</sup> Cf. recital 36 InfoSoc Directive.

<sup>1023</sup> Chapter 5 provides a detailed analysis of this test, which is also incorporated (inconsistently) in the Software, Rental Rights and Database Directives.

<sup>1024</sup> See Art. 10(1) and (2) Rental Right Directive and the very similar Art. 15 RC. On the later, see *supra* 2.4.3.

<sup>1025</sup> Bechtold, 2006, p. 370; Janssens, 2009, p. 325 & fn.40; Triaille et al., 2013, p. 247.

<sup>1026</sup> This results from the application of Art. 1(2)(a) InfoSoc Directive. See recital 50 InfoSoc Directive, *in fine*. See also Bechtold, 2006, p. 370.

<sup>1027</sup> Triaille et al., 2013, p. 246.

<sup>1028</sup> See, respectively, Art. 5(1), (2) and (3), and Art. 6 Software Directive.



allows a “lawful user” to perform acts required “for the purposes of access to the contents of the databases and normal use of the contents”; furthermore, Member States may extend other copyright limitations to those databases.<sup>1029</sup>

The relationship of limitations to contract law is in essence one between public choice or policy and private ordering.<sup>1030</sup> Although this relationship is generally unregulated by the InfoSoc Directive, commentators by and large accept that the instrument allows contractual disposition of the limitations in Article 5(2)–(4). This understanding relies on Article 9 being without prejudice to provisions concerning contract law, and recital 45 admitting contracts on fair compensation.<sup>1031</sup> In addition, this interpretation is systematically consistent with Article 6(4), fourth subparagraph of the directive, which allows contractual override of limitations where works are made available online with TPMs and on agreed contractual terms. From this perspective, the InfoSoc Directive indicates a predominance of private ordering over public policy.

However, contractual disposition may be prohibited in certain cases. These result from the definition of limitations as imperative in national law (e.g. in Portuguese and Belgian law<sup>1032</sup>), and the application of imperative provisions protecting end-users (e.g. consumer protection rules on adhesion contracts).<sup>1033</sup> Following a different approach, the Software and Database Directives afford absolute status to some of their limitations by explicitly prohibiting their contractual override and qualifying potential derogation clauses as “null and void”.<sup>1034</sup>

#### 4.4.1.2 Relationship with Technological Protection Measures

The term digital rights management (**DRM**) encompasses both TPMs (e.g. access and copy control measures) and electronic rights management information, such as fingerprinting or watermarking, also known as “social DRM”.<sup>1035</sup> The directive’s regulation of the relationship between limitations and TPMs has been subject to significant criticism.<sup>1036</sup> The tension between both regimes cannot be understated: while limitations strive to ensure access to, and dissemination of, works, TPMs increase protection of exclusivity and restrict that access and dissemination, sometimes protecting non-copyrightable content.<sup>1037</sup> Article 6(4) InfoSoc

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<sup>1029</sup> See Art. 6(1) and 2(d) Database Directive. See, in this sense, Triaille et al., 2013, p. 247. N.B. Art. 9 Database Directive does not allow analogous application of copyright limitations to the sui generis database right.

<sup>1030</sup> Dreier, 2015, pp. 142–144.

<sup>1031</sup> Bechtold, 2006, pp. 370–371; Janssens, 2009, pp. 341–342; von Lewinski & Walter, 2010, pp. 1022–1023, 1062. *But see* Lucie Guibault, 2009, pp. 529–530, 2010, p. 59, describing scholarship that holds an opposite view, relying on the letter of recital 45 InfoSoc Directive: “Whether the requirement that a contractual agreement must have the goal to secure the fair compensation of right holders means that contractual agreements with the purpose to override legitimate uses are impermissible is, according to these authors, questionable”.

<sup>1032</sup> See Lucie Guibault, 2009, pp. 537–541; Triaille et al., 2013, p. 255 (n.548), 472, noting that the Danish legislation is not clear on this aspect despite some commentators arguing that it includes such a rule. On the Belgian law, see Geiger, 2015a, p. 22.

<sup>1033</sup> Bechtold, 2006, pp. 370–371; Lucie Guibault, 2009, pp. 534–536; von Lewinski & Walter, 2010, pp. 1022–1023, 1062.

<sup>1034</sup> Art. 9 InfoSoc Directive, Arts 5(2)–(3) 6, and 8 Software Directive, and Arts 6(1), 8 and Art. 15 Database Directive.

<sup>1035</sup> Poort & Quintais, 2013. For a different classification of TPMs, see Efroni, 2011, pp. 195–196.

<sup>1036</sup> Janssens, 2009, pp. 333–334.

<sup>1037</sup> Bechtold, 2006, p. 390.

Directive regulates that tension through a formulation that mostly allows TPMs to override limitations.<sup>1038</sup> In doing so, it adds complexity to the balance of interests in copyright law.

Article 6 InfoSoc Directive implements and goes beyond Articles 11 WCT and 18 WPPT.<sup>1039</sup> It instructs Member States to provide adequate legal protection against the circumvention of effective TPMs, i.e. devices or components aimed at restricting unauthorised access to or use of works. “Access controls” are measures for protection of a work, such as encryption, scrambling or other transformation. “Use controls” refer to mechanisms that prevent, for example, the making of copies of works. The legal regime of TPMs includes protection against circumvention and preparatory acts.<sup>1040</sup>

Article 6(4) InfoSoc Directive entrusts rights holders (not legislators) with the role of providing the beneficiaries of certain limitations with the means of exercising the limitation through “voluntary measures”.<sup>1041</sup> If rights holders do not provide voluntary measures, Member States can step in to ensure exercise of the limitations and impose “appropriate” (i.e. mandatory) measures.<sup>1042</sup> Voluntary and mandatory measures are only required if the beneficiary has “legal access” to the work and to the extent necessary to exercise the limitation.<sup>1043</sup> The application of either type of measure does not prejudice the legal protection of TPMs.<sup>1044</sup>

Such legal protection is limited to the prevention of acts not authorised by the rights holder with respect for the principle of proportionality. Therefore, the application of TPMs must be suitable to achieve that objective and cannot “go beyond what is necessary for this purpose.”<sup>1045</sup>

The benefit of voluntary or mandatory measures is not available to all limitations in Article 5 InfoSoc Directive. Instead, these rules apply obligatorily to certain limitations and, optionally (at the discretion of the Member State), to private copying. Some commentators are critical of this

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<sup>1038</sup> Janssens, 2009, p. 334.

<sup>1039</sup> Arts 11 and 12 WCT prohibit the circumvention of TPMs, the removal or alteration of electronic rights management information, and the distribution (or other forms of marketing or use) of works or copies where that information has been removed or altered. These provisions are implemented in the EU through Arts 6 and 7 InfoSoc Directive. See also the corresponding Arts 18–19 WPPT. On the articulation of Art. 6 InfoSoc Directive with other anti-circumvention measures in EU law, notably on the Software Directive (Art. 7(1)(c)) and the Conditional Access Directive, see Bechtold, 2006, pp. 384–385. For an historical note and commentary, see von Lewinski & Walter, 2010, pp. 1065–1075.

<sup>1040</sup> Art. 6(1)–(3) InfoSoc Directive. On the meaning of “effective” TPMs, see CJEU, *Nintendo*, ¶¶27–28.

<sup>1041</sup> Janssens, 2009, p. 334 criticising this as a “remarkable policy reversal”.

<sup>1042</sup> Recital 52 clarifies the InfoSoc Directive’s preference for the adoption of voluntary measures. Where these are not taken, Member States should impose them on rights holders, under the terms described above. There is little guidance on how and when to impose such measures. However, recital 51 InfoSoc Directive requires that Member States wait for a “reasonable period of time” before imposing appropriate measures.

<sup>1043</sup> Art. 6(4), first subparagraph InfoSoc Directive. In this sense, see von Lewinski & Walter, 2010, p. 1073, providing examples of legal access (buying, renting, borrowing a legal copy or otherwise obtaining it with the consent of the right holder) and illegal access (“illegal peer-to-peer network”). N.B. the Court in *ACI Adam*, when deciding that copies from unlawful sources do not fall within the scope of the private copying limitation, failed to clarify the concept of “lawful source”. See Quintais, 2015b.

<sup>1044</sup> Art. 6(4), third subparagraph InfoSoc Directive.

<sup>1045</sup> CJEU, *Nintendo*, ¶¶29–31 (cit, ¶31), relying on Art. 6(2) and recital 48 InfoSoc Directive.

hierarchy, noting that the private use limitation, because it “is also justified by privacy and freedom of information”, should be listed as a “privileged” limitation.<sup>1046</sup>

The regime also applies by analogy to limitations in the Rental Right and Database Directives.<sup>1047</sup> Member States cannot impose any measures of this type in relation to the remaining limitations, which can be fully overridden by the application of TPMs.<sup>1048</sup>

The privileged limitations that must benefit from such voluntary or mandatory measures are those in Article 5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b) and (3)(e) InfoSoc Directive. None of these limitations is susceptible of applying to acts licensed in an ACS.<sup>1049</sup> Therefore, even if a limitation covers an online use, end-users may not benefit from it if the work is subject to TPMs, as that would require violating the prohibition against circumvention of technological measures.

Article 6(4), second subparagraph InfoSoc Directive, allows for the possible application of mandatory measures in relation to the private copying limitation in Article 5(2)(b), subject to additional conditions or clarification. Thus, no measures can be imposed by Member States: (1) if rights holders have adopted voluntary measures to enable private copying; or (2) vis-à-vis *copy control* TPMs that limit the number of reproductions made by users in accordance with such provisions.<sup>1050</sup> In addition, any measures must respect rights holders’ entitlement to use TPMs, the condition of fair compensation, and the three-step test.<sup>1051</sup>

The logic of these provisions is as follows: TPMs can restrict acts of digital reproduction and subject them to additional payment, even where those acts would otherwise be privileged private copying. That would make payments through a levy system unwarranted, because there would be no unauthorised copying or harm to compensate. Consequently, some commentators contend that the *application* of effective TPMs could lead to “phasing-out” of levies in the digital environment.<sup>1052</sup> In this line, a recent economic study for the EU Commission concludes that, due to “changes in the consumption of content”, the best policy option in this field would be that of “entirely removing levies”.<sup>1053</sup>

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<sup>1046</sup> Geiger & Schönherr, 2014b, p. 469.

<sup>1047</sup> Art. 6(4), fifth subparagraph InfoSoc Directive. See von Lewinski & Walter, 2010, p. 1075.

<sup>1048</sup> These are the limitations in Arts 5(1), 5(2)(c), (d) and (f)–(o) InfoSoc Directive.

<sup>1049</sup> N.B. not even the mandatory limitation in Art. 5(1) InfoSoc Directive can benefit from “appropriate” mandatory measures. See Bechtold, 2006, p. 392.

<sup>1050</sup> Art. 6(4), first and second subparagraphs InfoSoc Directive. See von Lewinski & Walter, 2010, p. 1073, considering the first point redundant and the second a mere clarification.

<sup>1051</sup> Recitals 39 and 52 InfoSoc Directive. Recital 39 addresses the articulation of TPMs and digital private copying and remuneration schemes, urging Member States to take into consideration “technological and economic developments” when applying this exception and limitation, noting that the latter “should not inhibit the use of technological measures or their enforcement against circumvention”.

<sup>1052</sup> See: Helberger & Hugenholtz, 2007; P. Bernt Hugenholtz, Guibault, & van Geffen, 2003; and Eechoud et al., 2009, p. 118 raising the possibility that, for cases where the application of TPMs makes private copying activities impossible or near impossible (e.g. copy controls on DVDs), no compensation should be claimed as it would be unjustified. *Contra* the argument that the InfoSoc Directive provides for automatic phasing out of levies, see von Lewinski & Walter, 2010, p. 1034. For a critical analysis of the “phasing-out provision”, see Séverine Dusollier & Ker, 2009.

<sup>1053</sup> Boulanger, Carbonnel, Coninck, & Langus, 2014, p. 103.

The little space available for limitations to apply where TPMs are used is further reduced by a special rule on licensed interactive on demand services.<sup>1054</sup> This rule prohibits Member States from implementing any measures limiting the effect of TPMs if the work in question is made available online for interactive on-demand transmission on agreed contractual terms.<sup>1055</sup> This includes rights holders making available works online (under Article 3 InfoSoc Directive) for streaming or downloading on-demand. Thus, in such a “technology plus contract” scenario, all limitations can be set aside.<sup>1056</sup>

To sum up, the application of TPMs overrides the possibility for end-users to exercise most limitations potentially applicable to online sharing, and leaves little space for the digital private copying limitation.<sup>1057</sup> This prioritising of TPMs over limitations regarding use over the Internet is also apparent in the CJEU’s case law on hyperlinks. Following *Svensson*, the choice by rights holders to impose technical access restrictions on a work will determine whether linking to that work (in circumvention of those restrictions) qualifies as a restricted act of communication to the public.<sup>1058</sup>

#### 4.4.1.3 Objectives

The InfoSoc Directive aims at creating a “general and flexible legal framework... to foster the development of the Information Society in Europe”.<sup>1059</sup> The directive is based *inter alia* on the objectives of increasing legal certainty, providing a high level of protection for copyright and related rights, and ensuring the smooth functioning of the internal market.<sup>1060</sup> Subject to the principle of subsidiarity, the harmonisation of copyright and limitations are considered necessary to achieve those objectives.<sup>1061</sup>

Harmonisation must comply with fundamental principles of law, such as property in copyright, freedom of expression, and the public interest.<sup>1062</sup> Limitations serve such public interest goals, including the promotion of culture and dissemination of knowledge, by enabling use outside exclusivity for purposes related to private use, educational teaching, scientific learning and

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<sup>1054</sup> Art. 6(4), fourth subparagraph, and recital 53 InfoSoc Directive.

<sup>1055</sup> “Agreed contractual terms” in this context seems to have a broad construction and likely applies also to standard form contracts such as typical online end-user licence agreements. See von Lewinski & Walter, 2010, p. 1074, (n.482). For a more restrictive view, arguing for the application of the provision solely to negotiated and agreed terms, see Lucie Guibault et al., 2007b, p. 112 (“the exception to the main rule of article 6(4) of the Directive could be interpreted as applying only in respect of the supply of online services for which the contracting parties have negotiated the terms of use...”).

<sup>1056</sup> Art. 6(4), fourth subparagraph, and recital 53 InfoSoc Directive, excluding from the scope of the provision non-interactive Internet transmissions. See also Poort & Quintais, 2013, p. 209.

<sup>1057</sup> Janssens, 2009, p. 334.

<sup>1058</sup> See *supra* 4.3.2.1.2. See the discussion in Dreier, 2015, pp. 144–145.

<sup>1059</sup> Recital 2 InfoSoc Directive.

<sup>1060</sup> On the objectives of EU copyright law, see *supra* 1.3 and *infra* 5.5.3.

<sup>1061</sup> On the directive’s general goal of harmonisation of copyright law in the EU, see recitals 1, 4, 6, 7, 9, 23, and 31 InfoSoc Directive. Recitals 31 and 32 refer in particular to the goal of harmonising limitations. See also Triaille et al., 2013, p. 250.

<sup>1062</sup> Recital 3 InfoSoc Directive.

research, news reporting, quotation, use by people with disabilities, public security use, and use in administrative and judicial proceedings.<sup>1063</sup>

The CJEU has recognised that certain limitations have fundamental rights justifications underlying these purposes, such as freedom of expression and information.<sup>1064</sup> Therefore, where rooted in public interest justifications and in fundamental rights, analysis of the existence and scope of limitations cannot be confined to market failure arguments.<sup>1065</sup>

Against this framework, limitations function as internal tools to strike a balance between competing interests in copyright. Recital 31 InfoSoc Directive clarifies this function, as well as the need for harmonisation of limitations, especially in the digital networked environment, and in light of the cross-border exploitation of works, subject to the directive’s overall internal market objective.

The list of limitations in Article 5 InfoSoc Directive attempts to achieve this balance by simultaneously taking “due account of different legal traditions of Member States” and “aiming to ensure a functioning internal market”.<sup>1066</sup> A further manifestation of the balancing principle is the need for Member States to consider the “increased economic impact” of limitations in the “new electronic environment”.<sup>1067</sup>

Following Dreier, it is important to dispel the notion that the often-touted objective of providing a “high level of protection” for copyright (in recitals 4 and 9 InfoSoc Directive) is synonymous with an infinitely excludable scope of protection. Instead, from the economic perspective, “‘excessive protection’ can have a negative impact on creativity and innovation”. Therefore, where broad exclusive rights are recognised in the *acquis*—as results from the analysis in 4.3—the function of limitations is to “reduce and confine the excessive protection afforded by the exclusive right to the optimal scope of protection”.<sup>1068</sup>

In sum, limitations are an essential component of copyright, as they promote access to, and dissemination of, culture, education and knowledge. In doing so, they stimulate the creation goal of copyright, by fostering access to and use of pre-existing works.<sup>1069</sup> Their essential role in pursuing the InfoSoc Directive’s objectives and balancing copyright exclusivity with the public interest and fundamental rights has been steadily recognised by the CJEU.

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<sup>1063</sup> Recitals 14, 34, 39 InfoSoc Directive.

<sup>1064</sup> See *infra* 4.4.1.4.

<sup>1065</sup> Triaille et al., 2013, p. 256, noting that “[b]oth the European lawmaker and the international one refer to public interest as a key justification of copyright exceptions”.

<sup>1066</sup> Recital 33 InfoSoc Directive.

<sup>1067</sup> Recital 44 InfoSoc Directive refers to the conditions of the test. For a restrictive application of this rationale, see CJEU, *ACI Adam*, ¶¶25–27. See *infra* 4.4.3.6.

<sup>1068</sup> Dreier, 2015, p. 140.

<sup>1069</sup> Geiger & Schönherr, 2014a, p. 110

#### 4.4.1.4 The Court’s Case Law: From Strict Interpretation to Restricted Flexibility

The CJEU has interpreted the InfoSoc Directive’s system of limitations on multiple occasions.<sup>1070</sup> Its rulings shape Member States’ margin of discretion in implementing limitations and national courts’ leeway in interpreting them.

In general terms, the CJEU’s activity centres around the objectives highlighted above: fair balance, high level of protection for copyright holders, adequate compensation, circulation of culture, resolving legal uncertainty, technological development, fair competition, and harmonisation of copyright law to achieve a functioning internal market. Although recognising Member States’ margin of discretion in implementing limitations, the Court has held that this margin is to be exercised within the limits of EU law, and in line with the aforementioned objectives and the principle of proportionality.<sup>1071</sup>

The CJEU has primarily interpreted limitations according to the doctrine or principle of strict interpretation. The first case to do so in the copyright field was *Infopaq I*, which examined the mandatory exemption for transient copies in Article 5(1) InfoSoc Directive. In simple terms, the doctrine considers exclusivity the baseline for copyright protection; any deviation thereto is exceptional and, thus, must be interpreted strictly. The principle is drawn from previous case law on derogations to general principles and is further supported by a restrictive reading of the three-step test, from which the Court infers a requirement to interpret limitations stringently.<sup>1072</sup>

The doctrine is a staple of CJEU decisions on limitations. Of particular relevance to the ACS debate is the application of the doctrine in *ACI Adam*, where the Court discussed whether the scope of the private copying limitation covers reproductions from unauthorised sources.<sup>1073</sup> In this judgment, the Court relied heavily on the letter of recital 44 InfoSoc Directive, which allows the reduction of the limitation’s scope in connection with “certain new uses” of works. In contrast, it was noted, nothing in the InfoSoc Directive mentions the possibility of extending that scope.<sup>1074</sup> Therefore, despite the directive’s silence on this controversial issue, limitations should be interpreted strictly.<sup>1075</sup> As a result, the Court ultimately concluded that Article 5(2)(b) cannot cover private copies made from unlawful sources.<sup>1076</sup> This reasoning was later upheld in *Copydan* and *Reprobel*.<sup>1077</sup>

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<sup>1070</sup> CJEU, *Laserdisken II*, CJEU, *LSG*, CJEU, *Infopaq I*, CJEU, *Murphy*, CJEU, *Padawan*, CJEU, *Stichting de ThuisKopie*, CJEU, *Painer*, CJEU, *Luksan*, CJEU, *Infopaq II*, CJEU, *DR and TV 2 Danmark*, CJEU, *VG Wort*, CJEU, *Amazon.com*, CJEU, *ACI Adam*, CJEU, *Copydan*, CJEU, *Ulmer*, CJEU, *Deckmyn*, CJEU, *OSA*, CJEU, *Meltwater*, CJEU, *Reprobel*.

<sup>1071</sup> Triaille et al., 2013, pp. 251–252. See: CJEU, *Infopaq I*, ¶62; CJEU, *Stichting de ThuisKopie*, ¶23; CJEU, *Padawan*, ¶¶35–36; CJEU, *Painer*, ¶¶103–105, 107; CJEU, *DR and TV2 Danmark*, ¶36. Listing the objectives of EU law, see *supra* 1.3 and *infra* 5.5.3.

<sup>1072</sup> CJEU, *Infopaq I*, ¶¶56–57; CJEU, *Painer*, ¶¶109, 133; CJEU, *Murphy*, ¶162; CJEU, *Meltwater*, ¶23. See also Janssens, 2009, p. 323 (considering the doctrine of strict interpretation a common view point in international norms), and Senftleben, 2013b, p. 93.

<sup>1073</sup> On which see Quintais, 2015b.

<sup>1074</sup> CJEU, *ACI Adam*, ¶¶25–27.

<sup>1075</sup> *Ibid.*, ¶¶22, 29–30. See also CJEU, *Infopaq I*, ¶56, and case law cited therein.

<sup>1076</sup> CJEU, *ACI Adam*, ¶41.

<sup>1077</sup> CJEU, *Copydan*, ¶¶74–79; CJEU, *Reprobel*, ¶¶57–64.

The CJEU’s adherence to the strict interpretation doctrine is consistent with what Leistner labels an essentially “economic” (rather than flexible) approach to the interpretation of exploitation rights in the InfoSoc Directive. This interpretation attempts to ensure appropriate remuneration for any independent act of exploitation by users, primarily through the expansion of exclusive rights, namely reproduction.<sup>1078</sup>

Still, post *Infopaq I*—and with the notable exception of *ACI Adam* and its progeny—, this doctrine has been tempered. In fact, it is possible to observe a gradual shift towards a more nuanced interpretation of limitations designed to secure their effectiveness in view of their objective and purpose, as well as the principle of proportionality.<sup>1079</sup> This shift is coherent with the goal of striking a fair balance in copyright law, which is central to the InfoSoc Directive.<sup>1080</sup> The goal, for its part, if not in direct contradiction with the strict interpretation doctrine, at least severely limits its application.<sup>1081</sup> As noted in *Painer* and *Murphy*, the interpretation of the conditions for the application of limitations must

enable the effectiveness of the exception thereby established to be safeguarded and its purpose to be observed<sup>1082</sup> ...as resulting in particular from recital 31 in the preamble to the Copyright Directive and from Common Position (EC) No 48/2000 adopted by the Council on 28 September 2000 with a view to adopting that directive...<sup>1083</sup>

By referencing recital 31 and Common Position (EC) No 48/2000, the Court clarifies that, in fulfilling the requirements of effectiveness and purpose-bound interpretation, it is essential to balance the interests of authors and rights holders, on the one hand, with those of users, on the other.<sup>1084</sup> Recital 31 is a key element for interpretation of the InfoSoc Directive in light of international and EU copyright law and the external constraints imposed by fundamental rights in the digital networked environment.<sup>1085</sup>

In that light, *Murphy* and *Meltwater*—when discussing the mandatory limitation for transient copies—qualify this balancing exercise as vital towards achieving the goal of development and operation of new technologies. *Murphy* states:

In accordance with its objective, that exception must allow and ensure the development and operation of new technologies and safeguard a fair balance between the rights and interests of right holders, on the one hand, and of users of protected works who wish to avail themselves of those new technologies, on the other.<sup>1086</sup>

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<sup>1078</sup> Leistner, 2014, p. 569- See also Senftleben, 2013b, p. 93, using the expression “dogma of strict interpretation”.

<sup>1079</sup> Recital 31 InfoSoc Directive. See inter alia: CJEU, *Deckmyn*, ¶¶19–23; CJEU, *Murphy*, ¶163; CJEU, *Painer*, ¶105; CJEU, *Ulmer*, ¶¶27, 31. Emphasising this point in legal scholarship, see European Copyright Society, 2014b; Leistner, 2014, p. 585; Triaille et al., 2013, pp. 487–489. See also Senftleben, 2013a, p. 93 calling this development a flexible interpretation of the dogma of strict interpretation.

<sup>1080</sup> CJEU, *Padawan*, ¶43; CJEU, *Murphy*, ¶¶163ff.; CJEU, *Painer*, ¶132; CJEU, *Deckmyn*, ¶26; CJEU, *Ulmer*, ¶43;

<sup>1081</sup> European Copyright Society, 2014b, p. 5.

<sup>1082</sup> CJEU, *Painer*, ¶133; CJEU, *Murphy*, ¶163.

<sup>1083</sup> CJEU, *Murphy*, ¶163.

<sup>1084</sup> CJEU, *Murphy*, ¶¶163ff.; CJEU, *Painer*, ¶¶132 ff.; CJEU, *Deckmyn*, ¶27; CJEU, *UPC Telekabel*, ¶46; CJEU, *Bonnier Audio*, ¶56; CJEU, *Netlog*, ¶51; CJEU, *Scarlett Extended*, ¶53; CJEU, *Tele2*, ¶28; CJEU, *Promusicae*, ¶68; CJEU, *Meltwater*, ¶24.

<sup>1085</sup> Chapter 5 elaborates on this this point. See *infra* 5.2.1.4 and 5.3.3.6

<sup>1086</sup> CJEU, *Murphy*, ¶164; CJEU, *Meltwater*, ¶24.

This understanding allows for teleological interpretation of the limitation to ensure its effectiveness and achieve its objectives, thereby mitigating the operation of the doctrine of strict interpretation.<sup>1087</sup>

Further to the balancing component, CJEU case law explicitly recognises the impact of fundamental rights in the interpretation of limitations.<sup>1088</sup> In *Painer*, it is noted that the quotation limitation in Article 5(3)(d) InfoSoc Directive

is intended to strike a fair balance between the right to freedom of expression of users of a work or other protected subject-matter and the reproduction right conferred on authors.<sup>1089</sup>

In *Deckmyn*, it is said that the parody limitation is justified by the fundamental right of freedom of expression and that it

must strike a fair balance between, on the one hand, the interests and rights of persons referred to in Articles 2 and 3 of that directive, and, on the other, the freedom of expression of the user of a protected work who is relying on the exception for parody, within the meaning of Article 5(3)(k).<sup>1090</sup>

From the aforementioned case law, it is possible to draw important conclusions regarding the influence of fundamental rights on a more flexible definition and interpretation of limitations. From an internal perspective, fundamental rights provide a justification for limitations, which is then considered when examining their purpose. At an external level, fundamental rights affect the balance of interests, functioning as rights of users (and third parties with legitimate interests) to be balanced against those of copyright owners.<sup>1091</sup>

The latter point merits elaboration. Neither the fundamental right of intellectual property as applied to copyright (Article 17(2) Charter) nor that of freedom of expression (Article 11 Charter) are absolute. Rather, copyright is a functional right. Like other fundamental rights, its application can only impose narrow constraints on freedom of expression. In that light, the design and interpretation of a system of copyright limitations should strike a “fair balance” between competing fundamental rights, guided by the principle of proportionality.

Thus, and at least for limitations justified on the basis of fundamental rights, it does not seem consistent with EU and international law to impose a “horizontal” doctrine of strict interpretation. Rather, in certain cases, copyright might have to cede to fundamental rights.<sup>1092</sup> This rationale underscores CJEU decisions finding that, where conditions for benefiting from limitations are met, the fundamental rights of users may prevail over the interests of authors.<sup>1093</sup>

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<sup>1087</sup> Triaille et al., 2013, p. 252.

<sup>1088</sup> Leistner, 2014, p. 585.

<sup>1089</sup> CJEU, *Painer*, ¶134.

<sup>1090</sup> CJEU, *Deckmyn*, ¶¶25–28 (cit. ¶27).

<sup>1091</sup> Leistner, 2014, p. 586: “...the judgment in that context implicitly acknowledges the impact of the fundamental freedoms on the interpretation of the provisions on the exceptions to copyright by fairly balancing the right of the authors with the right of the users to freedom of expression”.

<sup>1092</sup> See: European Copyright Society, 2014b, pp. 4–7, and case law cited therein; Geiger & Schönherr, 2014a, pp. 118–119. See also *Opinion AG in Deckmyn*, ¶¶80–85. On the application of Art. 10 ECHR to copyright, see ECtHR, *Ashby Donald*, and ECtHR, *The Pirate Bay*.

<sup>1093</sup> CJEU, *Painer*, ¶¶134ff.; CJEU, *Deckmyn*, ¶¶25–28, 34.



This conclusion is also in line with consistent case law of the Court that provides “shelter” to the “protection of fundamental rights in relation to copyright users”.<sup>1094</sup>

In this light, we can read the Court’s restrictive approach in *ACI Adam* and its progeny as resulting from a failure to consider the fundamental rights justification of the private copying limitation.<sup>1095</sup> As in the other cited cases, *ACI Adam* articulates the doctrine with the need to strike a fair balance of interests between authors and users.<sup>1096</sup> However, unlike *Painer* and *Deckmyn*, no reference is made to the impact of fundamental rights on the interpretation of limitations.<sup>1097</sup>

Given that the private copying limitation is intended, at least in part, to safeguard privacy interests of end-users (as is clear from the analysis in Chapter 2), that omission is open to criticism, as it would provide an essential counterweight to the strict interpretation doctrine. This argument, raised by the Dutch Government in *ACI Adam* and summarily (if unconvincingly) dismissed in the AG Opinion,<sup>1098</sup> is ignored by the Court, with important consequences.

When implementing optional limitations, Member States are subject to the principle of proportionality and the boundaries of the three-step test. Within those confines, their margin of discretion in specifying and qualifying the conditions of applicability of limitations is further subject to the principle of autonomous interpretation.<sup>1099</sup>

In *ACI Adam*, by overly relying on the doctrine of strict interpretation, the Court’s reading of the private copying limitation in connection with the three-step test apparently leaves Member States with a narrower margin of discretion for national implementation of limitations.<sup>1100</sup> To this effect, *ACI Adam* favours the position that national laws’ discretion can be used solely to restrict the scope of the limitation for “certain new uses of copyright works and other subject-matter”.<sup>1101</sup> (Arguably, the restrictive reading of the three-step test in *OSA* supports this approach.<sup>1102</sup>)

Still, such a position is inconsistent with the CJEU’s previous understanding in *Murphy* that limitations be interpreted so as to enable the development and operation of new technologies, balancing the interests of rights holders with those of users of new technologies.<sup>1103</sup> It is also inconsistent with the Court’s approach in *Deckmyn*, where it adopts a more liberal view of

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<sup>1094</sup> Marcella Favale et al., 2015, p. 60, citing CJEU, *Netlog*, CJEU, *Scarlet Extended*, CJEU, *Promusicae*, and CJEU, *Bonnier Audio*.

<sup>1095</sup> See *infra* 4.4.3.6. For a detailed analysis, see Quintais, 2015b.

<sup>1096</sup> CJEU, *ACI Adam*, ¶¶53–58. See also: CJEU, *Murphy*, ¶¶163–164; CJEU, *Painer*, ¶132; CJEU, *Deckmyn*, ¶¶25–28, 34;

<sup>1097</sup> Leistner, 2014, p. 585.

<sup>1098</sup> *Opinion of AG in ACI Adam*, ¶78. For criticism, see Consumentenbond & Bureau Brandeis, 2014, p. 3.

<sup>1099</sup> Leistner, 2014, p. 586.

<sup>1100</sup> Similarly, see Eleonora Rosati, 2014, pp. 710–711.

<sup>1101</sup> CJEU, *ACI Adam*, ¶27, relying on recital 44 InfoSoc Directive.

<sup>1102</sup> CJEU, *OSA*, ¶¶38–41. See Nérissou, 2015b, p. 391, stating that in *OSA* the CJEU closes the door to analogous or extensive interpretation of limitations.

<sup>1103</sup> CJEU, *Murphy*, ¶¶163–164, 179. The general point is made in Leistner, 2014, p. 585.

limitations,<sup>1104</sup> in line with a growing body of case law considering them akin to “user rights”.<sup>1105</sup>

A flexible understanding of copyright limitations can also be derived from the structure and contents of the directive’s catalogue in Articles 5(2) and 5(3). Whereas the list is exhaustive, therefore proscribing implementation of additional limitations, a degree of elasticity may result from its qualification as “categorically worded prototypes”, rather than narrow “circumscribed exceptions”.<sup>1106</sup> Quotation is a case in point, as it applies “for purposes *such as* criticism or review, provided that... their use is in accordance *with fair practice, and to the extent required by the specific purpose*”.<sup>1107</sup>

It is true that, in theory, Member States could use their margin of discretion in a restrictive way. This could be done by implementing and then narrowing the scope of the limitations through the imposition of additional conditions, in what has been described as a “homing” tendency.<sup>1108</sup>

However, this possibility is limited to the extent that the CJEU provides for autonomous interpretation of the limitation’s “prototype” or key concepts. In that line, the Court in *DR and TV2 Danmark* and *Deckmyn* denied that limitations should be implemented restrictively into national laws.<sup>1109</sup> This is in contrast with *ACI Adam*, *Copydan*, and *Reprobel*, where it imposed a narrower margin of implementation and subsequent interpretation through the addition of the condition of “lawfulness of the source of reproduction”.<sup>1110</sup> (Curiously, *Copydan* leaves to Member States discretion on the regulation of the use of third party devices for private copying, allowing the scope of the limitation to broaden.<sup>1111</sup>)

In fact, the practice of independent and uniform interpretation—rooted in the need for a uniform application of EU law and the principle of equality—is justified by the InfoSoc Directive’s goal of achieving a harmonious interpretation of limitations that is conducive to a proper and smooth functioning of the internal market. The goal, derived from recital 32, constitutes a manifestation

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<sup>1104</sup> Eleonora Rosati, 2015b, p. 10.

<sup>1105</sup> CJEU, *Padawan*, ¶43; CJEU, *Painer*, ¶132; CJEU, *Ulmer*, ¶43; CJEU, *Deckmyn*, ¶26. See also: European Copyright Society, 2014b, noting that “the idea of ‘users’ rights’ as enforceable rights of equal value has also recently featured in Case C-314/12, *UPC Telekabel*[2014],[57]”; and Eleonora Rosati, 2015b, p. 10. *Contra* such qualification as “user rights”, see von Lewinski & Walter, 2010, p. 1022.

<sup>1106</sup> P. Bernt Hugenholtz & Senftleben, 2011, p. 2: “the enumerated provisions are in many cases categorically worded prototypes rather than precisely circumscribed exceptions, thus leaving the Member States broad margins of implementation”. *But see*: von Lewinski & Walter, 2010, p. 1021; Eleonora Rosati, 2015b, p. 9, arguing that, following the restrictive interpretation of the CJEU in *Padawan*, *DR & TV 2 Danmark* and *ACI Adam*, in most cases the limitations in Art. 5 “would not be just categorically-worded prototypes”; and Nérison, 2015b, p. 284, arguing that *OSA* bars such interpretation.

<sup>1107</sup> Art. 5(3)(d) InfoSoc Directive, emphasis added. The point is made *inter alia* in European Copyright Society, 2014b, p. 5; P. Bernt Hugenholtz & Senftleben, 2011, which mention Art. 5(3) (a) and (f) InfoSoc Directive as examples. For a broad view of the quotation limitation in international copyright law, see Bentley, 2016 [paper forthcoming]. *Contra*, after *OSA*, Nérison, 2015b, p. 391.

<sup>1108</sup> Lucie Guibault, 2010, p. 64, referring to the “tendency of the Member States’ legislatures when translating provisions of the Directive into national law, preserving as much as possible the old formulations and adding further specifications”.

<sup>1109</sup> CJEU, *DR and TV2 Danmark*, ¶36; CJEU, *Deckmyn*, ¶¶16, 24.

<sup>1110</sup> CJEU, *ACI Adam*, ¶¶33–34; CJEU, *Copydan*, ¶¶74–79; CJEU, *Reprobel*, ¶¶57–64. See Eleonora Rosati, 2014, pp. 710–711.

<sup>1111</sup> CJEU, *Copydan*, ¶¶86–96. See *infra* 4.4.3.7.

of an overall objective of the directive, namely the harmonisation of EU copyright law.<sup>1112</sup> In part due to the lack of true harmonisation of the system of copyright limitations in the InfoSoc Directive’s design—i.e. the number of optional limitations, the wide margin of implementation, and lack of guidance on contractual overridability—and despite the Court’s efforts to the contrary, that goal has not been achieved.<sup>1113</sup> The result, mitigated by the CJEU’s expanding case law on the field, is a smorgasbord of divergent national implementation.

#### 4.4.1.5 Interim Conclusions

To conclude, Member States’ margin of discretion in defining the conditions for applicability of limitations, and national courts’ freedom of interpretation, are curtailed by two opposing constraints. From one side, the strict interpretation doctrine and the three-step test seem to impede the broadening of the scope of limitations. From the other, the prototypical nature of certain limitations, the principle of autonomous interpretation, the requirements of effectiveness and purposive interpretation, the need for a balancing of interests, and the (external and internal) operation of fundamental rights, all seem to prevent an overly narrow reading of limitations. Moreover, a strict interpretation may hinder the directive’s objective of harmonising limitations, with detrimental effects on the functioning of the internal market.<sup>1114</sup>

These considerations significantly mitigate the scope of the strict interpretation doctrine. Furthermore, less conservative readings of the three-step test are possible. In fact, both legal scholarship and some CJEU decisions lay the groundwork for a flexible construction of its conditions and consideration as an enabling clause; one which adequately balances interests, rights and limitations, while being consistent with the InfoSoc Directive’s aims and the internal market objective.<sup>1115</sup>

It follows that CJEU case law allows for a flexible and functional reading of limitations, especially as these apply to digital technologies.<sup>1116</sup> This position is coherent with the normative role of copyright limitations, namely that of securing shared constitutional values stemming from fundamental rights and serving the public interest in the dissemination of culture and knowledge.<sup>1117</sup> However, this is true only insofar as the system of limitations ensures a fair balance between competing interests of creators/rights holders and users, as well as “protection of, and access to, copyright works”.<sup>1118</sup> Hence, despite this flexible and functional approach, the scope of limitations remains constrained.

These findings have important implications for the present study. From a descriptive standpoint, the analysis so far argues for a liberal interpretation of limitations. If the activities of Internet users cannot fit within these spaces, then ACS implementation will require copyright reform to

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<sup>1112</sup> CJEU, *DR and TV2 Danmark*, ¶¶35–37; CJEU, *Deckmyn*, ¶15.

<sup>1113</sup> Bechtold, 2006, p. 369; European Copyright Society, 2014b, pp. 2–3; Geiger & Schönerr, 2014a, pp. 113–114; P. Bernt Hugenholtz, 2000, p. 501; P. Bernt Hugenholtz et al., 2006; Janssens, 2009; Westkamp, 2007. *But see* von Lewinski & Walter, 2010, pp. 1021–1022, labelling this criticism as “unjustified from the outset, as Art. 5 was not aimed at complete harmonization”.

<sup>1114</sup> Making the point in relation to *Painer*, see Triaille et al., 2013, p. 489.

<sup>1115</sup> See *infra* 5.2.2.2.

<sup>1116</sup> See, making a similar point, Senftleben, 2013b, p. 93.

<sup>1117</sup> European Copyright Society, 2014b, p. 3.

<sup>1118</sup> European Copyright Society, 2014b, p. 3.

adopt legalisation schemes. This clarifies the scope of an ACS by itemising which online uses trigger exclusive rights and require clearance through voluntary or mandatory models. Where copyright reform through legal licences is required, its admissibility hinges on compliance with the three-step test. (For some legal scholars, the same conclusion applies to mandatory collective management.<sup>1119</sup>)

Here, too, this chapter's analysis is important. First, because the limitations studied herein function as prototypes for "certain special cases" (first step). Second, because the normative considerations on flexibility and balancing of interests (including the role of fundamental rights) apply, *mutatis mutandis*, to the three-step test. Third, as any voluntary or mandatory ACS should articulate with the *acquis* and the breathing spaces it provides.<sup>1120</sup>

In the context of this chapter, the relevant question now is whether and to what extent the limitation prototypes in Article 5 InfoSoc Directive exempt any of the end-user acts of digital content sharing that trigger exclusive rights. Examining that list against the typology of online uses, five limitations emerge as potentially relevant, and are for that reason analysed in the following paragraphs: the mandatory limitation for temporary and transient or incidental copying (4.4.2); the optional limitation for private copying (4.4.3); and the limitations susceptible of application to digital adaptations, namely quotations, incidental inclusion and parody (4.4.4).

#### 4.4.2 Temporary and Transient Copying

Article 5(1) InfoSoc Directive contains a mandatory limitation to the right of reproduction in Article 2. Together with the exemptions for services of mere conduit, caching, and hosting in Articles 12–14 E-Commerce Directive, these rules regulate the liability of service providers for copyright-relevant acts in networked environments.<sup>1121</sup> Thus, only if there is a copyright violation pursuant to Articles 2 and 5(1) InfoSoc Directive, will the E-Commerce Directive's safe-harbours apply to determine liability of service providers.<sup>1122</sup>

Article 5(1) was included in the InfoSoc Directive in the wake of discussions on the scope of the reproduction right dating back to the 1996 WIPO Diplomatic Conference. Those discussions focused on whether the right should extend to temporary copies of works occurring during technological processes, such as random access memory (or "RAM") copies in computers, web browsing, and copies resulting from the use of routers and proxy servers.<sup>1123</sup> The limitation is relevant to this study as it applies to on-screen and cached copies made during acts of web browsing and reception of streams by end-users.

This limitation exempts from copyright protection any temporary reproductions of works and related subject matter that meet certain conditions regarding their characteristics and purpose.

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<sup>1119</sup> See *supra* the discussion at 3.3.4.2.

<sup>1120</sup> For example, where a legal licence ACS overlaps with existing limitations it might prove sensible to propose reform by extending existing mechanisms and considering these for the definition of remuneration.

<sup>1121</sup> Recital 16 InfoSoc Directive.

<sup>1122</sup> Bechtold, 2006, p. 371.

<sup>1123</sup> Bechtold, 2006, p. 371; von Lewinski & Walter, 2010, pp. 1018, 1023–1024.

Similar exemptions are included in the Software and Database Directives.<sup>1124</sup> To qualify for the limitation, a reproduction must meet four conditions:

- It must be temporary, in the sense that it is either transient or incidental;
- It must form “an integral and essential part of a technological process”;
- It must be for the sole purpose of (1) enabling Internet transmissions *or* (2) lawful uses; and
- It must have no “independent economic significance”.

In *Meltwater*, the “temporary” condition was examined independently. The CJEU concluded that on-screen and cached copies made during browsing meet this condition. First, on-screen copies are “deleted when the internet user moves away from the website viewed”; second, cached copies are usually replaced automatically by different content “after a certain time, which depends on the capacity of the cache and on the extent and frequency of internet usage by the internet user concerned”.<sup>1125</sup>

It is notable that commentators tend to examine “temporary” in opposition to permanent. In that sense, the term is manifested in two alternative requirements: that a copy is “transient”, i.e. that it lasts for a short period of time, or “incidental”, meaning that it has no particular relevance for copyright purposes.<sup>1126</sup>

Examples of transient copies are those occurring in a caching process or in the RAM, which are erased at the end of a session. Transient copies also occur during browsing. In fact, the CJEU has clarified that a temporary and transient copy “is intended to enable the completion of a technological process of which it forms an integral and essential part”; as such, it “must not exceed what is necessary for the proper completion of that technological process”.<sup>1127</sup> Furthermore, the process in question “must be automated so that it deletes that act automatically, without human intervention, once its function of enabling the completion of such a process has come to an end”.<sup>1128</sup>

Because browsing, by definition, requires the automatic creation and deletion of copies without human intervention, it follows that on-screen copies made during browsing are transient copies, and therefore exempted.<sup>1129</sup> The requirement of automatic deletion does not prevent the same result being achieved by human intervention. In browsing, for example, it is permissible for the Internet user to activate and terminate the session without the temporary copies losing their transient nature.<sup>1130</sup>

Temporary copies that exist for too long to qualify as transient—such as those on a proxy or cache server—may nonetheless qualify as “incidental” to the main use. This could be the case,

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<sup>1124</sup> Art. 5(1) Software Directive and 6(1) Database Directive.

<sup>1125</sup> CJEU, *Meltwater*, ¶¶25–27.

<sup>1126</sup> Bechtold, 2006, p. 371; von Lewinski & Walter, 2010, pp. 1024–1025. See also Depreeuw & Hubin, 2014, p. 46 (“The transient copy is an ephemeral act of reproduction.”)

<sup>1127</sup> CJEU, *Infopaq I*, ¶61.

<sup>1128</sup> CJEU, *Infopaq I*, ¶64; CJEU, *Meltwater*, ¶40.

<sup>1129</sup> Recital 33 InfoSoc Directive, See: CJEU, *Infopaq I*, ¶63; CJEU, *Meltwater*, ¶46.

<sup>1130</sup> CJEU, *Meltwater*, ¶¶32, 41–42.

for example, for a use privileged under a different limitation, like digital private copying.<sup>1131</sup> Hence, for a copy to be incidental its *existence* and *purpose* must be dependent on the technological process it integrates.<sup>1132</sup> In this light, the CJEU has found cached copies to be incidental to the technological process of browsing.<sup>1133</sup>

A temporary (transient or incidental) reproduction is “integral and essential to a technological process” when it fulfils two criteria. First, it is not technically severable from and is “carried out entirely in the context of the implementation of a technological process”; second, it is required for the proper functioning of the process.<sup>1134</sup> The copy must be a predetermined technical necessity, as occurs in the context of Internet transmissions.<sup>1135</sup> The CJEU considers that on-screen and cached copies meet this condition because the reproductions can be made at any stage of the process, in no small part because “without those copies, the internet would be unable to cope with current volumes of data transmitted online.”<sup>1136</sup>

The third condition of this limitation is that the temporary reproductions are made to enable Internet transmissions or, alternatively, to allow lawful use. *A contrario*, the limitation excludes copies made for additional or different purposes.<sup>1137</sup>

In the wording of Article 5(1)(a) InfoSoc Directive, the first purpose is for a “transmission in a network between third parties by an intermediary”.<sup>1138</sup> This privilege extends to intermediaries like access and service providers that enable Internet transmissions, so long as they do not “modify the information transmitted” or “interfere with the lawful use of technology”.<sup>1139</sup>

The second purpose is for a lawful use, meaning a use “authorised by the rightholder or not restricted by law”.<sup>1140</sup> An “authorised” use includes both express and implied licences. Hence, when a work is made available online without restrictions on browsing, the copies made by the end-user during that process are excluded from the scope of the exclusive right.<sup>1141</sup> A use “not restricted by law” refers to temporary copies made in the process of enabling use permitted by the limitations in Article 5(2) and (3) InfoSoc Directive.<sup>1142</sup>

Finally, the limitation applies solely if the temporary reproduction is devoid of “independent economic significance”. This condition—seen by some as an application of the three-step test—

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<sup>1131</sup> Bechtold, 2006, p. 371; von Lewinski & Walter, 2010, p. 1025.

<sup>1132</sup> CJEU, *Meltwater*, ¶43.

<sup>1133</sup> *Ibid.*, ¶¶48–50.

<sup>1134</sup> CJEU, *Meltwater*, ¶28; CJEU, *Infopaq I*, ¶61; CJEU, *Infopaq II*, ¶30.

<sup>1135</sup> Bechtold, 2006, p. 372, arguing that this feature results in an implementation of the three-step test. See also von Lewinski & Walter, 2010, p. 1025.

<sup>1136</sup> CJEU, *Meltwater*, ¶¶28, 33–38.

<sup>1137</sup> von Lewinski & Walter, 2010, p. 1025.

<sup>1138</sup> Art. 5(1)(a) InfoSoc Directive.

<sup>1139</sup> Recital 33 InfoSoc Directive. See also Bechtold, 2006, p. 372; von Lewinski & Walter, 2010, p. 1025. In CJEU, *LSG*, ¶46, the Court clarified that “access providers which merely provide users with Internet access, without offering other services such as email, FTP or file sharing services or exercising any control, whether de iure or de facto, over the services which users make use of, must be regarded as ‘intermediaries’ within the meaning of Art. 8(3) of Directive 2001/29”.

<sup>1140</sup> Recital 33 InfoSoc Directive. See also: CJEU, *Murphy*, ¶¶167–173; CJEU, *Infopaq II*, ¶¶42–43.

<sup>1141</sup> Bechtold, 2006, p. 372; von Lewinski & Walter, 2010, p. 1026.

<sup>1142</sup> Bechtold, 2006, p. 372.

allows only those reproductions having “no separate economic value on their own”, i.e. technically necessary and economically insignificant copies, which do not affect the economic potential of the reproduction right.<sup>1143</sup>

In *Murphy*, when analysing temporary copies created within the memory of the satellite decoder and on the television screen, the CJEU clarified that, for the limitation to have meaning,

That [economic] significance must also be independent in the sense that it goes beyond the economic advantage derived from mere reception of a broadcast containing protected works, that is to say, beyond the advantage derived from the mere picking up of the broadcast and its visual display.<sup>1144</sup>

The CJEU considered the acts in question to constitute “an inseparable and non-autonomous part of the process of reception of the broadcasts transmitted containing the works”, which were “performed without influence, or even awareness, on the part of the persons thereby having access to the protected works”. These acts were not capable of generating an “additional economic advantage” and, therefore, did not have independent economic significance. This conclusion was considered consistent with the limitation’s objective of ensuring “the development and operation of new technologies”.<sup>1145</sup>

In light of the above, it is possible to draw the following conclusions regarding downstream copies by end-users. First, “mixed forms” of copying that are not permanent but go beyond the concept of temporary, such as music playlists available offline for the subscription period or movies made available for a period of time subject to TPMs, do not satisfy the requirements of this limitation.<sup>1146</sup>

Second, copies created during browsing by Internet users are within the scope of the limitation. They constitute temporary and transient (or even incidental, depending on duration) copies, which are an integral and essential part of the technological process of using the Internet, whose sole purpose is a lawful use (access to works available online), and have no independent economic significance.<sup>1147</sup>

Third, copies made during the reception of streams are likely temporary (transient or incidental), and an integral and essential part of the technological process of streaming content. However, unless authorised by the rights holder directly or indirectly (via, e.g. an online service provider like Spotify), or made in the exercise of a different limitation (such as private use), they will probably be infringing.<sup>1148</sup> This is because outside those scenarios it is difficult to argue that the copies (1) are made for a “lawful use” and (2) have no independent economic importance, as they affect the economic potential of the reproduction right and likely generate an additional economic advantage for users.

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<sup>1143</sup> See recital 33 InfoSoc Directive, and CJEU, *Infopaq II*, ¶¶49–50. See also Bechtold, 2006, p. 373; von Lewinski & Walter, 2010, pp. 1026–1027.

<sup>1144</sup> CJEU, *Murphy*, ¶175.

<sup>1145</sup> CJEU, *Murphy*, ¶¶176–179 (cit. ¶176).

<sup>1146</sup> Depreeuw & Hubin, 2014, p. 77.

<sup>1147</sup> von Lewinski & Walter, 2010, p. 1027. This conclusion is anticipated in recital 33 InfoSoc Directive.

<sup>1148</sup> Depreeuw & Hubin, 2014, p. 73, concluding similarly.

Admittedly, the last conclusion is normatively debatable and legally uncertain. Contrary to the *ACI Adam* decision on the application of the private copying limitation to downloads, the CJEU has not ruled on the lawfulness of the source of streams in connection with Article 5(1) InfoSoc Directive. Absent technical restrictions, an Internet user receiving a stream is accessing a website and displaying it on screen. From that perspective, there are few differences from the on-screen copies made during browsing. However, due to the CJEU's interpretation of the reproduction right, it is possible that mere reception of streams would not meet all the conditions of Article 5(1), read in light of the three-step test in Article 5(5).

In that respect, *Meltwater* emphasises that rights holders' previous authorisation of the making available of the content online is essential to the finding that their legitimate interests were not affected, and that browsing did not constitute a conflict with the normal exploitation of their works.<sup>1149</sup> In the case of stream reception from unauthorised sources, that authorisation does not exist. *ACI Adam* and its progeny seem to go in this general direction when excluding copies of works from unauthorised sources from the scope of the private copying limitation to prevent a violation of the second and third conditions of the three-step test.<sup>1150</sup>

If the CJEU found this requirement of source in the private copying limitation in the absence of any wording to that effect, it is not a stretch to consider it would find a similar requirement where Article 5(1) InfoSoc Directive mentions "lawful use". (On this point, it is noted that where the lawful use requirement is tied to the application of the private copying limitation, *ACI Adam* indirectly reduces the scope of the temporary and transient copying limitation.<sup>1151</sup>) Furthermore, given the emergence of access-based online business models relying on streaming technology, it is possible to foreshadow a conflict with the normal exploitation, in violation of the second step of the test. On balance, a cautious interpretation suggests that the reception of streaming content by end-users is likely excluded from the scope of Article 5(1), despite the harshness of this outcome.

Importantly, if an ACS for non-commercial use is put in place, any temporary *downstream copies* made in the context of browsing or stream reception will be ancillary to lawful use and have no independent economic significance (as the system entails remuneration).

Finally, Depreeuw and Hubin argue that certain upstream copies transmitted to user devices might be exempted under this limitation. This would occur if the copies are temporary and incidental to the principal act of exploitation of a work—the communication to the public of streams "as catchup service or services of download"—, as the copies would be an essential and integral part of the technological process of transmission. Of course, this presupposes these acts are authorised by rights holders (and thus "lawful") and that their economic significance derives from the main exploitation act of making available.<sup>1152</sup> However, as the authors admit, that conclusion is limited to specific technology configurations; these, it is added, seldom occur for non-commercial acts by end-users.

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<sup>1149</sup> CJEU, *Meltwater*, ¶¶54–62.

<sup>1150</sup> See *infra* 4.4.3.6.

<sup>1151</sup> Depreeuw & Hubin, 2014, p. 73.

<sup>1152</sup> Depreeuw & Hubin, 2014, pp. 71–72.



### 4.4.3 Private Copying

To the extent the right of reproduction applies to downloading, stream capture and uploading, private copying is the most relevant limitation under analysis here. In fact, many legal licence ACS rely on an extended version of this limitation.<sup>1153</sup> Article 5(2)(b) InfoSoc Directive applies to reproductions made on all technologies and media, whether analogue or digital.<sup>1154</sup> It covers acts of reproduction of all subject matter, with the exclusion of software and databases.<sup>1155</sup>

The provision is subject to a number of cumulative requirements, which have been the object of a rich body of CJEU case law in *Padawan*, *Stichting de ThuisKopie*, *Luksan*, *VG Wort*, *Amazon.com*, *ACI Adam*, *Copydan*, *Reprobel*, *Austro-Mechana*, and *EGEDA II*.<sup>1156</sup> Due to the complexities of this case law and the importance of the limitation for the study of ACS, this section examines in detail its scope and requirements with a view to clarifying which online activities are privileged by the limitation.

#### 4.4.3.1 Private Use<sup>1157</sup>

First, the limitation can only apply for private use, an expression left undefined in the InfoSoc Directive. There is a consensus that “private” requires beneficiaries of the provision to be natural persons making reproductions for their personal purposes and within their private sphere, which may include a broader or narrower circle of family and friends.<sup>1158</sup>

This excludes wider concepts in national law, such as “personal use” and “own use”, which may include professional and commercial use.<sup>1159</sup> Consequently, acts carried out by natural persons on behalf of legal persons are not exempted.<sup>1160</sup> However, copies made on behalf of individuals and/or for their private use may fall in the private use category.<sup>1161</sup>

Less clear is the case of third party copying by a legal person acting as a commercial provider that facilitates private copying by a natural person for private purposes. Here, it seems that Member States must regulate the effect of the intervention of intermediaries and service providers in the act of reproduction.<sup>1162</sup> Undeniably, such differences have led to divergent

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<sup>1153</sup> Cf. *supra* 3.3.5.2.

<sup>1154</sup> Bechtold, 2006, p. 375; Poort & Quintais, 2013, p. 207; von Lewinski & Walter, 2010, pp. 1031–1032.

<sup>1155</sup> Art. 1(2)(a) and (e) InfoSoc Directive. This is despite recital 38 solely mentioning audio, visual and audio-visual material. See also: Eechoud et al., 2009, p. 117; and von Lewinski & Walter, 2010, p. 1031, for an explanation of the historical background of this provision and the articulation of the recital with lit. (b). On the latter point, see also *supra* 2.3.

<sup>1156</sup> At the time of writing, the following cases are pending: CJEU, Reference for Preliminary Ruling, Case C-110/15, *Nokia Italia*; CJEU, Reference for Preliminary Ruling, Case C-265/16, *VCAST Limited v R.T.I. SpA*.

<sup>1157</sup> This paragraph relies on and develops my analysis in Poort & Quintais, 2013, pp. 207–208.

<sup>1158</sup> See Poort & Quintais, 2013, p. 207, and von Lewinski & Walter, 2010, p. 1032, noting that the term “private use” is present elsewhere in the *acquis* and international copyright law, namely in Art. 15(1)(a) Rental Right Directive and Art. 6(2)(a) and 9(a) Database Directive. See also Depreeuw & Hubin, 2014, p. 54.

<sup>1159</sup> Poort & Quintais, 2013, pp. 207–208; von Lewinski & Walter, 2010, pp. 1032–1033.

<sup>1160</sup> Poort & Quintais, 2013, pp. 207–208; von Lewinski & Walter, 2010, p. 1033.

<sup>1161</sup> Poort & Quintais, 2013, pp. 207–208; von Lewinski & Walter, 2010, p. 1033.

<sup>1162</sup> Bechtold, 2006, p. 375; Poort & Quintais, 2013, pp. 207–208.

national implementation.<sup>1163</sup> The CJEU tackled the issue in *Copydan*, as explained below (see *infra* 4.4.3.7).

This brief sketch suffices to highlight the legal certainty challenges facing national courts in fixing the meaning of “private”, especially in light of its potential application in the digital environment (e.g. within social networking platforms) and against a dynamic concept of “public” in the *acquis*.<sup>1164</sup> For instance, is uploading a copy of a work to a cloud locker accessible only to a number of close friends and family a “private” use? How big does that group have to be before the act loses its privileged nature?

#### 4.4.3.2 Non-Commercial<sup>1165</sup>

A second requirement to qualify under the limitation is that the reproduction must not be for directly or indirectly commercial ends. The expression is not defined by the directive and is further confused by the fact that, whilst private acts are usually non-commercial, non-commercial acts can fail to qualify as private.<sup>1166</sup>

As noted throughout this dissertation, the term “commercial” includes a wide range of meanings, from “economic” to “for profit”. Furthermore, the scope of non-commerciality is complex to define, especially in connection with online use.<sup>1167</sup> At the very least, it was argued, commercial should not be a synonym for economic, as a private copying limitation excluding all use with economic significance is devoid of meaning and application.<sup>1168</sup> Such a limitation would therefore likely contravene the principle of effectiveness.

National legislators and courts have attempted to define this term by setting forth subjective and objective criteria, namely the infringing intent of the copier—meaning actual or constructive knowledge, linked to a profit-making aim—and the definition of a specific number of admissible private copies.<sup>1169</sup> However, it is challenging to apply these criteria to define indirect commerciality in digital private copying.<sup>1170</sup> This complexity also exists in the context of ACS, as mentioned in the previous chapter.<sup>1171</sup>

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<sup>1163</sup> Karapapa, 2012, pp. 53–59, with an overview.

<sup>1164</sup> Poort & Quintais, 2013, p. 208. See also Karapapa, 2012, pp. 49–78, with a detailed analysis. Karapapa proposes a test for the determination of the private character of the copyright use, which aims at assessing the relationship between the copier and the audience, the perception of the latter by the right holder vis-à-vis the commercial exploitation of the work, and the (private) nature of the place where the use is made. For the concept of “public” in the *acquis*, see *supra* 4.3.2.1.2.

<sup>1165</sup> This paragraph relies on and develops my analysis in Poort & Quintais, 2013, p. 208.

<sup>1166</sup> Bernault & Lebois, 2005, p. 30; Karapapa, 2012, p. 80; Poort & Quintais, 2013, p. 208.

<sup>1167</sup> See *supra* 1.2 and 3.4.2. See also Poort & Quintais, 2013, p. 208.

<sup>1168</sup> See *supra* 3.4.2.

<sup>1169</sup> Poort & Quintais, 2013, p. 208. See also Karapapa, 2012, p. 91, noting that the examination of the copier’s intent of commercial exploitation means that the judicial test for non-commerciality is not the exact counterpart of the definition of commerciality. N.B. Art. 6(4), second subparagraph InfoSoc Directive allows rights holders to take “adequate measures regarding the number of reproductions in accordance with these provisions” (Arts 5(2)(b) and 5(5)).

<sup>1170</sup> Poort & Quintais, 2013, p. 208. For attempts in legal scholarship, see Depreeuw & Hubin, 2014, p. 55; Karapapa, 2012, p. 98.

<sup>1171</sup> See *supra* 3.4.2.

In this respect, it is difficult to clarify the commercial nature of the many types of online use that qualify as copyright reproductions. The exclusive right extends, for example, to making copies of TV broadcasts for time-shifting, cloning copies of compact discs or digital versatile/video discs for playback or to share with family and friends, making backup copies of works, and downloading and storing works from authorised and unauthorised Internet sources, as well as making subsequent copies thereof.<sup>1172</sup>

Furthermore, it is unclear the extent to which the intervention of online service providers (e.g. vis-à-vis online “personal video recorders” or virtual storage space) enabling end-user copies but acting as commercial intermediaries—by charging subscription fees or generating advertisement revenues—affects the “non-commercial” nature of the act of reproduction and, consequently, the application of the limitation.<sup>1173</sup>

#### 4.4.3.3 Fair Compensation

If the limitation is implemented by the Member State, it must be accompanied by fair compensation. According to recital 35 InfoSoc Directive, the “form, detailed arrangements and possible level” of the compensation depend on the “circumstances of each case”; one significant criterion to determine these circumstances is “the possible harm... resulting from the act in question”. Furthermore, if rights holders have already received payment for the use (e.g. through licence fees), it is possible that no additional (or double) payment is due.<sup>1174</sup>

Therefore, the criterion of harm forms the basis of the concept of fair compensation.<sup>1175</sup> This is a corollary of the fact that fair compensation is a “recompense for the harm suffered by the author” for the introduction of the limitation.<sup>1176</sup>

As a rule, the recompense should focus on the “actual harm” suffered. Only if that proves impossible, for example because the harm remains unknown at the moment the tariff is set, can the calculation use as a reference point the “potential harm”.<sup>1177</sup> Nevertheless, the final amount of compensation must be adjusted to reflect the actual harm (e.g. through reimbursement mechanisms), avoiding scenarios of overcompensation contrary to the objective of fair balance between rights holders and users set forth in recital 31 InfoSoc Directive.<sup>1178</sup>

As noted, the limitation interfaces with the regulation of TPMs. Article 5(2)(b) InfoSoc Directive requires that the method for calculation of the “level” of fair compensation takes into consideration the application of TPMs in Article 6 of the directive.<sup>1179</sup>

In “certain situations where the prejudice to the rightholder would be minimal”, no obligation to pay fair compensation may arise.<sup>1180</sup> Member states have a wide margin of discretion in setting

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<sup>1172</sup> Poort & Quintais, 2013, p. 216.

<sup>1173</sup> Depreeuw & Hubin, 2014, p. 55. See *infra* the discussion at 4.4.3.7.

<sup>1174</sup> Recital 35 InfoSoc Directive.

<sup>1175</sup> CJEU, *Padawan*, ¶¶38–42. See also Poort & Quintais, 2013, p. 208, noting the difference from the concept of equitable remuneration in Art. 8(2) Rental Right Directive. See also *supra* 2.2.4.

<sup>1176</sup> CJEU, *Padawan*, ¶¶40, 42; CJEU, *Stichting de ThuisKopie*, ¶24; CJEU, *Reprobel*, ¶36.

<sup>1177</sup> CJEU, *Reprobel*, ¶¶69–71, 82.

<sup>1178</sup> *Ibid.*, ¶¶84–88.

<sup>1179</sup> Recital 35 InfoSoc Directive.

the threshold for when the prejudice caused to rights holders is to be considered minimal, provided the definition of that *de minimis* threshold is consistent with, *inter alia*, the principle of equal treatment in Article 20 Charter.<sup>1181</sup>

Fair compensation is an autonomous concept of EU law, subject to uniform interpretation in countries that have implemented the provision.<sup>1182</sup> According to the CJEU, this qualification is required by the InfoSoc Directive's objectives of establishing a high level of protection, ensuring a functioning internal market, and balancing the rights and interests of rights holders and users.<sup>1183</sup>

In light of these objectives and the fact that the directive imposes on Member States an obligation of result regarding the actual recovery of fair compensation, the respective right not only vests in the individual rights holder, but must also be qualified as unwaivable.<sup>1184</sup>

Importantly, fair compensation is only due to the holders of the exclusive reproduction right in Article 2 InfoSoc Directive: authors, performers, phonogram producers, film producers, and broadcasting organisations. Only they can suffer harm requiring compensation and not subsequent exploiters, such as publishers.<sup>1185</sup>

Member States are left with some discretion regarding the determination of the compensation system, which is however limited by recitals 35 and 38 InfoSoc Directive, the three-step test, and the principle of effectiveness.<sup>1186</sup>

#### 4.4.3.4 Rights Holders' Authorisation<sup>1187</sup>

One of the complex issues in determining the scope of private copying relates to the effect of the explicit or implicit authorisation of rights holders on fair compensation. On this topic, the main CJEU judgments are *VG Wort* and *Copydan*.<sup>1188</sup>

In *VG Wort*, the Court states that if the acts of copying by end-users fall within the scope of a limitation, any authorisation of the same by rights holders is irrelevant for the application or calculation of fair compensation.<sup>1189</sup> If Member States implement the limitation, the respective fair compensation must be based on the harm caused to rights holders by unauthorised reproductions.<sup>1190</sup> Activities covered by the limitation are permissible regardless of rights holders' authorisation, which is "devoid of legal effects"; therefore, that authorisation does not

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<sup>1180</sup> *Ibid.* See Poort & Quintais, 2013, p. 208, and Bechtold, 2006, p. 374, noting that both time and space-shifting might be covered by such *de minimis* cases.

<sup>1181</sup> CJEU, *Copydan*, ¶¶56–62; *Opinion AG Copydan*, ¶¶97–101.

<sup>1182</sup> CJEU, *Padawan*, ¶¶32, 37. See Poort & Quintais, 2013, p. 209.

<sup>1183</sup> See recitals 31 and 32 InfoSoc Directive, and CJEU, *Padawan*, ¶¶34–35. Clarifying the different objectives of the directive, see: CJEU, *Murphy*, ¶186; CJEU, *DR and TV2 Danmark*, ¶35; CJEU, *Painer*, ¶132.

<sup>1184</sup> CJEU, *Luksan*, ¶¶88–109. See also: CJEU, *Stichting de ThuisKopie*, ¶34; Leistner, 2014, pp. 587–588; Poort & Quintais, 2013, pp. 209–210.

<sup>1185</sup> CJEU, *Reprobel*, ¶¶44–49.

<sup>1186</sup> CJEU, *Stichting de ThuisKopie*, ¶¶33–41 CJEU, *Padawan*, ¶¶7, 39–41. See also Leistner, 2014, p. 587.

<sup>1187</sup> This paragraph relies on and develops my analysis in Poort & Quintais, 2013, pp. 210–211; Quintais, 2015a.

<sup>1188</sup> CJEU, *VG Wort*, ¶¶48–50; CJEU, *Copydan*, ¶¶63–67.

<sup>1189</sup> CJEU, *VG Wort*, ¶40. Proposing a different interpretation see *Opinion AG in Copydan*, ¶¶57–68. See also Poort & Quintais, 2013, p. 210.

<sup>1190</sup> Poort & Quintais, 2013, p. 210.

affect the potential harm caused by the copying activities and cannot be considered in the calculation of the compensation.<sup>1191</sup>

When *Copydan* came around, the AG Opinion in that case departed somewhat from *VG Wort* and considered that the CJEU left open the question of whether levies are due if rights holders have made available a work online subject to payment that includes fair compensation (e.g. a licence fee for the download of a song from an authorised platform). In light of the principle of fair compensation and the directive's objective of fair balance, the AG posited that no levy should be due where the authorised content had already been subject to "a payment or other form of fair compensation", as that would lead to an unjustified double payment by users.<sup>1192</sup>

That conclusion echoes the recommendation of Mediator Vitorino on the topic.<sup>1193</sup> It also opened the door for what Peukert called a "two-tier system", where levies would be charged mostly for works lawfully made available online for no fee and unrestricted by TPMs. Interestingly, this would mean a significant change of direction for CMOs in the field, who would now be responsible for fostering a "sharing culture".<sup>1194</sup>

The *Copydan* judgment disagreed with the AG and re-stated the *VG Wort* doctrine, clarifying that it also applies where a work is made available subject to payment.<sup>1195</sup> However, because the authorisation in question is devoid of legal effects, the rights holder should not be entitled to any additional remuneration for that act:

Since, in circumstances such as those set out in paragraph 65 above, such authorisation is devoid of legal effects, it cannot, of itself, give rise to an obligation to pay remuneration of any kind in respect of the reproduction, for private use, by the user of the files concerned to the rightholder who authorised such use.<sup>1196</sup>

The "circumstances" mentioned in the citation relate to the optional nature of the limitation, meaning the choice by Member States to implement the limitation. The most straightforward interpretation of this statement is that Member States choosing to implement the limitation exclude from its material scope any authorisation from rights holders for acts of private copying. No "two-tier system" is possible and the positions of Mr. Vitorino and the AG are rejected. Also, one might add, the possibility of contractual disposition of the limitation outside the cases expressly allowed in the InfoSoc Directive becomes difficult to accept. This seems to be the CJEU's method of avoiding the problem of double payments.<sup>1197</sup>

However, it is likely that rights holders will price into the purchase of content the possibility of private copies, causing consumers to pay twice for private copies. This outcome contradicts the principle of *de minimis* harm. If rights holders have already received payment for private copies

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<sup>1191</sup> CJEU, *VG Wort*, ¶¶34–39. On this point the Court diverges from the *Opinion AG in VG Wort*, ¶¶119–121. See Poort & Quintais, 2013, p. 210; Quintais, 2015b, p. 78.

<sup>1192</sup> *Opinion AG in Copydan*, ¶¶57–68. See also Quintais, 2015a.

<sup>1193</sup> Vitorino, 2013, pp. 6–8.

<sup>1194</sup> Quintais, 2014, pp. 6–8, 2015a, 2015b, pp. 78–79.

<sup>1195</sup> CJEU, *Copydan*, ¶65, citing CJEU, *VG Wort*, ¶37.

<sup>1196</sup> CJEU, *Copydan*, ¶66. See also Quintais, 2015a.

<sup>1197</sup> Quintais, 2015a.

they suffer no further (or only negligible) harm. Therefore, Member States should be free to exempt such use from levies.<sup>1198</sup>

To avoid double payments, Member States could consider that, because rights holders price private copying acts into the purchase of content, paid authorised use causes only *de minimis* harm, meaning that no fair compensation is due. If properly defined, this solution would be within their margin of discretion and respect the principle of equal treatment (Article 20 Charter), while achieving a fair balance between the interests of rights holders and users.<sup>1199</sup>

#### 4.4.3.5 Application of Technological Protection Measures<sup>1200</sup>

The relationship of the private copying limitation with TPMs was introduced above.<sup>1201</sup> The CJEU has addressed the issue in *VG Wort*, *ACI Adam*, and *Copydan*.<sup>1202</sup> In the Court's view, TPMs allow rights holders to restrict unauthorised acts and help define the scope of the private copying limitation. The limitation is a legislative permission from Member States, who must therefore ensure its proper application. This includes preventing acts that rights holders do not authorise.<sup>1203</sup>

Because TPMs are voluntary, even where they are available but not applied, the condition of fair compensation remains applicable.<sup>1204</sup> However, Member States may decide that application of such measures has an impact on the level (i.e. calculation and amount) of fair compensation so that “rightholders are encouraged to make use of them and thereby voluntarily contribute to the proper application of the private copying exception”.<sup>1205</sup>

Here, it is important to remember that the *Nintendo* Court stated that legal protection of TPMs must respect the principle of proportionality: their application by rights holders should be suitable to achieve the goal of preventing unauthorised acts and not go beyond what is required for that purpose.<sup>1206</sup>

The emphasis on fair compensation as a means to encourage voluntary adoption of technological measures and proper delimitation of the limitation introduces the possibility that TPM-ed works are subject to higher levies than unrestricted works. This odd outcome seems prejudicial to end-users and the InfoSoc Directive's fair balancing aim.<sup>1207</sup>

Instead, it would be logical for application of these measures to result in lower or even no levies. This is because the possibility of engaging in private copying is reduced, making the prejudice to

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<sup>1198</sup> A less obvious interpretation is that it is up to national law to exclude from its material scope any authorisation from rights holders for those acts. Where it does not make this exclusion, the authorisation of rights holders is not devoid of legal effects and it is possible to set aside fair compensation, triggering a two-tier system in those countries. See Quintais, 2015a.

<sup>1199</sup> Quintais, 2015a.

<sup>1200</sup> This paragraph relies on and develops my analysis in Quintais, 2015a.

<sup>1201</sup> See *supra* 4.4.1.2.

<sup>1202</sup> CJEU, *VG Wort*, ¶¶52–57; CJEU, *ACI Adam*, ¶¶43–44; CJEU, *Copydan*, ¶¶68–73.

<sup>1203</sup> CJEU, *VG Wort*, ¶¶48–52. See also Quintais, 2015a.

<sup>1204</sup> CJEU, *VG Wort*, ¶¶48–57. See also: *Opinion AG in VG Wort*, ¶104; CJEU, *ACI Adam*, ¶¶43–44; Poort & Quintais, 2013, p. 211; Quintais, 2015a.

<sup>1205</sup> *Opinion AG in Copydan*, ¶¶69–80; CJEU, *Copydan*, ¶¶68–73; CJEU, *VG Wort*, ¶58. See also Quintais, 2015a.

<sup>1206</sup> CJEU, *Nintendo*, ¶¶29–31. See also Quintais, 2015a.

<sup>1207</sup> Quintais, 2015a.

rights holders minimal. Here, again, application of the *de minimis* criterion may provide an escape valve to prevent unwarranted payments by consumers.<sup>1208</sup>

#### 4.4.3.6 Lawfulness of Source<sup>1209</sup>

In *ACI Adam*, the CJEU ruled that the private copying limitation, when interpreted in light of the three-step test, can only privilege reproductions made from lawful sources. This interpretation was later confirmed in *Copydan* and *Reprobel*.<sup>1210</sup>

These judgments are important because they qualify multiple daily acts of end-users—such as downloading and streaming entertainment content from unlicensed Internet sites—as clearly infringing, thereby extending the scope of the exclusive right of reproduction. Furthermore, the decisions impact the calculation of levies and interpretation of the three-step test.

A preliminary question to address here is what constitutes an unlawful source. In a survey of twenty-seven Member States prior to *ACI Adam*, a WIPO report stated that most laws prohibited reproduction from unlawful sources, which it identified as including “peer-to-peer network, newsgroups, torrent sites and the like, where music and films have been uploaded without consent from the rights holders”.<sup>1211</sup>

A comparison of the survey with commentaries on national laws leads to a different conclusion. In fact, only a small number of Member States’ laws expressly and unequivocally excluded copies from unlawful sources from the limitation’s scope. How that is made effective in practice is not clear. In all other cases, the condition is either absent or derived by certain stakeholders from ambiguous requirements, such as “lawful publication” (which seems to be related to the right of disclosure instead).<sup>1212</sup>

For example, in Germany, the scope of the limitation is restricted to private copies that have not “obviously been produced or made publicly available illegally”; what exactly constitutes “obvious” remains to be clarified by case law.<sup>1213</sup>

Similarly, since 2006, Spanish copyright law has limited the scope of private copying to copies “obtained from works that have been lawfully accessed”, a language Xalabarder deems “directly intended to rule out P2P downloading” but that does not entail the requirement of ownership of the copy.<sup>1214</sup> In a 2014 amendment, the scope of the limitation was further reduced to solely cover reproductions made “from copies of works ‘acquired by commercial purchase’ or received by radio or tv broadcast”.<sup>1215</sup>

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<sup>1208</sup> Quintais, 2015a.

<sup>1209</sup> This paragraph relies on and develops the analysis in Quintais, 2015b.

<sup>1210</sup> CJEU, *ACI Adam*, ¶¶20–58; CJEU, *Copydan*, ¶¶74–79; CJEU, *Reprobel*, ¶¶57–64.

<sup>1211</sup> WIPO, 2014, p. 4.

<sup>1212</sup> See Quintais, 2015b, pp. 79–82, for a detailed analysis.

<sup>1213</sup> See Art. 53(1) German Copyright Act. See also Dreier & Specht, 2012, p. 445; WIPO, 2014, p. 63; WIPO & Stichting de Thuiskopie, 2016, p. 81.

<sup>1214</sup> See Xalabarder, 2012, p. 941 (n.42), 949, 952. See also WIPO & Stichting de Thuiskopie, 2016, pp. 150–151.

<sup>1215</sup> See Xalabarder, 2014.

In France, a 2011 amendment added the requirement of lawful access to a protected work for the application of the private copying limitation (“copies ou reproductions réalisées à partir d’une source licite”).<sup>1216</sup>

Denmark and Sweden amended their copyright acts in the 2000s to the effect that the limitation does not extend to copies made “on the basis of an unlawful representation of a work or an illegal circumvention of a technological measure”, an amendment claimed to result from the three-step test.<sup>1217</sup> The Danish Copyright Act further prohibits digital private copying “on the basis of a copy that has been lent or hired” without the consent of the author.<sup>1218</sup>

For its part, Italian law only allows private copying reproductions to be made by the natural person who has acquired the lawful possession of copies of the work/subject matter (“acquisito possesso legittimo di esemplari dell’opera o del materiale protetto”) or had “lawful access” to it (“accesso legittimo”).<sup>1219</sup>

In light of these different national implementations, the mechanism of preliminary reference provided the CJEU with an opportunity to offer decisive guidance on this key aspect of the limitation’s scope, starting with *ACI Adam*. Examining the Court’s jurisprudence in this area, it is noteworthy that unlawful sources are not defined beyond the scenario of works made available to the public without the consent of rights holders.<sup>1220</sup> In fact, when asked to address unlawful sources “by some other means” the *Copydan* Court found the question inadmissible because it “failed to provide sufficient information relating to the nature of the reproductions to which the question submitted relates”, thereby preventing the Court from giving a useful answer.<sup>1221</sup>

On the issue of whether unauthorised sources are included in the scope of the limitation, both *Copydan* and *Reprobel* closely track *ACI Adam*. In the latter judgment, the CJEU’s analysis departed from recital 44 InfoSoc Directive and its reference to the possibility of reducing the scope of limitations in connection with “certain new uses” of copyright content; contrariwise, nothing in the directive mentions the possibility of extending the scope of limitations.<sup>1222</sup> Furthermore, recital 22 InfoSoc Directive indicates that the objective of support for the dissemination of culture should not be achieved by “sacrificing strict protection of rights or by tolerating illegal forms of distribution of counterfeited or pirated works”.<sup>1223</sup>

On that basis, and despite the directive’s silence on the issue, the Court applied the doctrine of strict interpretation to its reading of the three-step test. The conclusion from this analysis was that reproductions from unlawful sources may infringe the second and third steps of the test.<sup>1224</sup>

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<sup>1216</sup> See Carre, 2012, pp. 406–407, 413, 417–418, making reference to L311-1 French Intellectual Property Code and Law No. 2011-1898 of December 20, 2011 (on the private copying remuneration). For the situation prior to the 2011 amendment, including a description of contradictory case-law, see Geiger, 2008a.

<sup>1217</sup> Rognstad, 2012, p. 858. See also WIPO & Stichting de Thuiskopie, 2016, pp. 152–155.

<sup>1218</sup> Art. 12(3) Danish Copyright Act (WIPO translation). See WIPO & Stichting de Thuiskopie, 2016, pp. 60–63.

<sup>1219</sup> Art. 71–sexies, (4) Italian Copyright Act. See WIPO, 2014, pp. 77–78; WIPO & Stichting de Thuiskopie, 2016, pp. 97–102, and Sica & D’Antonio, 2012, pp. 546, 553–557.

<sup>1220</sup> CJEU, *Copydan*, ¶¶74, 79.

<sup>1221</sup> *Ibid.*, ¶¶92–95.

<sup>1222</sup> CJEU, *ACI Adam*, ¶¶25–27.

<sup>1223</sup> *Ibid.*, ¶36; CJEU, *Reprobel*, ¶59.

<sup>1224</sup> CJEU, *ACI Adam*, ¶¶31, 38. CJEU, *Copydan*, ¶76; CJEU, *Reprobel*, ¶59.



On the second step, the Court states that allowing reproductions from unlawful sources encourages piracy, which will “inevitably” reduce revenues from lawful sources and conflict with the normal exploitation of works.<sup>1225</sup> Put differently, there would be a substitution effect between reproductions made from lawful *versus* unlawful sources. That assertion, which seems essential to the ruling and must rely at least partially on factual analysis, is not further explained.

Regarding the third step, the Court argues that the inclusion of unlawful sources in the scope of the limitation would force rights holders to tolerate infringements accompanying the making of private copies, thereby unreasonably prejudicing their legitimate interests.<sup>1226</sup> There is some circularity to this argument, which relies on strict interpretation but ignores the historic role of the remuneration element (here: fair compensation) in satisfying the third step condition.<sup>1227</sup> On this basis, it is concluded that Article 5(2)(b) InfoSoc Directive cannot cover private copies made from unlawful sources.<sup>1228</sup>

Following that rationale, national laws that do not exclude reproductions from unlawful sources cannot ensure the proper application of the limitation. Such a conclusion, the CJEU posits, is independent of, and remains unaffected by, the non-availability of effective TPMs to prevent unauthorised reproductions.<sup>1229</sup>

Furthermore, when interpreting the condition of fair compensation in light of previous case law and recital 31 InfoSoc Directive, a levy system which does not distinguish between the source of copies fails to respect the fair balance between the rights and interests of authors and users that the InfoSoc Directive intends to safeguard.<sup>1230</sup> That is because under such a system the “harm” on the basis of which fair compensation is calculated includes “an additional, non-negligible cost” for reproductions made from unlawful sources. That cost is ultimately passed on to consumers purchasing levied goods. As a result, those consumers are “indirectly penalised”, as they will contribute towards compensating for harm caused by reproductions not allowed under the directive.<sup>1231</sup>

In sum, the joint reading of the private copying limitation and three-step test provisions led the CJEU to conclude that national laws that do not distinguish between lawful and unlawful sources for the act of reproduction are not in conformity with EU law.<sup>1232</sup> Still, it remains unclear whether copies made from legally uncertain sources can be subject to fair compensation.<sup>1233</sup>

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<sup>1225</sup> CJEU, *ACI Adam*, ¶39.

<sup>1226</sup> *Ibid.*, ¶40; CJEU, *Reprobel*, ¶61.

<sup>1227</sup> On this role, see *supra* 2.3.

<sup>1228</sup> CJEU, *ACI Adam*, ¶41; CJEU, *Reprobel*, ¶57.

<sup>1229</sup> CJEU, *ACI Adam*, ¶¶45–46.

<sup>1230</sup> *Ibid.*, ¶¶47–54, 57. Recital 31 InfoSoc Directive mentions the need to adjust the degree of harmonisation of exceptions and limitations in light of cross-border exploitation of works and the new electronic environment in light of the objectives of ensuring “the proper functioning of the internal market” and achieving a “fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users”.

<sup>1231</sup> CJEU, *ACI Adam*, ¶¶55–56; CJEU, *Copydan*, ¶77–78.

<sup>1232</sup> CJEU, *ACI Adam*, ¶58. See also CJEU, *Copydan*, ¶75.

<sup>1233</sup> The AG in *Copydan* seems to think they should not. Cf. *Opinion AG in Copydan*, ¶¶84–85.

#### 4.4.3.7 Third Party Devices Used for Copying<sup>1234</sup>

Another relevant issue relates to how the private copying limitation deals with copies made by an individual by or with the aid of a device belonging to a third party. In *Copydan*, the referring national court exemplified such use as copies made by an individual from a third party's DVD, CD, MP3 player, computer or other device. In theory, this third party can be a friend, acquaintance, or colleague, as well as a service provider. Moreover, the content in question can be acquired with or without the authorisation of the rights holder.<sup>1235</sup>

*Copydan's* approach to this issue is not clear. The Court notes that Article 5(2)(b) InfoSoc Directive makes no reference to “the legal nature of the connection, such as the right to property” between the individual that benefits from it and the device used to make copies.<sup>1236</sup> In other words, nothing is said about use of third party devices to make copies.<sup>1237</sup>

In that light, following the principle of strict interpretation and taking into account that the directive aims at partial harmonisation, the use of third party devices for private copying is outside the scope of the provision.<sup>1238</sup> One could legitimately ask: is it strict interpretation when you allow third party devices for private copying, therefore extending the possibilities available for making copies?<sup>1239</sup>

The response is that the Court argues for a different meaning for strict interpretation, interpreting *ACI Adam* and *Melzer* (a non-copyright case) by analogy, and stating that a limitation “cannot give rise to an interpretation going beyond the cases expressly envisaged”.<sup>1240</sup> Why the same understanding was not applied to the un/lawful nature of the source remains unclear.<sup>1241</sup>

Consequently, says the Court, Article 5(2)(b) should not be read in light of the three-step test in Article 5(5). This is because the test “is not intended either to affect the substantive content of provisions falling within the scope of Article 5(2) of that directive or, inter alia, to extend the scope of the different exceptions and limitations provided for therein”.<sup>1242</sup> Put differently, the test does not apply to use of third party devices because that topic is outside the harmonised scope of the limitation, and it is in relation to this scope that the test operates.<sup>1243</sup>

The result is that national legislation that imposes a levy on third party devices used for private copying is compatible with the InfoSoc Directive.<sup>1244</sup> This is because the choice to levy these

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<sup>1234</sup> This paragraph relies on and develops my analysis in Quintais, 2015a.

<sup>1235</sup> CJEU, *Copydan*, ¶16. For the arguments of the AG, see *Opinion AG in Copydan*, ¶¶86–96. See also Quintais, 2015a.

<sup>1236</sup> CJEU, *Copydan*, ¶¶80–86.

<sup>1237</sup> Quintais, 2015a.

<sup>1238</sup> CJEU, *Copydan*, ¶¶87–88.

<sup>1239</sup> Quintais, 2015a.

<sup>1240</sup> CJEU, *Copydan*, ¶87. N.B. *Melzer* relates to judicial cooperation in civil matters and already applies this reading by analogy to the Court's judgement in *Zuid-Chemie*.

<sup>1241</sup> Quintais, 2015a.

<sup>1242</sup> CJEU, *Copydan*, ¶90.

<sup>1243</sup> Quintais, 2015a.

<sup>1244</sup> CJEU, *Copydan*, ¶91.

devices is outside the scope of the directive and, thus, within the margin of discretion of Member States.<sup>1245</sup>

If a levy is applied, the use of such devices cannot be qualified as copyright infringement. This has some interesting consequences. If a user copies songs from a friend's laptop but those songs were downloaded from The Pirate Bay, the copies come from an unlawful source and are not covered by the limitation. However, the device is subject to a levy and those copies may thereby be exempted, which seems incongruous. It is up to national laws to regulate this intersection between unlawful source and copying from third party devices. In doing so, however, it is difficult to imagine that end-users will not end up paying levies for copies made from unlawful sources, i.e. for private copies they are not allowed to make.<sup>1246</sup>

Also, *Copydan* is bound to have an effect on intermediary or secondary liability for the provision of such devices or related services. An individual setting up a service for “do-it-yourself” copies is providing a third party device for the user to make private copies. Unless national law prohibits it, such service should not give rise to liability. However, it is easy to imagine that Member States will envisage different solutions to this problem, with potential negative effects on the internal market for the provision of these services.<sup>1247</sup>

The issue is of particular complexity in relation to “do-it-yourself” copies in the digital environment, namely cloud services that provide technical means for users to make or request their own copies, such as virtual storage spaces and online “personal video recorders”. Member States’ laws already qualify copies made by third parties differently; furthermore, the identification of the copier in the context of personal video recorder services has been subject to contrasting decisions in France and Germany.<sup>1248</sup> In this respect, *Copydan* leaves the status quo untouched, with the abovementioned negative effects.<sup>1249</sup>

This uncertainty extends to the possibility of levying cloud services for making private copies (the upload copies) covered by the limitation, a topic already broached in a 2014 resolution by the European parliament.<sup>1250</sup> If realised, the resulting regime would approximate private copying to an ACS for non-commercial digital reproductions by end-users.

#### **4.4.3.8 Application to Activities of Internet Users**

For the purposes of this dissertation, private copying is the most relevant limitation in the InfoSoc Directive. It can apply to certain acts of downloading, (down) streaming, stream capture/ripping and uploading by end-users. Furthermore, some of its conditions are susceptible of transplant to non-voluntary ACS, namely the non-commercial purpose or character of the use and fair compensation.

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<sup>1245</sup> Quintais, 2015a.

<sup>1246</sup> Quintais, 2015a.

<sup>1247</sup> Quintais, 2015a.

<sup>1248</sup> Depreeuw & Hubin, 2014, pp. 53–54.

<sup>1249</sup> Quintais, 2015a.

<sup>1250</sup> EP Resolution Private Copying Levies 2014, ¶30. N.B. the issue of compatibility with EU law of a compulsory licensing system for cloud services for the remote video recording of private copies of copyright works is the subject of a preliminary reference to the CJEU. See CJEU, Reference for Preliminary Ruling, Case C-265/16, *VCAST Limited v R.T.I. SpA*.

However, the interpretation of the limitation by the CJEU results in a reduced space for the copying activities of Internet users. This is so because the limitation does not apply to copies made from unauthorised sources and is restricted in the context of works made available online on agreed contractual terms subject to TPMs.

Thus, digital reproductions of works made through downloading and stream capture are covered by the private copying limitation only if originating from an authorised source. That will be the case when online service providers expressly authorise the reproduction. Authorised online streaming and downloading platforms, it is noted, typically make works available subject to agreed contractual terms and TPMs, which triggers the absolute circumvention prohibition in Article 6(4) InfoSoc Directive.<sup>1251</sup> (In this case, there is also a high risk of double payments by end-users, which are subject to the licence fee and the levy.)

That authorisation is usually clear to a subscriber of streaming services (e.g. Spotify and Netflix) through the user interface and its technical restrictions. The same does not apply to downloading platforms (e.g. Apple's iTunes Store and Amazon Music), where the user enjoys an "ownership" experience, but is typically subject to contractual restrictions on the subsequent use of the download copy in the form of a "license to use".<sup>1252</sup> In both cases, reproduction by the end-user is limited by technology and contract, which together help define the scope of the limitation and applicable fair compensation. Copies made by that same user outside those boundaries are unauthorised and, after *ACI Adam*, appear to be outside the limitation's scope, even if that prohibition is impossible to enforce.

Outside those cases, the limitation also applies when the work is made available online without technical restrictions, for download or streaming with the express authorisation of the rights holder, for example on the author's homepage, or under a Creative Commons licence. In these cases, because the TPM regime does not apply and the source of the reproduction is lawful, it is arguable that *VG Wort* and *Copydan* leave no room for contractual restrictions on private copying, provided fair compensation is paid.<sup>1253</sup>

However, absent express authorisation from the rights holder or their representative—or application of national doctrines of implied consent—end-users face legal uncertainty. After *ACI Adam* and its progeny, many online reproductions by Internet users probably originate from unauthorised sources, a term that may include all content not lawfully acquired, accessed or made available by the rights holder. As for the unauthorised source of an act of communication to the public, it will be nearly impossible for individuals to ascertain the legal status of the source of reproduction.<sup>1254</sup>

Consequently, initial and subsequent reproductions (downloads) made in the context of most torrent file sharing networks, newsgroups, social networks or cyberlockers, will likely not qualify as private copies. The same holds true for most acts of stream capture, which will in

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<sup>1251</sup> See Jutte, 2015, pp. 7–11, for an analysis of terms of use and restrictions in online music stores and streaming services.

<sup>1252</sup> See Jutte, 2015, pp. 4–6.

<sup>1253</sup> See *supra* 4.4.3.4. See also Jutte, 2015, p. 12.

<sup>1254</sup> See *supra* 4.3.2., on unauthorised sources and the right of communication to the public,

addition risk violating the prohibition on circumvention of TPMs. Hence, such acts will frequently infringe the right of reproduction.<sup>1255</sup>

Finally, uploading copies of works to a cloud storage locker can theoretically constitute private copying, subject to the following conditions. First, access to the locker cannot be public. Second, under the applicable law, the copier must be the individual and not the third party service provider; alternatively, that third party may be authorised to make the copy on behalf of a natural person without prejudicing the application of the limitation.<sup>1256</sup> Third, the copy in question is from an authorised source and does not result from circumvention of TPMs.<sup>1257</sup>

If these requirements are met, Internet users should not be infringing. It will then be incumbent upon Member States to define whether their levy systems already provide fair compensation for such copies (e.g. by levying the media/equipment used therefor) or if it is justified to levy cloud services, which does not currently happen. Failing these requirements, the upload activities probably infringe the reproduction right or, if the upload copy is accessible to the public, the right of communication to the public.<sup>1258</sup>

#### 4.4.4 Limitations Susceptible of Application to Digital Adaptations

As noted above (at 4.2.7), digital adaptations are part of Internet users' daily online activities. Although this dissertation does not focus on the non-harmonised right of adaptation, digital adaptations can trigger the application of certain harmonised exclusive rights and limitations in the InfoSoc Directive.<sup>1259</sup> It is therefore important to address these acts in the context of a potential ACS, even if in practice they are not valued by Internet users as much as the remaining forms of online use examined in this chapter.<sup>1260</sup>

Digital adaptations can involve three exclusive rights: reproduction of the pre-existing work, communication to the public of the pre-existing and derivative works, and adaptation *per se*.<sup>1261</sup> Reproduction and adaptation are not synonyms and can be distinguished as follows:

while reproduction concerns the copying of the particular shape of a work determined by the author, the adaptation right covers changes to the underlying corpus mysticum...to the intellectual substance of work.<sup>1262</sup>

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<sup>1255</sup> Depreeuw & Hubin, 2014, pp. 28–29; von Lewinski, 2005, pp. 7–8. Arguing that extending the limitation to stream-ripping would contravene the three-step test, see Jutte, 2015, pp. 14–18. See also Goldstein & Hugenholtz, 2013, pp. 370–373, questioning whether private copying levies should also compensate for unlawful use (e.g. P2P), and whether such levies and corresponding exemptions should survive in a DRM controlled digital environment.

<sup>1256</sup> See Depreeuw & Hubin, 2014, p. 71, discussing German case-law on online personal video recorders.

<sup>1257</sup> N.B. some national laws allow circumvention for purposes of private copying. See *supra* 4.4.1.2.

<sup>1258</sup> See *supra* 4.3.2.2.

<sup>1259</sup> On the exclusion from the scope of analysis of the adaptation right, see *supra* Cf. *supra* 1.3.

<sup>1260</sup> See Handke et al., 2015, Appendix 2, with results from a survey of a representative sample of the Dutch population on different configurations of an ACS. These results show that individuals do not value significantly the inclusion of a right to create digital adaptations in an ACS. For the perspective of creators on digital adaptations, see Noll et al., 2012, pp. 53–54, reporting on survey data from the Netherlands. This data shows that creators “express little appreciation for adaptation/remixing, more appreciation for stronger copyright control”, and that “30 to 60 percent of Dutch creators feels financially threatened by adaptation/remixing.”

<sup>1261</sup> Triaille et al., 2013, p. 459.

<sup>1262</sup> P. Bernt Hugenholtz & Senftleben, 2011, p. 26.

This distinction finds support in international law. The BC's broad and technology neutral formulation of the reproduction right does not include reproductions in a "transformed manner" and is distinct from specific exclusive rights to make transformative uses. Such rights include translations in Article 8, adaptations (arrangements and other alterations) in Article 12, and cinematographic adaptations in Article 14(1).<sup>1263</sup> These rights are in turn distinct from the protection of the translation or adaptation as a protected work.<sup>1264</sup>

EU law does not harmonise the exclusive right of adaptation. However, all EU Member States are part of the BC, as well as WCT and TRIPS, which incorporate by reference BC provisions on adaptation. As a result, the right is part of all Member States' laws as either a standalone provision or part of the reproduction right.<sup>1265</sup> Hence, the copyright regulation of transformative uses in the EU partly takes place at national level. This includes the definition of the exact contours of the adjacent rights of reproduction and adaptation, and the protection of independent works.<sup>1266</sup>

The *acquis* allows some flexibility in the regulation of digital adaptations, partly resulting from legislative omission.<sup>1267</sup> The copyright directives contain a right of translation/adaptation only in respect of computer programs and databases, although it is debatable whether the BC protects such types of work.<sup>1268</sup> On the other hand, limitations in Article 5 InfoSoc Directive do not apply to the adaptation right but merely to reproduction and communication to the public.<sup>1269</sup> This leads some authors to consider that the *acquis* leaves "ample unregulated space with regard to the right of adaptation", to be shaped for example through determination of infringement criteria.<sup>1270</sup>

Some Member States use this flexibility to enable free non-commercial online transformative uses. German law, for instance, recognises a free adaptation/use rule ("Freie Benutzung"). In the Netherlands, the "new work" exemption provides a carve-out from the right of adaptation. Outside Europe, Canadian law has implemented a new limitation for UGC.<sup>1271</sup> Another approach for maximising this flexibility is through a broad application of the limitations to harmonised rights susceptible of privileging adaptations, namely quotation, incidental inclusion, and

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<sup>1263</sup> See: P. Bernt Hugenholtz & Okediji, 2008, pp. 14–15; von Lewinski, 2008, p. 140.

<sup>1264</sup> Dreier, 2006; von Lewinski, 2008. On translations and adaptations as protected works, see Art. 2(3) BC. Article 12 BC grants authors the "exclusive right of authorizing adaptations, arrangements and other alterations of their work". In essence, the right covers transformative uses (excluding translations and cinematographic adaptations of works under Arts 8 and 14 BC) where the pre-existing work is perceptible, but not merely reproduced. This use goes beyond literal reproduction and influences the work's *corpus mysticum*.

<sup>1265</sup> Borgne-Bachschmidt et al., 2008, p. 188; Dreier, 2006, pp. 40, 56; Eechoud et al., 2009, pp. 83–84.

<sup>1266</sup> Dreier, 2006, p. 55; Triaille et al., 2013, p. 461; von Lewinski, 2008.

<sup>1267</sup> P. Bernt Hugenholtz & Senftleben, 2011, pp. 2, 26–27; P. Bernt Hugenholtz, 2012, p. 55; Senftleben, 2013b, p. 90.

<sup>1268</sup> Arts 4(1)(b) Software Directive and 5(b) Database Directive. See Dreier, 2006, pp. 12–13, 40.

<sup>1269</sup> Eechoud et al., 2009, pp. 83–84, 100. See *infra* 4.4.4.

<sup>1270</sup> P. Bernt Hugenholtz & Okediji, 2008, pp. 14–15; P. Bernt Hugenholtz & Senftleben, 2011, pp. 2, 26. See also Eechoud et al., 2009, pp. 83–84, justifying this lack of harmonisation on the close connection of the issue with moral rights and the need to first harmonise the concept of work of authorship, as applied to derivative works.

<sup>1271</sup> See Art. 29.21 Canadian Copyright Act on "Non-commercial User-generated Content" (introduced in 2012 through the Bill C-11 – "Copyright Modernization Act"). For critical comments, see Ficsor, 2012a, arguing that such limitation is in violation of international treaty obligations under the BC (minimum right of adaptation and moral right of integrity) and the WCT (right of making available), as well as the three-step test.

parody.<sup>1272</sup> The adoption of either approach in the *acquis*, or their combination, would probably require legal reform.<sup>1273</sup>

In theory, a non-harmonised exclusive right of adaptation could cover all digital adaptations that effect a change to a work's *corpus mysticum*, including most types of UGC. However, there is legal uncertainty on the amplitude of such a right, due to variation in national implementation and the broad scope of the harmonised rights of reproduction and distribution, especially after *Infopaq I* and *Art & Allposters*.<sup>1274</sup>

In *Infopaq I*, for instance, the Court considered the copying of eleven words in the title of a newspaper article to be a “reproduction in part”.<sup>1275</sup> This has led some authors to argue that there will always be a reproduction in part in UGC content, given the derivative works’ reliance on the pre-existing work.<sup>1276</sup> If a reproduction is found, any subsequent unrestricted online dissemination of the derivative work will likewise trigger the right of communication to the public in respect of the reproduced part of the pre-existing work.<sup>1277</sup> The broad interpretation of the right of distribution in *Art & Allposters* further delimits the potential scope of a right of adaptation.<sup>1278</sup>

In short, adaptations by Internet users that are not *de minimis* or covered by contractual arrangements will constitute copyright infringement unless expressly exempted under national law or an EU level limitation susceptible of application to transformative uses, namely quotation, incidental use, or parody.<sup>1279</sup> Therefore, the following paragraphs examine the potential application of these limitations in the InfoSoc Directive to digital adaptations.

#### 4.4.4.1 Quotations

Article 5(3)(d) InfoSoc Directive contains a limitation to the rights of reproduction and communication to the public regarding

quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated,

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<sup>1272</sup> P. Bernt Hugenholtz & Senftleben, 2011, pp. 26–27, making reference to Art. 24 German Copyright Act, and Arts 13 and 18b (for parody) Dutch Copyright Act. Senftleben, 2013b, p. 89, also makes reference to the exemption for “independent new works” that result from an adaptation provided in Art. 5(2) Austrian Copyright Act. Regarding this option, the most common suggestion is the broadening of the quotation limitation to include transformative uses typical in UGC. See: in France, Lescure, 2013; in the Netherlands, Commissie Auteursrech, 2012 (the latter a report from the Dutch Copyright Commission). Both examples are discussed in Triaille et al., 2013, pp. 522–525.

<sup>1273</sup> Triaille et al., 2013, p. 460.

<sup>1274</sup> Eleonora Rosati, 2015a. The intricacy in defining the scope of an adaptation right is illustrated by the fact that this is not even typically subject to collective rights management on a voluntary basis. See Gervais, 2009, pp. 848–849.

<sup>1275</sup> CJEU, *Infopaq I*, ¶¶48, 51.

<sup>1276</sup> Triaille et al., 2013, p. 460, following Ficsor, 2012a, p. 2.

<sup>1277</sup> Triaille et al., 2013, p. 460.

<sup>1278</sup> Eleonora Rosati, 2015a.

<sup>1279</sup> Borgne-Bachschmidt et al., 2008, p. 188; Triaille et al., 2013, pp. 501–504, 522–525. N.B. the agreements mentioned are between rights holders and online platforms, and aim at filtering uploaded content within a notice-and-takedown system (e.g. YouTube’s Content ID system). The agreements include revenue-sharing contracts between owners of pre-existing works and UGC platforms.

and that their use is in accordance with fair practice, and to the extent required by the specific purpose.

The wording closely follows Article 10 BC on “certain free uses of works”, namely its paragraphs 1 (on quotations) and 3 (on indication of source and author). Limitations in the *acquis*, of course, are to be interpreted in light of the applicable rules in the BC.<sup>1280</sup>

At national level, Member States have implemented the quotation limitation to varying degrees. While most countries accept the contractual disposition of the limitation, many only allow reproduction of relatively small parts of the pre-existing work, some require that the “intellectual legacy” of said work is respected, while a few bar quotation for commercial purposes or where it affects the quoted work’s commercial exploitation.<sup>1281</sup>

The directive’s provision is broad in relation to its purpose: criticism, review or similar. That broad scope, indicated by the phrase “such as”, linked to a context requirement, is reduced by a series of cumulative conditions.<sup>1282</sup>

First, the quoted work must have been “lawfully made available to the public”, i.e. with the rights holder’s consent,<sup>1283</sup> or under a legal licence.<sup>1284</sup> This aligns with the CJEU’s approach in *Painer*, where it understood the requirement as meaning the act of making that work available to the public under Article 3(2) InfoSoc Directive.<sup>1285</sup>

Second, there must be an indication of source, including the author or performer’s name, unless identification of either proves impossible.<sup>1286</sup>

Third, the quotation must be according to “fair practice”. This requirement is derived from Article 10(1) BC, and has prompted scholarly discussion on whether to apply the three-step test in this context.<sup>1287</sup> In the absence of further guidance in the directive or by the CJEU, Member States have significant flexibility in the implementation of this requirement.<sup>1288</sup>

For Dreier, fair practice in the BC does not refer to a “prior existing practice”, but rather to an objective criterion of fairness: “the practice must be fair, in and of itself, according to an objective appreciation”. This includes quotations made in support of and having a connection with the views and ideas of the person making them, and that go beyond providing a substitute for the quoted work.<sup>1289</sup>

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<sup>1280</sup> CJEU, *Painer*, ¶126 (and case law cited therein).

<sup>1281</sup> Triaille et al., 2013, pp. 472–473.

<sup>1282</sup> P. Bernt Hugenholtz & Senftleben, 2011, pp. 14–18; Triaille et al., 2013, p. 464.

<sup>1283</sup> Bechtold, 2006, p. 379; von Lewinski & Walter, 2010, p. 1049. Art. 3(3) BC refers to the narrower concept of “lawfully published”.

<sup>1284</sup> Dreier, 2006, p. 44, with reference to the identical requirement in Art. 10(1) BC.

<sup>1285</sup> CJEU, *Painer*, ¶¶124–128.

<sup>1286</sup> *Ibid.*, ¶¶138–149.

<sup>1287</sup> Ricketson & Ginsburg, 2006, pp. 785–787. *Contra* application of the test in this context, see Bentley, 2016 [paper forthcoming].

<sup>1288</sup> von Lewinski & Walter, 2010, pp. 1049–1050. On national implementations of this requirement, see P. Bernt Hugenholtz & Senftleben, 2011, p. 7.

<sup>1289</sup> Dreier, 2006, pp. 44–45.



Fourth, the limitation is subject to a “context” requirement: a quotation is allowed only to the extent required by the specific purpose for which it is made, which must be criticism, review or similar.<sup>1290</sup> It follows that the quoted work (whatever the extent of use necessary) should be ancillary to the subsequent work, and to the proposition the latter intends to illustrate or prove.<sup>1291</sup> However, the limitation is worded as a prototype and allows quotation for purposes comparable to (“such as”) criticism or review. That is to say, it enables some flexibility in national laws, including, in the view of Hugenholtz and Senftleben, “ample room for the courts to arrive at fair solutions”.<sup>1292</sup>

How then does this limitation apply to online digital adaptations, such as UGC? Despite referring to quotation of pre-existing works in press reports, the CJEU’s findings in *Painer* provide guidance.<sup>1293</sup> The case marks the first explicit consideration of the impact of fundamental rights on the interpretation of limitations.<sup>1294</sup> It identifies the objective of the quotation exemption as striking a fair balance between the rights holder’s right of reproduction in the pre-existing work and the freedom of expression of subsequent users of the same.<sup>1295</sup>

If the conditions for quotation are met, the fundamental right of freedom of expression can prevail over the exclusive right, irrespective of the copyright-protected nature of the “quoting content”.<sup>1296</sup> For digital adaptations, this means that *even if* a UGC object quoting a pre-existing work does not itself qualify as a derivative work, it can benefit from this limitation.<sup>1297</sup>

This consideration of freedom of expression and information, coupled with the non-harmonisation of the adaptation right, could open the door for a broad understanding of quotation. Yet, it would be difficult to place within this limitation’s scope the broad swathe of acts included in digital adaptation. Regardless, some authors argue that if national laws fully use the flexibility provided by the directive’s prototype, this limitation could privilege a significant amount of use.<sup>1298</sup>

The application of this conclusion to digital adaptations is debatable. First, not all digital adaptations are for purposes of criticism, review or similar. Many constitute forms of creative self-expression with different goals (e.g. artistic, entertainment, informational), which would be difficult to reconcile with the limitation.

Furthermore, the requirement that the pre-existing work has been lawfully made available to the public likely disqualifies the use of pre-existing works from unauthorised sources. This includes,

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<sup>1290</sup> This condition is derived from the requirement in Art. 10(1) BC that the extent of the quotation does not exceed what is justified by the purpose. See: P. Bernt Hugenholtz & Senftleben, 2011, pp. 15–16; von Lewinski & Walter, 2010, p. 1050.

<sup>1291</sup> von Lewinski & Walter, 2010, p. 1050.

<sup>1292</sup> P. Bernt Hugenholtz & Senftleben, 2011, p. 15

<sup>1293</sup> Triaille et al., 2013, p. 473.

<sup>1294</sup> Leistner, 2014, p. 585.

<sup>1295</sup> CJEU, *Painer*, ¶134.

<sup>1296</sup> *Ibid.*, ¶¶135–137.

<sup>1297</sup> Triaille et al., 2013, p. 474.

<sup>1298</sup> P. Bernt Hugenholtz & Senftleben, 2011, pp. 14–18, exemplifying with Art. 15a Dutch Copyright Act. For a broad interpretation of the quotation limitation in Art. 10 BC, see Bentley, 2016 [paper forthcoming].

for example, copying parts of a work accessed via P2P systems or unauthorised cyberlockers, as well as works stripped of TPMs.<sup>1299</sup>

In addition, many non-commercial digital adaptations fail to meet the requirement of indication of source. This may be rooted in ignorance of the law by end-users, coupled with insufficient or inadequate availability and application of RMI by rights holders.<sup>1300</sup> Nevertheless, both the InfoSoc Directive and *Painer* clarify that only impossibility (not inconvenience) justifies the failure to meet this requirement.<sup>1301</sup> While for some UGC indication of source and name is impossible, in other cases it is merely inopportune, in which case the limitation cannot apply.

Finally, guidance is required as to what constitutes fair practice in the context of UGC. Without a doubt, in the field of amateur creativity, many digital adaptations would struggle to comply with a high criterion of objective fairness, thereby setting aside the privilege of the limitation.

In sum, the quotation limitation provides a flexible prototype to exempt certain transformative uses from authorisation. In that sense, it also functions as a limitation to the (non-harmonised) adaptation right. Flexibility is inherent to its “context requirement”, allowing acts comparable to criticism and review. After *Painer*—which recognised a fundamental rights justification for quotation—acts meeting the requirements of Article 5(3)(d) InfoSoc Directive deserve additional consideration, and should weight significantly in favour of users and against application of exclusivity. However, when transposed to the online environment, the joint application of the limitation’s requirements and its inherent (limited) scope will fail to exempt a large number of digital adaptations, while creating legal uncertainty for other types of use, where doubts subsist on the meaning of each requirement.

#### 4.4.4.2 Incidental Inclusion

Article 5(3)(i) InfoSoc Directive allows Member States to introduce a limitation to the rights of reproduction and communication to the public for the “incidental inclusion of a work or other subject-matter in other material”. No identical parent provision exists in international treaties and the CJEU is yet to rule on the provision.<sup>1302</sup> As with parody, this limitation is subject to the three-step test.

To qualify for the limitation, the pre-existing work must be “included” in the subsequent work, becoming part of it.<sup>1303</sup> The term “incidental” refers to taking that is accidental or unintentional,

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<sup>1299</sup> See *supra* 4.4.3.6, on the challenges of qualifying what is an “unlawful source” for private copying,

<sup>1300</sup> Triaille et al., 2013, pp. 474–475.

<sup>1301</sup> CJEU, *Painer*, ¶¶139–148.

<sup>1302</sup> N.B. Art. 10*bis*(2) BC allows union countries to determine the conditions under which, for the purpose of reporting current events, works seen or heard in the course of said events may be reproduced and made available to the public. Hence, this provision may be used to exempt certain incidental inclusions of works. See P. Bernt Hugenholtz & Okediji, 2008, p. 52: “the provision attempts to balance the need of reporters to provide ample coverage of current events by taking pictures or recording such events, and the interests of authors whose works may be captured incidentally by such recording”. On the conditions of application of the provision, see Ricketson, 2003, pp. 18–19.

<sup>1303</sup> von Lewinski & Walter, 2010, p. 1053.

as opposed to significant or merely in the background; this is therefore a *de minimis* limitation.<sup>1304</sup>

To distinguish an incidental from a significant inclusion, commentators focus on factors like the portion used and the intent of the subsequent user.<sup>1305</sup> In a recent study for the EU commission, for example, it is said that the limitation applies to

situations in which the purpose of the user was not to capture the sounds or the images at stake but where such capture happened at the occasion of the recording of another element which was the real subject matter of the recording/creation by the user.<sup>1306</sup>

A typical example in the field of UGC is that of a recording and subsequent online dissemination of a private or semi-public event (e.g. birthday party, wedding) where in the background it is possible to hear a protected sound recording.<sup>1307</sup>

In theory, this optional limitation could provide some coverage for a subset of UGC activities, as exemplified above. Yet, the absence of implementation in many Member States, and its limited implementation in others—by circumscribing it to certain types of work or purpose (e.g. reporting on current events)—leads instead to legal uncertainty for end-users and complex challenges for pan-EU solutions on this basis.<sup>1308</sup> It would conceivably be possible to address this challenge by placing *de minimis* use, such as most incidental inclusion, outside the scope of copyright.<sup>1309</sup> However, that was not the normative choice of the EU legislature.

#### 4.4.4.3 Caricature, Parody and Pastiche

Article 5(3)(k) InfoSoc Directive contains a limitation to the rights of reproduction and communication to the public in respect of use “for the purpose of caricature, parody or pastiche”. The terms are not defined in the directive, leaving Member States with some flexibility for implementation, subject to the three-step test.

The dictionary definition of these terms clarifies their ordinary meaning. A caricature is a “[g]rotesque or ludicrous representation of persons or things by exaggeration of their most characteristic and striking features.”<sup>1310</sup> The key element for copyright purposes is the exaggeration of certain features of the adapted work (e.g. painting or photograph).<sup>1311</sup> A parody refers to

A literary composition modelled on and imitating another work, esp. a composition in which the characteristic style and themes of a particular author or genre are satirized by being applied to inappropriate or unlikely subjects, or are otherwise exaggerated for comic effect.

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<sup>1304</sup> Bechtold, 2006, p. 380; Senftleben, 2004, p. 262; Triaille et al., 2013, pp. 483–487; von Lewinski & Walter, 2010, p. 1053. von Lewinski & Walter, 2010, state that the included “work or other subject matter must not have any compelling relation to the other material and therefore must be void of any significance for that material.”

<sup>1305</sup> Bechtold, 2006, p. 380.

<sup>1306</sup> Triaille et al., 2013, p. 482.

<sup>1307</sup> Triaille et al., 2013, pp. 482–483.

<sup>1308</sup> Triaille et al., 2013, pp. 483–487.

<sup>1309</sup> This is suggested by Senftleben, 2004, p. 262.

<sup>1310</sup> OXFORD ENGLISH DICTIONARY, *Caricature*, <http://www.oed.com/view/Entry/27973?rskey=rPVzu8&result=1&isAdvanced=false#eid> (accessed 30.04.2016).

<sup>1311</sup> von Lewinski & Walter, 2010, p. 1055.

In later use extended to similar imitations in other artistic fields, as music, painting, film, etc.<sup>1312</sup>

The treatment of the reproduced or adapted work or its features in an ironic, satiric or comical way is the central feature of parodies.<sup>1313</sup> A pastiche is usually perceived as an “imitation of style”,<sup>1314</sup> but its definition includes any work

incorporating several different styles, or made up of parts drawn from a variety of sources...  
A work, esp. of literature, created in the style of someone or something else; a work that humorously exaggerates or parodies a particular style.<sup>1315</sup>

It is clear that some overlap exists between the definitional meanings of caricature, parody or pastiche. No international treaty contains a provision identical to Article 5(3)(k) InfoSoc Directive, although it has been argued that the use of parts of works for criticism or review purposes constitutes a form of quotation falling under Article 10(1) BC.<sup>1316</sup> Most Member States have not expressly incorporated the limitation in their copyright legislation, although in a number of them a similar effect is achieved by application of the constitutional right of freedom of expression or general principles of law. Furthermore, in certain countries, some acts of parody are subsumed within the quotation limitation.<sup>1317</sup>

In *Deckmyn*, the CJEU clarified important aspects of how the provision applies to cases of parody.<sup>1318</sup> It stated that “parody” is an autonomous concept of EU law which has two essential characteristics: evoking an “existing work while being noticeably different from it”; and, “to constitute an expression of humour or mockery”.<sup>1319</sup> Beyond those characteristics, it does not have to possess “original character of its own” or fulfil any additional conditions that do not derive from the usual meaning of the term or from the wording of the directive.<sup>1320</sup>

Furthermore, the Court recognised that parody is justified on the basis of freedom of expression. As a result, application of the limitation must balance that fundamental freedom of users with the interests and rights of affected rights holders, which in this case may include legitimate interests in objecting to a discriminatory parody.<sup>1321</sup>

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<sup>1312</sup> OXFORD ENGLISH DICTIONARY, *Parody*, <http://www.oed.com/view/Entry/138059?rskey=DnlSIH&result=2#eid> (accessed 30.04.2016).

<sup>1313</sup> Similarly, von Lewinski & Walter, 2010, p. 1055.

<sup>1314</sup> von Lewinski & Walter, 2010, p. 1055.

<sup>1315</sup> OXFORD ENGLISH DICTIONARY, *Pastiche*, <http://www.oed.com/view/Entry/138594?rskey=9UINNb&result=1&isAdvanced=false#eid> (accessed 30.04.2016).

<sup>1316</sup> Senftleben, 2004, p. 194.

<sup>1317</sup> Triaille et al., 2013, p. 482.

<sup>1318</sup> For commentaries to the case, see European Copyright Society, 2014b; Eleonora Rosati, 2015b.

<sup>1319</sup> CJEU, *Deckmyn*, ¶¶14–17, 20. In contrast, the AG contended that the concept of parody possesses two basic features: “structural”, as the parody is a copy and a creation (i.e. a derivative work); and “functional”, as parodies have a subject (an earlier work or a different reference point), a (humorous) effect and content (which may trigger the application of fundamental rights). See *Opinion AG in Deckmyn*, ¶¶46–48, 65–67, 80–85.

<sup>1320</sup> CJEU, *Deckmyn*, ¶¶21–24, 33.

<sup>1321</sup> *Ibid.*, ¶¶25–27, 32–34. In light of the parody in question in the particular case, the Court noted the potential application of the principle of non-discrimination based on race, colour and ethnic origin, as confirmed, *inter alia*, by Art. 21(1) Charter, in which case copyright owners “have, in principle, a legitimate interest in ensuring that the work protected by copyright is not associated with such a message.” CJEU, *Deckmyn*, ¶¶30–31.

As regards online use, the patchwork national landscape resulting from different implementations of the limitation is a driver for legal uncertainty. Despite the encouraging ruling in *Deckmyn*, only a subset of non-commercial UGC would likely qualify under the parody limitation (or under an extended version of the quotation limitation). Furthermore, there is a risk that many parodies made available online will constitute copyright infringement in certain Member States, even if exempted in others.

#### 4.4.4.4 Interim Conclusions

There are three limitations to the reproduction right in the InfoSoc Directive susceptible of application to non-commercial digital adaptations: quotation, incidental inclusion, and caricature, parody and pastiche. The analysis shows these limitations to be insufficient *per se* to insulate Internet users from a significant number of infringement claims in the context of UGC.<sup>1322</sup>

Even the combination of a broad interpretation of the three limitations would probably fail to exempt such activities from authorisation, or to tangibly improve legal certainty in this field.<sup>1323</sup> Instead, the more likely outcome is that users and platforms adapt their online behaviour to the most restrictive interpretation available for each limitation as a common denominator. This would lead to an overall *de facto* reduction of available exempted space.<sup>1324</sup>

For some scholars, the harmonisation of the three limitations *and* their broad interpretation could cover the majority of UGC use, or at least the “most valuable” use from the viewpoint of freedom of expression and development of culture. However, even these scholars recognise the need for legislative change to the limitations, including making them mandatory, unwaivable, and for the sole benefit of their creators.<sup>1325</sup>

Thus, if the objective is to exempt the majority of digital adaptations, copyright reform is necessary. Absent harmonisation of the right of adaptation at EU level, Member States have some margin of discretion to recognise free uses or comparable limitations for non-commercial digital adaptations or subsets thereof.<sup>1326</sup> Yet, that margin is narrow. This is so, first, as a result

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<sup>1322</sup> For some commentators, other approaches could achieve the objective of allowing UGC. These include fundamental rights (freedom of expression and freedom to conduct a business), the proper consideration of the *ratio legis* or purpose of a limitation, and theories of implied consent and misuse/abuse of copyright. See Triaille et al., 2013, pp. 504–510, 522. On implied licences and tolerated use, see Gervais, 2009, pp. 868–870 (discussing enforcement issues in the UGC context), and Wu, 2007 (introducing the concept of “tolerated use”).

<sup>1323</sup> *But see* Triaille et al., 2013, p. 519, arguing that “none of the exceptions taken separately could cover the great majority of UGC works; only by considering several exceptions does one cover, in our view, the majority of UGC.” In the same study, the authors conduct a detailed analysis at EU and Member State level and reach this conclusion. Cf. Triaille et al., 2013, pp. 464–510.

<sup>1324</sup> Geiger, 2015b, p. 14; Triaille et al., 2013, pp. 504–510, 522.

<sup>1325</sup> Triaille et al., 2013, pp. 524, 534–541. The authors would combine this with making the relevant limitations mandatory and at least quotation and parody unwaivable by contract, they would further make clear that only the individual creators would benefit from the limitations, as opposed to UGC platforms.

<sup>1326</sup> Borgne-Bachschmidt et al., 2008, pp. 188–189, noting that “[a]bsent harmonization of the adaptation right, Member States remain autonomous and may elect to codify exceptions or limitations to this right to permit certain non-commercial transformative uses.” See P. Bernt Hugenholtz, 2012, p. 55: “Member states remain free to provide for limitations and exceptions to the right of adaptation at their own discretion, subject only to the ‘three-step test.’” See also Triaille et al., 2013, p. 504.

of national provisions on moral rights, namely attribution and integrity.<sup>1327</sup> Second, a potential limitation for transformative uses would be subject to the three-step test as regards its impact on the adaptation right (at national level) and, especially, the harmonised right of reproduction.<sup>1328</sup> The CJEU's broad interpretation of such a right (e.g. in *Infopaq I* and *Murphy*), and strict reading of limitations (e.g. in *ACI Adam* and *OSA*), further hinders that flexibility.

## 4.5 Conclusions

The online activities of Internet users can be categorised into different types of act: browsing, downloading, streaming, stream capture/ripping, uploading, linking, and digital adaptation. These acts are subject to the harmonised exclusive rights of reproduction and communication to the public in Articles 2 and 3 InfoSoc Directive. Digital adaptation is also subject to the non-harmonised right of adaptation, a BC minimum right, partially recognised in the Software and Database Directives.

The determination of which rights apply to which use is challenging in the online environment, largely due to the possibilities for fragmentation and overlap of rights. For example, acts of uploading may involve restricted reproduction and making available of works, whereas UGC can involve partial reproduction of the pre-existing work, its adaptation, and communication to the public. Moreover, these rights may be held by different rights holders across different territories.

The chapter focuses on harmonised rights. It shows that these rights are interpreted broadly by the CJEU, in a combination of technical and economic approaches, which safeguard for rights holders most new technological avenues of exploitation with commercial significance. A by-product of this approach is the increased risk of infringement and legal uncertainty for individuals in their online activities.

On the one hand, the prevailing understanding of the reproduction right qualifies copies in the technical sense as legally relevant. In this way, the right is extended to most digital reproductions of works, as these are technically required for online consumption, manipulation, and dissemination of content.

On the other hand, the application of the right of communication to the public to digital networks by the CJEU has seen the development of criteria—public, new public, specific technical means, profit-making nature—in a sometimes inconsistent way. The Court's case law at times extends and at times contracts the scope of the right, creating legal uncertainty in its interpretation.

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<sup>1327</sup> Borgne-Bachschtmidt et al., 2008, pp. 188–189; Triaille et al., 2013, pp. 462–464. The latter study states “that the condition of acknowledgement of the source constitutes, as a matter of fact, a uniform implementation of the right of attribution in the field of these exceptions” (illustration of teaching and scientific research, reproduction by the press, quotation, and use of political speeches).

<sup>1328</sup> P. Bernt Hugenholtz & Senftleben, 2011, pp. 26–28, arguing that the regulation of the right of adaptation, understood as the “*corpus mysticum* of a ...work – is left to national law making”, being that the InfoSoc Directive only applies to “literal reproduction”. See also Green Paper Copyright in the Knowledge Economy 2008, p. 20: “Under the Berne convention, a transformative use would be *prima facie* covered by the reproduction right and the right of adaptation. An exception to these rights would have to pass the three-step test. In particular, it would have to be more precise and refer to a specific policy justification or types of justified use. It would also have to be limited to short takings (short passages, excluding particularly distinctive takings), therefore not infringing the right of adaptation”.

Furthermore, the online scope of the right is influenced by the application of contractual and technical restrictions imposed by rights holders.

For example, the exclusive right does not cover hyperlinking if the work was previously accessible online without access restrictions (e.g. subscription pay-walls). However, if the work was subject to such restrictions, any type of link circumventing them is a prohibited communication to the public, as it makes the work available to a new public, irrespective of the prohibition on circumventing TPMs. This is particularly problematic for end-users where the access restriction is placed on the work after an initial period of free accessibility.

Furthermore, it is currently unclear whether linking to a freely available but unauthorised source is making the work available to a new public, and therefore infringing.<sup>1329</sup> Partly due to the extension of the right to linking activities and the relevance of the communication source, a pending case before the CJEU will decide whether the activities of a website operator through a system that allows users to trace and up/download works (like The Pirate Bay) is an act of communication to the public.<sup>1330</sup> It is also not clear whether an upload or upstream transmission of a work to a restricted group (e.g. within a group on a social sharing website) amounts to a communication to the “public” or, instead, a non-public reproduction.

The result of this legal framework is twofold. First, due to the mixed technical and economic design of the rights, the majority of individuals’ non-commercial online activities are subject to exclusive rights. The reproduction right applies theoretically to browsing, downloading, “consumption” of streams, stream capture, certain uploads, and the making of digital adaptations. The right of communication to the public applies to the Internet transmission of streams, certain uploads, and all types of hyperlinking, with the exception of links to freely accessible works. Second, due to the inconsistent design of the rights (mainly their technological dependency and complex criteria) multiple online activities of Internet users are subject to legal uncertainty.

Where exclusive rights apply, it is possible that the non-commercial activities of users are exempted from authorisation by the application of limitations in the InfoSoc Directive. However, the directive restricts the scope of limitations and gives rise to additional uncertainty.

Limitations in the InfoSoc Directive do not apply to software and databases, and the respective sectorial directives leave little room for online use. Most limitations are optional, leading to different levels of implementation and interpretation. Only some limitations are subject to fair compensation, notably private copying. Also, although the relationship between limitations and contract law is unregulated, contractual disposition of limitations is generally possible. Finally, TPM application supersedes the exercise of most limitations for online use, severely hindering digital private copying.

In spite of this, examination of the directive’s objectives leads to the conclusion that limitations are essential for promotion of access to and dissemination of knowledge and culture, as well as for balancing exclusivity with the public interest and fundamental rights. The CJEU recognises

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<sup>1329</sup> This issue is at the core of the following pending cases: CJEU, Reference for Preliminary Ruling, Case C-160/15, *GS Media*; and CJEU, Reference for Preliminary Ruling, Case C-527/15, *Filmsteper*.

<sup>1330</sup> This issue is at the core of the pending case CJEU, Reference for Preliminary Ruling, Case C-610/15, *Stichting Brein v Ziggo*.

this normative function and its role in shaping the scope of (at least some) limitations. Two opposing forces are noticeable in this regard. On one side, the Court applies the strict interpretation doctrine and three-step test to narrow the scope of limitations. On the other, it recognises the need for flexible interpretation of limitations due to the prototypical nature of their wording, the requirements of effectiveness and purposive interpretation, the need for a balancing of interests, and the (external and internal) operation of fundamental rights. In both cases, the principle of autonomous interpretation is used to further the argument.

On balance, the analysis shows that the Court employs the highlighted arguments to mitigate the effects of strict interpretation where a limitation is justified on fundamental rights. (The most relevant deviation from this trend is found in the private copying case law.) This trend should be welcomed, as it is consistent with the InfoSoc Directive's objective of harmonising limitations and fair balance; it is also not contrary to the directive's objective of ensuring a high level of protection, if this is understood as an "optimal" level of protection for rights holders.

In addition, as explored in Chapter 5, this tendency is also consistent with a view that the three-step test is not primarily a restricting clause. Rather, it can be construed as an enabling provision that leaves space for a flexible and functional interpretation of limitations, especially in light of their fundamental rights' justification. Mitigation of the strict interpretation doctrine and a more flexible interpretation of the test allow limitations to strike a balance in copyright law and better achieve the internal market objective.

However, it is undeniable that the design of the directive, together with the Court's interpretation of exclusive rights and limitations—especially when focusing on strict interpretation and the "high level of protection" mantra—skew the legal framework towards the preservation of exclusivity online and loss of legal certainty. Therefore, as a descriptive matter, limitations in the *acquis* are constrained, even if we read them in a flexible way.

The point is illustrated by the examination of how limitations in the InfoSoc Directive apply to the online activities of individuals. The mandatory limitation for temporary copies in Article 5(1) InfoSoc Directive, as interpreted by the Court, exempts browsing copies from the scope of the reproduction right. Still, its application to copies made when (down) streaming content is uncertain. It seems that absent authorisation from the rights holder, this activity fails to meet the requirements of "lawful use" and absence of "independent economic importance".

The private copying limitation in Article 5(2)(b) InfoSoc Directive is susceptible of application to acts of downloading, (down) streaming, stream capture and uploading. The limitation is equally relevant because some of its conditions (non-commercial, fair compensation, and the design of levy systems) are candidates for transplant to legal licence ACS. As interpreted by the CJEU, the limitation does not privilege up/downstream copies made from unauthorised sources. Therefore, the limitation excludes or casts doubt on the legality of a large set of non-commercial online reproductions made by end-users. Uncertainty remains in relation to copies made using cloud services (including private online video recorders), and the possibility of imposing a levy on the respective providers.

Digital adaptations, including transformative uses, have an intricate regulation. On the one hand, due to legislative omission in the *acquis*, these uses may be in part covered by the non-harmonised right of adaptation at national level, separately from the right of reproduction. On the other hand, some of these uses are privileged by limitations to harmonised rights, namely



quotation, incidental inclusion and parody in Article 5(3)(d), (i) and (k) InfoSoc Directive. However, these apparent flexibilities are limited in relation to non-commercial online use.

First, due to the broad interpretation of harmonised exclusive rights by the CJEU, a viable adaptation right would require that the scope of the right of reproduction is delimited to literal reproductions. Second, the scope of the applicable limitations does not necessarily encompass most digital adaptations. Even if the limitations are interpreted broadly and considered jointly, it is doubtful that they are sufficient to privilege a large portion of non-commercial digital adaptations, or seriously reduce legal uncertainty for UGC.

The quotation limitation offers a flexible prototype to privilege certain transformative uses comparable to criticism and review. After *Painer*, the fundamental rights pedigree of the privilege may broaden its scope. Still, its application to online use is constrained by the requirements of context, lawful availability of quoted work, source indication, and fairness.

The incidental inclusion limitation is either not implemented or only partially so in domestic laws. Hence, reliance thereon to exempt even a small subset of (quasi) *de minimis* digital adaptations is doubtful.

The limitation for caricature, pastiche and parody is also implemented unevenly. The CJEU has interpreted the provision in relation to parody, which *Deckmyn* qualified as an autonomous concept of EU law, justified by the fundamental right of freedom of expression. Still, only a portion of non-commercial UGC will qualify as a parody or be covered by an extended version of the quotation privilege. Furthermore, there is a risk that many online parodies are infringing in some Member States, but not others.

In sum, a significant portion of non-commercial online use is subject to exclusive rights and not privileged by limitations in the *acquis*. In many cases, there is appreciable uncertainty in the application of the right or limitation to a use. It seems, however, that the tendency is to extend exclusivity to activities of personal enjoyment and expression—irrespective of their non-commercial purpose—that would functionally not appear to be within the realm of copyright (e.g. linking). Furthermore, the legal framework affords priority to “private choice” contractual and technological measures in shaping the scope of the exclusive right and applicable limitations.

This was already a feature of the relationship between limitations, and contract and TPMs in the design of the InfoSoc Directive. It is reinforced by the CJEU in the relevance afforded to the “authorised source” of the online communication to the public or private copy, as well as the “freely accessible” / “access restrictions” binomial inherent in the new public criterion. Countervailing forces seem to be the purposive interpretation of limitations in light of their fundamental rights justification, and the reinforced nature of fair compensation vis-à-vis contractual dispositions (absent TPM application).

From a normative perspective, at least two insights emerge from this chapter’s analysis. The first is that the current system is at least partly inconsistent with key objectives of the InfoSoc Directive. These include a fair balance of the interests of rights holders and users (and the public interest), enhancing legal certainty, the smooth functioning of the internal market (through the coherent application of exclusive rights and limitations), promoting the development of the information society (and that of new technologies), and fostering the circulation of culture. As noted previously, it is also arguable whether the technically based expansion of exclusive rights and contraction of limitations, at the expense of the aforementioned objectives and without

achieving an “appropriate reward”, adequately meets the goal of providing a “high level of protection” to rights holders, understood as “adequate” or “optimal” protection.<sup>1331</sup>

The second insight relates to the complexity of substantive and territorial fragmentation of overlapping exclusive rights as they apply to mass online use of copyright works. The analysis provided is a snapshot of a volatile moving target, subject to the interpretative winds of the CJEU. If legal reform through ACS is to be effective, its best hope is to rely on models capable of aggregation of rights and enhancing legal certainty. ACS relying on legal licences or mandatory collective management are the best options available in this regard.

If a non-voluntary ACS is the way forward, its admissibility hinges on passing the three-step test, at least for a statutory licence system. As noted in Chapter 3, it is debatable whether the test applies to mandatory collective management, which appears to affect only the *exercise* of copyright. Regardless, due to the contentious nature of the topic, the policy legitimacy of an ACS based on mandatory collective management would benefit from its compliance with the test. For this purpose, it is possible to use the more restrictive option of statutory licensing as an analytical proxy. That is to say, if such a licence is compliant with the test, *a maiore ad minus*, so will be the less restrictive model of mandatory collective management.<sup>1332</sup> In this light, the following chapter examines the consistency of a legal licence ACS with EU copyright law.

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<sup>1331</sup> The connection between a “high level of protection” with creative incentives and “adequate remuneration” for rights holders is patent in recitals 9 and 10 InfoSoc Directive. For the use of “fair balance” and “adequate protection” by the CJEU as teleological arguments to limit a broad interpretation of rights in the copyright *acquis*, see Marcella Favale et al., 2015, pp. 65–68. See also *infra* 5.5.3.

<sup>1332</sup> See *supra* 3.5.