Copyright in the age of online access

Alternative compensation systems in EU copyright law

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5 Copyright Reform: Admissibility of Legalisation under the Three-step Test and the Objectives of EU Copyright Law

5.1 Introduction

It is now clear that copyright law significantly restricts the online use of works by individuals. Strict enforcement of this use is often impossible, costly, or simply undesirable. Moreover, both enforcement and criminalisation of non-commercial use alienate end-users and contribute to diminishing the respect and legitimacy of copyright law. Yet, empirical research shows that individuals are willing to participate in, and pay for, alternative models of access to and use of copyright works, like ACS. Despite facing lower legal hurdles, voluntary ACS are exposed to the risks of substantive and territorial fragmentation of copyright, and are dependent on the participation of rights holders. As a result, they will likely fail to provide a satisfactory all-encompassing legalisation scheme. Conversely, a system based on a compensated limitation and statutory licensing has the potential to enable large-scale non-commercial online use in the EU.

It is therefore crucial to inquire whether such a system is admissible under EU copyright law and consistent with its objectives. This chapter is divided into two parts, each examining one of the following research questions. While the first question is predominantly doctrinal, the second is normative:

Whether and to what extent is a statutory licence ACS for non-commercial online use of works by individuals admissible under EU copyright law, namely the three-step test?

Whether and to what extent is a model of access and remuneration, such as an ACS, consistent with the general aims of copyright and the objectives of EU copyright law?

The first part builds on the previous analysis by assuming that a statutory licence ACS is the best model to regulate mass individual non-commercial online use. A statutory licence has the advantage of dealing with most high-level challenges associated with territorial and substantive fragmentation, representing a comparative advantage in relation to voluntary licences. However, as demonstrated in the previous chapter, exclusive rights of reproduction and communication to the public in the acquis cover many types of online use. Thus, a statutory licence ACS entails an expansion of existing limitations to those rights.

The main obstacle to such expansion is the three-step test, which regulates the introduction of use privileges by national laws. This chapter views the international and EU versions of the test as normative benchmarks for copyright limitations. Because EU law must be interpreted in light of international law, the international provisions in relation to the three-step test feature prominently in the analysis.

The second and more normative part of the chapter examines the consistency of a legalisation model enabling remunerated online access to and use of works with the aims of copyright (i.e. its

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1333 See supra 1.1, making these points, and the analysis in Chapter 4, regarding the reach of exclusive rights to online use. See also Geiger, 2014c, p. 127-

1334 As noted supra at 4.5 the statutory licence ACS is used here as an analytical proxy for mandatory collective management assuming, arguendo, that an ACS based on such a model would be subject to the three-step test.
prevailing rationale) and the objectives of the EU *acquis*. To carry out this examination, this part looks into the dominant theories of copyright in the European legal tradition—natural rights and utilitarianism—, the access and remuneration dimensions of copyright, and the objectives of copyright law, as derived from the recitals of different directives and CJEU case law.

The chapter proceeds as follows. The first part contains the doctrinal analysis of ACS under the three-step test, spanning sections 5.2 to 5.4. Section 5.2 develops an analytical framework for the test: it clarifies the different variants of the test in international and EU law, elucidates its addressees and functions, and maps its potential interpretations. Section 5.3 examines the three-step test to discover the space available for a limitation-based ACS. It analyses the test sequentially but considers it as a whole aimed at balancing competing interests through the principle of proportionality. The analysis is innovative in that it includes normative elements in all steps of the test, and integrates fundamental rights in the assessment of the third step. This balancing exercise identifies a potential conflict with the normal exploitation of works as the main obstacle to ACS. In that light, section 5.4 explores whether certain mechanisms advanced in legalisation proposals—embargo periods and opt-out systems—assist in overcoming such conflict in a way consistent with international law and the *acquis*. The second part of the chapter (section 5.5) examines the legalisation of non-commercial online use as a normative choice between exclusivity and remunerated access. It assesses the consistency of ACS with the rationale of copyright, its access and remuneration dimensions, and the objectives of EU copyright law. Section 5.6 offers a summary and the conclusions of the chapter.

5.2 Analytical Framework of the Three-Step Test

A statutory licence for non-commercial online use requires a limitation to the exclusive rights of reproduction and communication to the public. The introduction of a limitation in the *acquis* is subject to the three-step test in international law, in which light Article 5(5) InfoSoc Directive must be interpreted. That makes it important to understand the web of international rules on the test, its addressees, and possible readings. For that purpose, this section develops an analytical framework for the test, which first clarifies its different variants in international and EU law, and their relationship to each other (5.2.1). This is followed by a discussion of the spectrum of interpretations of the test (5.2.2).

5.2.1 Variants and Interpretation

The test is a set of three conditions that regulate the imposition and permissible scope of limitations to copyright. According to it, copyright limitations must:

1. Be certain special cases,
2. Not conflict with the normal exploitation of the work,
3. Not unreasonably prejudice the legitimate interests of the author or rights holder.
The three-step test was originally suggested by the British delegation at the Stockholm revision conference of the BC. This origin makes it appropriate to analyse the test with reference to its English language versions found in different treaties.1335

In international intellectual property law, there are eight variations of the test in four conventions currently in force: Article 9(2) BC; Articles 10(1) and (2) WCT; Article 16(2) WPPT; and Articles 13, 17, 26(2) and 30 TRIPS. 1336 Articles 17, 26(2) and 30 TRIPS do not refer to copyright but to trademarks, designs and patents. They differ from their copyright counterparts insofar as they expressly mention “limited exceptions” instead of “certain special cases” (in the first step), and the need to take into account the legitimate interests of “third parties” (in the third step). The trademark test, furthermore, omits the second condition, making it in fact a two-step test. In the absence of an explanation in the drafting history of TRIPS, these differences should be resolved through legal interpretation.1337

In the acquis, the main embodiment of the test is Article 5(5) InfoSoc Directive. However, the Software, Database and Rental Right Directives contain substantially similar (if partial) versions it.1338

The myriad tests have different wordings with slightly varying purpose and operation.1339 Still, the copyright versions share a common structure and content in relation to the three criteria.1340 They also share an intentionally general and abstract formulation, intended to enable BC members to accommodate existing national limitations, and afford them discretion on how to give effect to the test.1341 The same lack of specificity makes the test a challenging standard for interpretation, especially in the dynamic context of new technologies.1342

The interpretation of the international law versions of the test should be made in accordance with Articles 31–33 VCLT. As noted in Chapter 1, these rules favour a literal approach, mitigated by systematic (“context”) and teleological (“object and purpose”) interpretation of treaty provisions.1343 The “context” comprises the text of the treaty, including preamble and annexes, together with related agreements and instruments made or accepted by all the parties in relation to the treaty.1336

1335 Pursuant to Art. 37(1) BC the French version prevails in the event of conflict with the English version. The only such linguistic discrepancy is found in the second step, when contrasting the English and French translation of “unreasonable prejudice”. Still, it is possible to reconcile the meaning of both versions. See Peukert, 2005, pp. 29–30; Senftleben, 2004, p. 114.

1336 Christie & Wright, 2014, with a comparative analysis of the three-step tests in international treaties. The test is also included in Art. 11 WIPO Beijing Treaty and Art. 11 WIPO Marrakesh Treaty.

1337 Kur, 2008, pp. 19–20; Senftleben, 2006, pp. 412, 421–422. N.B. Art. 17 TRIPS does not refer to a conflict with the normal exploitation of trademarks (but rather provides an example: “fair use of descriptive terms”), as their primary function is distinguishing goods and services in the course of trade. Cf. EC–Trademarks I, ¶7.664. Kur, 2008, p. 20, notes that the WTO panel reports on the different tests are to be read as not overstating the differences in formulation. For a detailed breakdown of the discrete elements of all tests, see Christie & Wright, 2014.


1339 Christie & Wright, 2014.


to the treaty.\textsuperscript{1344} It only includes documents approved by all signatories to a treaty that are contemporaneous with its ratification.\textsuperscript{1345} These documents include the majority of Agreed Statements to different provisions of the WIPO Treaties.\textsuperscript{1346} The “object and purpose” of a treaty relies on elements like preambles.\textsuperscript{1347}

In certain circumstances, Article 32 VCLT allows recourse to extrinsic elements to the treaty’s text.\textsuperscript{1348} Express reference is made to preparatory works of the treaty, and the circumstances of its conclusion.\textsuperscript{1349} Admissible supplementary materials also include national court decisions, authoritative scholarship, and a wide range of materials.\textsuperscript{1350} Amongst supplementary sources, particular attention should be given to preparatory works in international conventions and reports of panels appointed in the course of procedures of the WTO Dispute Settlement Body.\textsuperscript{1351}

Preparatory works include published documents typically identified as “Actes”, “Documents”, or “Records” of diplomatic conferences preceding and resulting in the conclusion of a treaty or convention.\textsuperscript{1352} They should also include the “uncontested statements” made during the course of preparatory works, which would thus not qualify as “context”.\textsuperscript{1353} This is the case for Professor Ulmer’s statements as Chairman of the Main Committee I of the Stockholm Conference, often relied upon for strict interpretation of the three-step test in Article 9(2) BC.\textsuperscript{1354}

The WTO Panel reports are relevant for the interpretation of the three-step test of Article 13 TRIPS. Despite their limited binding force, the influential nature of the reports in scholarship makes them unavoidable, even when examining Article 5(5) InfoSoc Directive.\textsuperscript{1355}

\begin{itemize}
\item \textsuperscript{1344} Art. 31(2) VCLT.
\item \textsuperscript{1345} Iuliano, 2011, p. 473; Sinclair, 1984, p. 119. Finally, Art. 31(4) VCLT reads: “A special meaning shall be given to a term if it is established that the parties so intended.”
\item \textsuperscript{1346} Ficsor, 2002c, pp. 63–64; Ricketson, 2003, p. 6.
\item \textsuperscript{1347} Ricketson, 2003, p. 6–7; Senftleben, 2004, p. 102; Sinclair, 1984, pp. 117–118.
\item \textsuperscript{1348} Recourse to supplementary materials is allowed to confirm the meaning resulting from the application of Art. 31 VCLT or to determine the meaning of a provision when Art. 31 leads to an interpretation that is unclear or “manifestly absurd or unreasonable.” See Bouthillier, 2011, p. 843; Christie & Wright, 2014, pp. 411–416; Ricketson & Ginsburg, 2006, pp. 197–198; Senftleben, 2004, p. 103; Sinclair, 1984, p. 116.
\item \textsuperscript{1349} “Circumstances of the treaty’s conclusion” are not particularly relevant for this study. They include the “historical background against which the treaty was negotiated, and the individual characteristics and attitudes of the contracting parties.” See Ricketson, 2003, pp. 8–9; Ricketson & Ginsburg, 2006, pp. 197–208. See also Bouthillier, 2011, pp. 859–861.
\item \textsuperscript{1350} Bouthillier, 2011, pp. 854, 861–863; Senftleben, 2004, p. 111.
\item \textsuperscript{1351} Sorel & Eveno, 2011, pp. 820–821, noting that the Dispute Settlement Body refers almost automatically to the VCLT rules in the interpretation of TRIPS.
\item \textsuperscript{1352} Ricketson, 2003, pp. 7–8.
\item \textsuperscript{1353} Bouthillier, 2011, p. 852; Ricketson, 2003, pp. 7–8; Ricketson & Ginsburg, 2006, p. 198; Sinclair, 1984, p. 130. See also Sinclair, 1984, p. 130, finding this the better interpretation and stating that the importance of these elements may be enhanced “by the authority of the person making the statement”.
\item \textsuperscript{1354} Ricketson & Ginsburg, 2006, pp. 190–192, with further analysis.
\item \textsuperscript{1355} Kur, 2008, pp. 32–33, arguing that WTO panel decisions do not qualify as definitive interpretations, subsequent agreements or practices, even after adoption by the Dispute Settlement Body. See also Geiger et al., 2014, pp. 600–601 (WTO Panel Reports are not binding interpretations of the TRIPS test for all members of the agreement or for future WTO panels examining the test), and Shabalala, 2010, p. 149 (WTO Panel Reports bind only the parties to the dispute and concern the debated provisions in its specific context, object and scope).
\end{itemize}
The following paragraphs examine the different versions of the copyright three-step test at international level, starting with the BC (5.2.1.1) and moving on to the WIPO Treaties (5.2.1.2) and TRIPS (5.2.1.3). Subsequently, the investigation turns to Article 5(5) InfoSoc Directive and the extent to which its interpretation should reflect the international tests (5.2.1.4).

5.2.1.1 The Berne Convention and its Relationship to Other Treaties
There is no authoritative interpretation of Article 9(2) BC. The original version of this provision was introduced in the 1967 Stockholm revision conference. It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

The provision applies to the reproduction right and mentions the interests of authors. The analysis of the private copying precedent in Chapter 2 clarifies the mixed nature of the test in Article 9(2) BC. On the one hand, the test is a limiting clause, to be read in a sequential and cumulative manner. On the other hand, due to the abstract nature of the criteria and its compromise nature, the test is flexible enough to accommodate diverse national limitations on the right of reproduction with social, cultural and economic motivations.

As copyright law evolved so did the three-step test, both within the international framework and in regional and national laws. Westkamp aptly describes the evolution as more of a “contemporaneous compromise” than “a rigid obstacle to creating new limitations”. From a relatively moderate scope at inception, the test currently extends (with different wordings) to all rights and rights holders, by virtue of TRIPS and the WIPO Treaties. In addition, as these treaties incorporate Article 9(2) BC by reference, the context of the BC provides common ground for analysis of the subsequent tests.

When considering these “interwoven contexts”, it must be remembered that the object and purpose of the later treaties is more complex, especially due to their reference to notions of

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1356 A definitive interpretation can only be given by the International Court of Justice (Art. 33 BC) but no case has ever been brought before this Court, as dispute resolution procedures under the BC are not deemed effective. Cf. P. Bernt Hugenholtz & Okediji, 2008, p. 21; Iuliano, 2011, p. 471.

1357 For historical background, see Ficsor, 2002b, p. 115ff.; Kur, 2008, pp. 17–18; Senftleben, 2004, pp. 43–82. See also supra 2.3.2.

1358 Ficsor, 2002b, pp. 125–127. See supra 2.3.2.1, referring to the reported statements of Professor Eugen Ulmer, chairman of Main Committee I at the 1967 Stockholm Conference. Cf. Records BC Stockholm 1967, 885. But see Geiger, Gervais, & Senftleben, 2014, pp. 609–611, noting that “…one cannot derive the entire interpretation from these statements”.


1360 Westkamp, 2008b, p. 11.

1361 Arts 13 TRIPS, 10 WCT (and its Agreed Statements), and 16(2) WPPT, including the Agreed Statements to the latter treaties.

balance and public interest. For example, the WCT Preamble introduces considerations of competing interests to those of authors and “the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention.”

The mention of the BC highlights a “balance” dimension not immediately apparent in the text of that convention, but nevertheless unanimously recognised and adhered to by the WCT parties. Ricketson and Ginsburg find the reference meaningful and indicative of “the need to interpret Berne provisions in a qualified way”. It is also consistent with the aforementioned diplomatic compromise nature of the BC.

Like the BC, TRIPS affords a central role to “balance”, namely when dealing with the objectives and principles of the treaty in its preamble and Articles 7 and 8. These provisions consider intellectual property rights as functional tools for the promotion of trade, technological development, and economic and social purposes, to be balanced with competing and often rival interests of users. The emphasis on public interest, some scholars argue, increases the space for limitations.

This brief excursion shows that the three-step tests in TRIPS and the WIPO Treaties can be interpreted in a more flexible way than the BC test, if read in light of the object and purpose of the respective treaties. The point is reinforced for online limitations, due to temporal issues on interpretation. Article 31(1) VCLT mandates that interpretation of the ordinary meaning of a provision is fixed at the date of conclusion of the treaty text. In the BC, that date significantly precedes the digital age and refers to a substantially different technological and economic context, where the definition of “primary” exploitation markets was more transparent and stable. Accordingly, the more up to date tests in TRIPS and the WIPO Treaties are of greater

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1363 The attention to the object and purpose of the treaty is fully consistent with the rules of the VCLT. Cf. Geiger et al., 2014, p. 597.-
1364 The preamble to the WPPT contains similar wording but omits the reference to the BC and replaces “authors” with “performers and producers of phonograms”. In the analysis the position is taken that the ordinary meaning of the terms “rights” (of authors) and “interests” (of the general public) do not translate into different hierarchical value (e.g. of rule vs exception), but rather their different technical nature: rights are specifically regulated, whereas the notion of interests is broader. Cf. Kur, 2008, pp. 46–47.
1368 Geiger & Schönherr, 2014b, pp. 442–444 & n.130. N.B. some authors argue that the benchmark for assessing the minimum safeguards for intellectual property rights is not a “property-biased approach” but rather one focused on competition and the prevention of international market failure. See Kur, 2008, pp. 36–39, arguing for a greater interpretative relevance of Arts 7 and 8 following the Doha Declaration (2001). See also Geiger et al., 2014, p. 597-.
1369 Ricketson, 2003, p. 7; Ricketson & Ginsburg, 2006, pp. 208–209. The conclusion is not affected by the “special agreement” nature of the WIPO Treaties under Art. 20 BC, which means they should not derogate from existing obligations under the BC and comply with the incorporated substantive provisions. It is likewise not contrary to the similar non-derogation provision in Art. 2(2) TRIPS. But see Ricketson & Ginsburg, 2006, pp. 210–211, with an apparently different view.
1371 Cf. Westkamp, 2008b, pp. 7–8. For example, in the music sector, the primary market is characterised by single authors (writers, lyricists, composers) directly contracting with music publishers or the record company, whilst the
relevance to assessment of limitations in the digital age. At the very least, they warrant exploring a flexible interpretation of the test.

5.2.1.2 The WIPO Treaties and the Agreed Statements

The three-step test in the WCT applies only to authors, like the test in the BC. Unlike the BC version, the WCT test extends beyond the reproduction right, including limitations to all WCT-rights (paragraph 1) and “when applying the Berne Convention” (paragraph 2). The latter reference fulfils an “additional safeguard function” regarding exclusive rights in the BC. For its part, the WPPT test benefits performers and producers of phonograms.

The tests in the WIPO Treaties are accompanied by near identical Agreed Statements. The Agreed Statement on Article 10 WCT, adopted mutatis mutandis for Article 16 WPPT, states:

It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.

It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.

This statement is between all parties to the WCT, which makes it “context” for interpretation of the treaty. That status means, first, that it ranks higher than supplementary sources (e.g. most statements in preparatory works) and, second, that it must be read in direct relation to the treaty text.

One of the implications is that the Agreed Statements should be interpreted in light of the preambles of the WIPO Treaties. As noted, these preambles accentuate the need for balance between authors/rights holders and the public interest. In this way, the Agreed Statements open the door for a flexible interpretation of the test, taking into account policy considerations and relevant societal values in assessing digital limitations.
This interpretation is, on the one hand, supported by the drafting history of the WCT—which is populated with references to balancing concerns—and, on the other hand, consistent with the test’s technology neutral character, as it allows it to adjust to an evolving landscape of copyright use. With a view to a good faith interpretation, the Agreed Statements and preamble could even “retroactively infuse meaning into the norms of the BC as incorporated into TRIPS and the three-step test”.

Without a doubt, the Agreed Statements are difficult to reconcile with rigid sequential interpretation of the test that prevents extension of limitations to the digital environment. A more defensible interpretation views them as guidelines for: (1) the adaptation and extension of existing limitations to BC rights to the digital environment, including reproduction and certain forms of communication to the public; and (2) the creation of new limitations for digital use, which go beyond the scope of those already in existence, such as making available online.

On guideline (1), it is noteworthy that the Agreed Statement’s second paragraph allows retention of existing limitations valid under the BC but theoretically in violation of the WCT test. The result is to neutralise restrictive readings of Article 10(2) WCT, avoiding automatic rejection of online limitations. In this context, the main flexibility tool that the test provides for national policy makers is the payment of remuneration as a means to prevent unreasonable prejudice (or, for some commentators, to avoid conflicts with normal exploitation).

Regarding guideline (2), on new limitations for digital use, the Agreed Statement opens the door for a flexible interpretation of the test and properly justified deviations from the principle of exclusivity in the online realm. This is relevant for a statutory licence ACS, which partially relies on pre-WCT limitations extended to the digital environment and, at least regarding the making available right, on a new limitation.

5.2.1.3 The Agreement on Trade-Related Aspects of Intellectual Property Law

The three-step test in TRIPS is a compromise “grandfathering-clause”. The inclusion of the test in TRIPS gave rise to fears that a norm of international copyright law would be transformed into a norm of international trade law, degrading its normative content and further hindering the balance between access and exclusivity. This version of the test replaces “authors” with “the

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1379 Geiger et al., 2014, pp. 589–591; Senftleben, 2013c, pp. 17–18, referring to the basic proposal for the WCT and the Minutes of Main Committee I, which clearly reflect the different balancing concerns of national delegations.
1380 Mihály Ficsor, 2012, p. 6, emphasising the technology-neutral nature of the test.
1382 Geiger et al., 2014, p. 610.
1383 Geiger et al., 2014, pp. 591, 617, 625–626; Senftleben, 2013c, pp. 17–19. See also Christie & Wright, 2014, pp. 418–419, arguing on the basis of the wording of Art. 10(1) WCT and the Agreed Statement that member states are not restricted to implementing exceptions in the digital environment only in certain special cases or in those permitted in the BC.
1384 P. Bernt Hugenholtz & Okediji, 2008, p. 20; Ricketson & Ginsburg, 2006, pp. 871–872. To be clear, this does not mean that the test does not apply to limitations to BC rights as transposed to the digital environment. Cf. Peukert, 2005, pp. 44–45.
1385 See, e.g., Senftleben, 2014, pp. 6–7. See infra 5.3.2.3, 5.3.3.1, and 5.3.3.3.
right holder”, broadening the scope of the provision to derivative rights holders.\textsuperscript{1388} It also extends the test to new rights provided for in TRIPS.\textsuperscript{1389}

WTO Panels interpreted the TRIPS tests on four occasions: \textit{US–Copyright} (in 2000); \textit{Canada–Patent} (in 2000); and \textit{EC–Trademarks I} and II (in 2005).\textsuperscript{1390} Only \textit{US–Copyright} interprets Article 13 TRIPS, making its findings of greater importance to this dissertation. As supplementary means of interpretation\textsuperscript{1391} these panel reports may assist in defining the scope of the TRIPS and BC tests and, to an indirect extent, the WCT test.\textsuperscript{1392} Their importance is qualified by the fact that they are taken in the context of international trade, not copyright. This makes them less sensitive to public interest arguments, despite the objectives of TRIPS requiring such interests to be balanced in the protection and enforcement of intellectual property rights.\textsuperscript{1393} The main value of the reports lies in the provision of a roadmap to apply the test.\textsuperscript{1394} It is in this capacity they are used in the following analysis, without forgetting the significant criticism to which they have been subject.\textsuperscript{1395}

Finally, it is noted that the panel reports have less weight than the aforementioned Agreed Statements in the interpretation of the three-step tests in the WIPO Treaties and the InfoSoc Directive. As previously mentioned, the directive implements the WIPO Treaties and should be read in their light.\textsuperscript{1396} This is important because strict readings of the three-step test often rely primarily on \textit{US–Copyright}, to the detriment of the Agreed Statements.\textsuperscript{1397}

### 5.2.1.4 EU Copyright Law and its Relationship to International Law

The drafting history of Article 5(5) InfoSoc Directive shows the inception of a restrictive view of the three-step test in EU law.\textsuperscript{1398} The directive’s version of the test originates from the 1995 Green Paper on Copyright and Related Rights in the Information Society. The document is

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\textsuperscript{1388} It is noteworthy that TRIPS contains slightly different versions of the test in the fields of trademarks (Art. 17), designs and models (Art. 26(2)) and patents (Art. 30).

\textsuperscript{1389} This includes rental of computer programs and cinematographic works. See Art. 11 TRIPS.

\textsuperscript{1390} Because the trademark reports concern parallel complaints with identical texts, the following analysis makes reference only to the most comprehensive report, namely WTO, \textit{EC–Trademarks I}. Cf. Senftleben, 2006, p. 407 & n.3.


\textsuperscript{1392} Senftleben, 2004, pp. 107–110.

\textsuperscript{1393} P. Bernt Hugenholtz & Okediji, 2008, pp. 22, 39–40, emphasising Art. 7 TRIPS.

\textsuperscript{1394} Kur, 2008, p. 17–, with further references. The author criticises the excessive length of the reports, their repetitive reasoning and little substance, as well as the political nature of the surrounding process. See also P. Bernt Hugenholtz & Okediji, 2008, pp. 21–22.

\textsuperscript{1395} For persuasive criticism of the panel reports, see Geiger et al., 2014, pp. 592–611; Griffiths, 2009, p. 10; P. Bernt Hugenholtz & Okediji, 2008, p. 24; Iuliano, 2011, pp. 489–490; M. Kennedy, 2014; Kur, 2008, pp. 30–31; Shabalala, 2010. However, it is undeniable that the absence of new panel reports on Art. 13 TRIPS has permitted US–Copyright “to become the de facto yardstick against which proposals to further restrict copyright protection have been made”, especially in legal scholarship. Cf. Shabalala, 2010, p. 188.

\textsuperscript{1396} N.B. no CJEU decision on limitations mentions the WTO Panel Reports, although WTO, \textit{US–Copyright} is mentioned in Opinion AG in VG Wort, ¶9, and Opinion AG in ACI Adam, ¶55.

\textsuperscript{1397} See infra 5.2.2, 5.3.1.2 and 5.3.2.1. See, e.g., the criticism of Iuliano, 2011, p. 468, to the analysis of Peukert, 2005.

\textsuperscript{1398} Senftleben, 2013c, pp. 14–15.
critical of Article 9(2) BC for being detrimental to the effectiveness of the reproduction right and causing divergent national limitations for reprography and private copying.\textsuperscript{1399}

The criticism is again patent in a 1996 follow-up paper, where the Commission adopts a “rights-holder centric” approach to what it views as an “economic prejudice test”.\textsuperscript{1400} However, with the adoption of the WIPO Treaties in 1996 (which the EU later joined as a member), the Commission was forced to adjust its view. This adjustment is patent in the 1997 proposal for a new directive.\textsuperscript{1401}

The InfoSoc Directive’s explanatory memorandum expresses the Commission’s concern that obligations arising from the WIPO Treaties’ tests could cause different interpretations, thereby posing a risk to the establishment of an internal market for online services.\textsuperscript{1402} The memorandum stresses the need to interpret those provisions in light of the \textit{acquis}, namely the similar tests in the Software and Database Directives.\textsuperscript{1403} It therefore advances a draft wording closer to that of existing directives than that of international treaties.\textsuperscript{1404} During the legislative process, the wording was tweaked and the possibility of an open-norm rejected. Ultimately, even the desire to follow the \textit{acquis} was abandoned by the Council Working Group, which realigned the draft provision with its international counterparts.\textsuperscript{1405}

Against this background, Article 5(5) InfoSoc Directive states that the limitations provided in the same article:

\begin{quote}
shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.\textsuperscript{1406}
\end{quote}

This test became the “benchmark for all copyright limitations” in the EU.\textsuperscript{1407} The wording is similar to that of international treaties and provides the reference point for the subsequent analysis in this chapter. The main function of this test is to control the application of limitations to the directive’s exclusive rights. For national legislators, this means that limitations must comply with the conditions set forth in the exhaustive list of Article 5(1) to (4) and the three-step test in paragraph (5). This design means the EU test has a similar additional safeguard function to Article 10(2) WCT.

The EU test deviates from its international predecessors by stating that limitations “shall only be applied in certain special cases”. The references to the modal verb “shall” and to \textit{application}
the article (and also in recital 44 InfoSoc Directive) raise the question of whether the test doubles as a substantive norm for national judges to decide on specific instances of liability.\textsuperscript{1408}

The topic is debated in scholarship and has not been settled by the CJEU. Whereas the Court does not consider the test to affect the substantive content of limitations, it likewise holds that where certain acts of a defendant fall within their scope, the requirements of Article 5(5) must be met.\textsuperscript{1409} In addition, the Court has stated on several occasions that limitations must be construed \textit{in light of} Article 5(5).\textsuperscript{1410} On this basis, some authors and AGs consider that the test is also addressed to national courts.\textsuperscript{1411}

Beyond this aspect, the relationship of Article 5(5) with the aims of the InfoSoc Directive and international obligations is often at the centre of interpretations on the scope and flexibility of the test. As noted in the previous chapter, among the main objectives of the directive are increased legal certainty, a high level of protection, and a functioning internal market; to achieve them it is crucial to harmonise copyright and its limitations, while giving respect to fundamental rights.\textsuperscript{1412} The harmonisation goal intersects with the adaptation of EU law to international standards, in particular the WIPO Treaties, as expressly stated in recital 15.\textsuperscript{1413} Furthermore, recital 44 states that limitations “should be exercised in accordance with international obligations”. The EU, of course, is a member of TRIPS and the WIPO Treaties, making the treaties binding on its institutions and Member States.\textsuperscript{1414}

For some authors, the reference to “international obligations” in the InfoSoc Directive relates specifically to Article 10 WCT and its Agreed Statement.\textsuperscript{1415} Thus, if the EU three-step test is interpreted in light of this set of WCT materials (including its Preamble), these authors argue, it should be interpreted as a flexible norm that allows for the adaptation or creation of limitations in the digital environment.\textsuperscript{1416} Although this interpretation is persuasive, it should be noted that different readings are possible. For example, recital 44 InfoSoc Directive offers support for the view that the scope of future limitations for online use of works ought to be reduced due to their potential for “increased economic impact” on the revenues of rights holders.\textsuperscript{1417}

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\textsuperscript{1410} See: Arnold & Rosati, 2015; \textit{Opinion AG in Stichting de Thuiskopie}, ¶42 (“...though being primarily a norm addressed to the legislature, the three-step test must also be applied by the national courts in order to ensure that the practical application of the exception to Article 2 of Directive 2001/29 provided by national legislation remains within the limits allowed by Article 5 of that directive” [sic]); \textit{Opinion AG in ACI Adam}, ¶48.

\textsuperscript{1411} See \textit{supra} 4.4.1.3.


\textsuperscript{1413} Cf. Art. 216 TFEU. On the need to interpret the \textit{acquis} in light of international law, see \textit{supra} 1.3. See also Geiger & Schönherr, 2014a, p. 135 & n.102, 2014b, p. 443, citing CJEU jurisprudence in support of this principle regarding “mixed agreements”, such as TRIPS and the WCT. N.B. the WIPO Treaties were approved on behalf of the European Community by Council Decision 2000/278/EC.

\textsuperscript{1414} Geiger & Schönherr, 2014a, p. 121 & n.41; Senftleben, 2013c, pp. 15–17. See also Senftleben, 2004, p. 256.

\textsuperscript{1415} Geiger & Schönherr, 2014a, p. 121.

\textsuperscript{1416} The final sentences of recital 44 InfoSoc Directive mention the possibility that limitations may have an increased economic impact in the digital environment. Hence, their scope “may have to be even more limited when it comes to
5.2.2 Spectrum of Readings

The analytical framework presented influences the range of potential readings of the test, demarcated by two opposing views: strict versus flexible interpretation. The following paragraphs explain both views, providing background for the subsequent analysis of a limitation-based ACS.

5.2.2.1 Strict Interpretation

On one side of the spectrum, the three-step test can be interpreted as a restricting clause. This understanding derives from the doctrine of strict interpretation, which departs from the principle of exclusivity and construes derogations thereto as exceptional. It posits that the test can only have a narrow sphere of operation, imposing “limits on limitations”.

The approach can be synthesised as follows. The three conditions have a conjunctive structure: they are cumulative and successive “steps” instead of factors. The initial steps have priority. Analysis starts from the first condition and works its way up. If along the way a condition is not met, the limitation fails the test.

The first and second conditions are designed to impose quantitative thresholds and economic standards that restrict the qualification of what constitutes a “certain special case”, and broaden the concept of “normal exploitation”. The reference point for the first condition is reduced to a subset of exclusive rights instead of the area of exclusivity affected by the limitation. The second condition is deemed to include not only current but also potential new forms of exploitation of works in relation to each type of right affected, the foreseeability of which is not necessarily required. Through this approach, the strict interpretation doctrine eschews normative considerations that could temper the quantitative elements.

The result is an analytical framework in which most limitations for online use, even if narrow in scope, likely conflict with a broad notion of normal exploitation. Moreover, this method disallows the introduction of equitable remuneration to cure potential conflicts in the second step, while only admitting a balancing of rights and interests in the third step.

It is possible to find this approach at international, regional and national levels. First, the strict interpretation method is pervasive in the WTO panel reports on different TRIPS tests. In the influential US–Copyright, for instance, the panel posits that Article 13 TRIPS can only have a narrow or limited operation, and that the conditions are to be applied cumulatively and successively, in a hierarchy of analysis. The remaining tests are similarly understood as allowing only a “small diminution of the rights”. Although all panel reports recognise certain new uses of copyright works and other subject-matter”. The recital anchors a restrictive interpretation of limitations in ACI Adam. On its basis the Court argues that the scope of limitations can only be reduced but not extended, as such a possibility is not expressly envisaged in the InfoSoc Directive. See CJEU, ACI Adam, ¶27; Opinion AG in ACI Adam, ¶49. For criticism, see Quintais, 2015b.

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See supra 4.4.1.4 and 4.4.3.6.
Cf. Senftleben, 2006, p. 413, describing the WTO Panel approaches to the test.
elements of flexibility in the test, usually by identifying normative considerations in each condition, the strict interpretation lens favours a restrictive economic reading over policy considerations.

At EU level, both the AGs and the CJEU have followed this doctrine in a number of cases, including the method of cumulative and successive reading. Likewise, it is possible to identify interpretations of the test as a restrictive standard by national courts across Europe. The strict interpretation method is problematic because the initial conditions of the three-step test exclude flexibility and a balancing exercise, facilitating the rejection of limitations at an early stage. This pre-empts normative analysis and transforms the test into a tool to perpetuate exclusivity, solely (or predominantly) allowing copyright limitations for de minimis use of works. From this perspective, the focal point of the test is to safeguard the normal exploitation of works, relegating the consideration of prejudice to the legitimate interests of the authors to a secondary role. This interpretation is in no small part inspired by a historical approach, as it closely follows Ulmer’s position reported in the BC preparatory works.

5.2.2.2 Flexible Interpretation

In contrast, more flexible constructions are advocated which tend to see the test as an enabling clause, allowing consideration of different interests at national level and the adequate balancing of rights and limitations.

To achieve a flexible reading, scholars have advanced different (and often conceptually overlapping) approaches. First, inspired by the US fair use doctrine, it is suggested that the different steps are not cumulative or successive conditions. Rather, the provision is a multi-factor test subject to a “comprehensive overall assessment” and teleological interpretation, balancing competing interests on equal grounds. A different approach is to read the test in reverse,
incorporating normative considerations at the beginning of the analysis. A third method emphasises fair balance and proportionality, either suggesting their consideration at the second step or by favouring the third step, where balancing traditionallly takes place. Yet another suggestion is to take into account compensation in the analysis of the second step as a means to counteract conflicts with the normal exploitation. Finally, some authors advocate a narrow definition of “normal exploitation” of works, either by rejecting a purely economic view of the concept and focusing on the justification of limitations, or by not taking into account the potential harm dimension of the concept advanced in US–Copyright.

In this line, Hugenholtz and Senftleben examine the *acquis* and argue that the InfoSoc Directive’s exhaustive list of limitations consists in many cases of “categorically worded prototypes rather than precisely circumscribed exceptions, thus leaving the Member States broad margins of implementation”. In combination with the three-step test, this interpretation “would effectively lead to a semi-open norm almost as flexible as the fair use rule of the United States”.

The authors, along with other scholars, support their position on a systematic reading of the InfoSoc Directive, noting the link in recitals 15 and 44 to compliance with international obligations. Recognising the historic compromise nature of the provision and the inherent flexibility required by the WCT, they interpret the directive’s test in light of international law as an enabling clause for digital limitations.

This position has parallels with a recent shift in CJEU case law towards a more balanced view of the test—what Chapter 4 terms “restricted flexibility”. The key feature in this shift lies with the normative justifications of a limitation. The Court attempts to secure the effectiveness of limitations by interpreting them in light of their objective and purpose, the principle of proportionality, and the overall objectives of the InfoSoc Directive. The result seems to be greater flexibility in the interpretation of limitations that are justified on fundamental rights or that facilitate the development and operation of new technologies. An illustration of this approach is visible in *Meltwater* and *Ulmer*, where the Court reads the test in a non-sequential preparation of the preparatory works. See also Westkamp, 2008b, pp. 42–43, arguing for a more liberal balancing of interests, modelled on the US fair use clause. Regarding Art. 30 TRIPS, see a similar position in Lamping, 2014, pp. 688–689, 693.

See, e.g., Gervais, 2005, proposing a reverse reading of the test based on the US fair use doctrine, which would transform it into an “effects based norm”. See also Geiger, 2007b; P. Bernt Hugenholtz & Okediji, 2008, p. 21.


Geiger et al., 2008, p. 711.

Geiger, 2007b; Senftleben, 2006. See also He, 2009, proposing an “adapted fair use test” for this effect.

P. Bernt Hugenholtz & Senftleben, 2011, p. 2. It is noted that the possibility that such a reading would support interpretation of the test to create new limitations to Arts 2 and 3 is denied by the Court in *OSA*, in line with the exhaustive nature of the list of limitations in Art. 5. See CJEU, *OSA*, ¶¶37–41. Cf. the position of Nérisson, 2015a.


manner to achieve a balanced interpretation.\textsuperscript{1437} In synch with this shift by the Court, a growing body of national decisions recognises the three-step test as a flexible and enabling standard.\textsuperscript{1438}

Of course, different interpretations of the test lead to its inconsistent application. For some authors, the distance between the strict and flexible views is symptomatic of the test’s inadequacy for regulation of competing interests.\textsuperscript{1439} While it is possible to view the test in a restrictive way, it is submitted that its conditions can and in certain cases should be read as “open-ended factors” enabling the “introduction and broadening of limitations” in light of their objective and purpose.\textsuperscript{1440} This is especially true for limitations justified on fundamental rights and freedoms. Any restriction imposed on these by the competing fundamental right of copyright (in Article 17(2) Charter) must strike a fair balance and be proportional, necessary and, under certain circumstances, exceptional.\textsuperscript{1441} Due to the challenges and costs of imposing exclusivity for non-commercial online use, it is justifiable to explore whether a flexible interpretation of the test leaves space for a limitation-based ACS.

5.3 The Space for an Alternative Compensation System in the Three-Step Test

This section examines the three-step test in the InfoSoc Directive to assess whether it allows for a limitation-based statutory licence ACS. CJEU judgments on the test are sparse. For that reason and the need to interpret EU law in light of international law, legal scholars often rely on the analysis of US–Copyright as a baseline. Consequently, and despite its shortcomings, this section pays particular attention to that WTO panel report.

To prevent redundancy and provide a structured analysis, this section adopts a sequential study of the test, considering each step separately.\textsuperscript{1442} However, it is noted that the steps overlap and are not separate tests in themselves. Rather, the three-step test is “one single analytical whole and serves the ultimate goal to strike an appropriate balance”,\textsuperscript{1443} requiring a multi-factor approach to ensure consideration of the social policy benefits of a limitation.\textsuperscript{1444} This section first looks at what requirements a limitation-based ACS must meet to qualify as a certain special case (5.3.1).

\textsuperscript{1437} CJEU, Meltwater, ¶¶55–63; CJEU, Ulmer, ¶¶47–48.


\textsuperscript{1439} Griffiths, 2009.

\textsuperscript{1440} Geiger & Schönherr, 2014b, p. 444, concluding similarly, Contra, Nérisson, 2015b, p. 391, basing her position on OSA, ¶¶37–41 (although the author recognises the CJEU’s broad purposive interpretation of limitations in some cases).

\textsuperscript{1441} Art. 52(1) Charter. Cf. Geiger & Schönherr, 2014b, pp. 450–454, which highlight the consideration of copyright as a derogation to the principle of freedom of expression in ECtHR, Ashby Donald. See supra 4.4.1.4, 4.4.4.1, and 4.4.4.3, discussing the shift away from strict interpretation of limitations justified by fundamental rights in CJEU jurisprudence. See also Senftleben, 2013c, pp. 23–24.

\textsuperscript{1442} WTO, Canada–Patent, ¶7.21. See Griffiths, 2009, cautioning against redundancy.

\textsuperscript{1443} Geiger et al., 2014, pp. 585, 610–611.

\textsuperscript{1444} R. Wright, 2009, pp. 609, 617.
It then examines whether such an ACS conflicts with the normal exploitation of works (5.3.2), and if it causes unreasonable prejudice to the legitimate interests of rights holders (5.3.3). The section concludes with a summary of findings for each step and an assessment of the margin the test allows for the legalisation of non-commercial online use in the *acquis* through a statutory licence (5.3.4).

### 5.3.1 Certain Special Cases

The CJEU provides little guidance on the first step of the test. Its jurisprudence suggests that the step is met if an act falls clearly within the scope of a limitation.\(^{1445}\) For that reason, it is assumed that all limitations in Article 5 InfoSoc Directive constitute a certain special case.\(^{1446}\) Against this background, the following paragraphs analyse in sequence the meaning of “certain” cases (5.3.1.1) and “special” cases (5.3.1.2).

#### 5.3.1.1 Certain Cases

A “case” is an occurrence, circumstance, event or fact. In relation to copyright limitations, a case can have different meanings. *US–Copyright* described it “in terms of beneficiaries of the exceptions, equipment used, types of works or by other factors”.\(^{1447}\) To be a “certain” case, it added, domestic limitations must be “clearly defined”, which does not require privileged uses to be listed or enumerated, but merely that the provision’s scope is “known and particularized”, thereby assuring “a sufficient degree of legal certainty”.\(^{1448}\)

Not all scholars share this view. Some argue that in the BC preparatory works “certain” refers to “some” and not to “clearly specified” cases.\(^{1449}\) Others note that the “less strict and rigid” analysis in *Canada–Patent* does not contain a requirement of legal certainty at this stage.\(^{1450}\) Whichever the view, a good faith interpretation of the first step seems to imply that a certain case entails a foreseeable requirement, aimed at forbidding unspecified and indeterminate limitations.\(^{1451}\)

The legislative technique of Article 5 InfoSoc Directive—an exhaustive list of limitations—seems more aligned with a foreseeability condition than open-ended norms.\(^{1452}\) If that is true, a limitation that approximates the *acquis* model should be more consistent with the test than, for example, the US fair use clause, even considering the extensive case law applying it. Nevertheless, the latter is not only internationally accepted, but also considered compliant with the first step requirement of certainty by a majority of scholars.\(^{1453}\) Hence, if the scope of a

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1447 *WTO, US–Copyright*, ¶6.110.


1450 Senftleben, 2006, p. 418.


1452 Geiger, 2007a, pp. 4–5.

statutory licence ACS is sufficiently concrete as regards subject matter, permitted uses and remaining criteria, it is likely to comply with the first step, even if this is subject to a strict interpretation.\footnote{Rietjens, 2006, p. 327.}

\subsection*{5.3.1.2 Special Cases: Qualitative and Quantitative Considerations}

A certain case can be “special” from the qualitative and quantitative viewpoints. The first viewpoint refers to quantifiable restrictions on allowed uses.\footnote{The qualitative viewpoint does not require an analysis of the economic impact of the limitation, which typically takes place in the second step. See Senftleben, 2006, p. 417, describing the approach of the WTO panels.} The second viewpoint pertains to the function of a limitation, namely its justification and public interest dimension.\footnote{Ficsor, 2002b; Geiger, 2007b; Senftleben, 2004.}

\textit{US–Copyright} exemplifies a predominantly quantitative approach. It initially recognises both viewpoints by stating that to be a “special” case a limitation should have “an individual or limited application or purpose”, “be narrow in quantitative as well as a qualitative sense”, and have an “exceptional or distinctive objective” (as opposed to “normal”).\footnote{WTO, \textit{US–Copyright}, ¶6.109.} In essence, an exception must be narrow in “scope and reach”.\footnote{\textit{Ibid.}, ¶¶6.112, 6.159.}

Narrowness refers to the types of exempted use (a subset of exclusive rights), categories of works,\footnote{\textit{Ibid.}, ¶¶6.102–6.153. See, critically, Senftleben, 2006, pp. 416–417, arguing for the possibility of using broader reference points, “such as the field of public performances or broadcasts”.} and the number of potential beneficiaries (users).\footnote{WTO, \textit{US–Copyright}, ¶6.127, 6.143. \textit{But see} WTO, \textit{EC–Trademarks I}, ¶7.654, for a less stringent approach regarding third party beneficiaries.} The benchmark for examination of this scope is the current state of technology.\footnote{WTO, \textit{US–Copyright}, ¶¶6.137, 6.150, 6.153. See Ginsburg, 2001, p. 17. This approach marks a difference from the panel’s analysis of “normal exploitation”, which considers potential markets.}

One issue with this approach is that it does not follow from a limitation being “limited in its field of application” that it must be qualitatively and quantitatively narrow.\footnote{Gervais, 2005, p. 15. Regarding the patent test, Lamping, 2014, p. 687, states that an exception is “limited” if it “is reasonably proportionate to its objective and purpose” and adequately fulfils a “legitimate purpose”.} Other approaches are conceivable. For example, the quantitative reference point in \textit{Canada–Patent} and \textit{EC–Trademarks I} was not the impact of the limitation on specific rights or subsets thereof but rather on broader exclusive rights granted in relation to patented inventions and trademarks.\footnote{Senftleben, 2006, p. 419.}

But the analysis in \textit{US–Copyright} poses another problem. Despite drawing the distinction between quantitative and qualitative, the report eschews the qualitative assessment. Based on previous Appellate Body decisions, the report states that the first step does not require

\footnotetext[1454]{Rietjens, 2006, p. 327.}
\footnotetext[1455]{The qualitative viewpoint does not require an analysis of the economic impact of the limitation, which typically takes place in the second step. See Senftleben, 2006, p. 417, describing the approach of the WTO panels.}
\footnotetext[1456]{Ficsor, 2002b; Geiger, 2007b; Senftleben, 2004.}
\footnotetext[1457]{WTO, \textit{US–Copyright}, ¶6.109.}
\footnotetext[1458]{\textit{Ibid.}, ¶¶6.112, 6.159. See, critically, Senftleben, 2006, pp. 416–417, arguing for the possibility of using broader reference points, “such as the field of public performances or broadcasts”.}
\footnotetext[1459]{WTO, \textit{US–Copyright}, ¶6.127, 6.143. \textit{But see} WTO, \textit{EC–Trademarks I}, ¶7.654, for a less stringent approach regarding third party beneficiaries.}
\footnotetext[1460]{WTO, \textit{US–Copyright}, ¶¶6.137, 6.150, 6.153. See Ginsburg, 2001, p. 17. This approach marks a difference from the panel’s analysis of “normal exploitation”, which considers potential markets.}
\footnotetext[1461]{Gervais, 2005, p. 15. Regarding the patent test, Lamping, 2014, p. 687, states that an exception is “limited” if it “is reasonably proportionate to its objective and purpose” and adequately fulfils a “legitimate purpose”.}
\footnotetext[1462]{Senftleben, 2006, p. 419.}
assessment of the “subjective aim or objective pursued by national legislation”. This results from a strict interpretation method, motivated by a desire to analyse each step separately and deal with policy considerations at a later stage. The main risk, noted before, is the rejection of limitations without assessing their policy underpinnings.

Rietjens’ analysis of broadband levies is a good illustration of the dangers of this approach vis-à-vis ACS. The author compares the number of broadband users with the total number of households in the Netherlands, and concludes that the number of potential beneficiaries of the limitation does not qualify as quantitatively narrow. He further argues that a P2P licence would be broader (as it relates to works covered) than the home-style exception rejected in US–Copyright and, therefore, would not pass the quantitative first step.

In response, one could point out the importance of examining factors delimiting the licence’s scope, which may lead to a different conclusion. These factors include subject matter exclusions, articulation with other limitations, the non-commercial purpose of use, the exclusion of legal persons as beneficiaries, or the application to works after first publication or making available.

Furthermore, a purely quantitative interpretation conflates the scope of a limitation with its effect on the exploitation of the right, while rejecting its justifications. Indeed, full adoption of a cumulative approach could turn the test into a “one-step inquiry”, invalidating even existing limitations in the InfoSoc Directive, such as digital private copying. Of course, this would not be a satisfactory outcome.

Consequently, it is important to consider the qualitative viewpoint, pursuant to which a case is “special” if it serves an objective of public policy, cultural interests or “some other exceptional circumstance”. In fact, considering these elements is consistent with the context and history of the BC.

For Gervais, for example, the first condition of the test was historically designed as a last filter to the two subsequent “operational” conditions. In that sense, it is of little relevance beyond the recognition that the term “special” requires limitations to have a “sound policy justification”.

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1464 WTO, US–Copyright, ¶6.111–6.112. Critically, see Ficsor, 2002b, pp. 223–229. See also Gervais, 2005, p. 15, noting that following this position Member States would not have a burden of proof regarding the limitation’s justification.

1465 Kur, 2008, pp. 23–24, identifying this undesirable outcome regarding the stockpiling exception in Canada–Patent. See also Iuliano, 2011, pp. 477–478, noting critically that a shifting qualitative standard without a policy rationale check opens the possibility for the inadmissible outcome that legislatures “frame categories in order to pass laws that would otherwise be invalid”.


1467 Peukert, 2005, p. 32. See also: WTO, Canada–Patent, ¶7.49, stating that the first step “is neither designed nor intended to address the issue of economic impact directly”; and Senftleben, 2006, p. 436, noting that “quantitative considerations... should not be overestimated” and arguing for a conceptual approach to this step, where the same would confine limitations solely to a “specific kind of use”.

1468 Rietjens, 2006, p. 329. See also Iuliano, 2011, pp. 479–480, making the general argument for the importance of incorporating public policy into the first step.


1471 Gervais, 2005, pp. 15–16, citing the Records BC Stockholm 1967, p. 1145. See also Opinion AG Infopaq I, ¶135 (“...limitations must be clearly defined and must be based on specified particular objectives”).
Besides, the qualitative lens enables respect for international and EU law, as it ensures consideration of a limitation’s function, a key aspect when the same derives from fundamental rights recognised in legal instruments to which states are bound. Such a view aligns with the CJEU’s interpretation of fundamental rights-based limitations, the aims of the test, and the more general goals of the InfoSoc Directive, interpreted in light of international law.

However, we must be cautious when taking into account quantitative and qualitative connotations. Considered cumulatively, they turn a special case into a “maximum requirement of narrowness” precluding most limitations from application online. Conversely, meshing both viewpoints avoids a mechanical sequential analysis and allows subsequent consideration of the wider social benefits of a limitation.

In sum, a “special” case ought to be a mixed quantitative and qualitative standard. This standard should clarify the limitation’s justification and scope, while setting the stage for the analysis of the remaining steps to answer the decisive question of “whether the exception is limited enough in view of its purpose and potential impact”. Quantitatively, “special” requires an assessment of the extent to which a limitation curtails exclusive rights. Quantitative restrictions should be considered as delimiting the limitation’s scope, but are not determinative, as they merely offer a “rough estimate” of the threshold beyond which the viability of the exclusive right is affected—i.e. whether the scope of the limitation is reasonably foreseeable. Qualitatively, the limitation should have a policy justification that operates as a check and balance to prevent overly restrictive quantitative standards. In that role, it would avert the premature rejection or phasing out of online limitations that serve fundamental social welfare aims on grounds of potential (or actual) technological control of uses.

5.3.2 Conflict with the Normal Exploitation of Works

This subsection discusses the second step of the test and whether a statutory licence ACS poses a conflict with the normal exploitation of works. This step is usually considered the most restrictive of the three and the major challenge to the adoption of a legalisation system. The concept of “normal exploitation” of works is a legal fiction with no clear meaning and undeniable circularity: exploitation occurs in markets to which exclusive rights extend, whereas...

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1472 Geiger, 2007b, p. 5.
1473 On which, see supra 1.3, 4.4.1.3, and 4.4.1.4.
1475 Senftleben, 2006, pp. 418–419, identifying this as the approach in Canada–Patent. See also R. Wright, 2009, pp. 617–618.
1477 See He, 2009, p. 290, although the author distinguishes his point of reference from that of the “overall commercialization of works”. See infra 5.3.2.3, on the point of reference for analysis of the second step.
1478 Geiger et al., 2008, p. 711; He, 2009, p. 290. Examples of quantitative restrictions are those “on specific technical equipment, a specific administrative process or specific forms of use”. See Senftleben, 2006, p. 420.
privileged uses are by definition outside those markets. Hence, the analysis should avoid turning the step into a “self-validating” mechanism for limitations, while rejecting a construction of the concept so broad that it prevents all but de minimis use.\footnote{Kur, 2008, p. 25; Rietjens, 2006, p. 329. The “circular reasoning” critique of the step originates from Goldstein, 2001.} Within this range lies the appropriate definition of normal exploitation.

The examination starts by considering the traditional view of normal exploitation, rooted in US–Copyright, and its application to ACS (5.3.2.1). It then raises some objections to the traditional view, which justify a more flexible interpretation (5.3.2.2). For that reason, the subsequent analysis proposes a flexible reading of the concept to assess whether an ACS complies with the second step of the test (5.3.2.3).

**5.3.2.1 The Traditional View of Normal Exploitation**

“Exploitation” refers to the economic value extracted from rights through the commercialisation of works.\footnote{Gervais, 2005, p. 16; Mihály Ficsor, 2012, p. 3. See: WTO, Canada–Patent, ¶7.53; WTO, US–Copyright, ¶6.165.} An ACS privileges use by individuals that is “non-commercial”. As a result, its effects on the normal (commercial) exploitation of works are mostly indirect.

The definition of “normal” in relation to exploitation is challenging. To address the challenge legal scholars commonly seek guidance from the WTO panel reports on the test.\footnote{Kur, 2008, pp. 16–17.} The broadest—and likely most influential—view of “normal” exploitation is contained in US–Copyright. Most commentators that reject the legal admissibility of statutory licence ACS proposals rely to some extent on this report. Accordingly, we should reflect on its reasoning and potential application, together with the remaining panel reports.

“Normal” exploitation has empirical and normative dimensions, the contours of which are sometimes unclear. The first dimension reflects the degree of market displacement caused by a limitation as measured by different standards, including lost profits, reasonably expected licensing fees, or actual and potential effects.\footnote{Peukert, 2005, p. 33.} There is some confusion as to the normative dimension, which is ascribed different meanings, ranging from the effect of a limitation on potential markets (in US–Copyright) to the policy justifications of exclusive rights (in the remaining WTO panel reports).\footnote{P. Bernt Hugenholtz & Okediji, 2008, p. 24.}

In US–Copyright, normal exploitation involves the assessment of the actual and potential impact on the market of a limitation. The actual or “empirical” aspect reflects the effect of the limitation on forms of exploitation that “currently generate significant or tangible revenue”.\footnote{WTO, US–Copyright, ¶6.180.} This effect is measured in relation to markets that rights holders would expect to exploit if not for the limitation, and the reference point for analysis is the exclusive right or category of right
affected. If this were the sole test, normal exploitation would exclude uses for which there is no expectation of compensation.

In contrast, the potential or “normative” aspect in US–Copyright relates to forms of exploitation that “with a certain degree of likelihood and plausibility, could acquire considerable economic or practical importance”. In other words, the emphasis is on the potential effect of a limitation on the market.

To give meaning to this normative dimension, the copyright panel relied on the Swedish/BIRPI Study Group report of 1964. According to this, “normal” includes current and future forms of exploiting a work of “considerable economic or practical importance in potential future markets”. The reliance on this document, without scrutinising its status, has been qualified as a “significant misapplication of normal practice under the Vienna Convention”.

The consequences are far-reaching. Infused with this meaning, “normal” exploitation includes “potential, permissible or desirable” forms of exploitation, including new technological modes of exploitation not presently “common or normal in an empirical sense”. It covers potential sources of income for every individual right, irrespective of their importance in the overall commercialisation of works.

Because the potential impact is based on unknown and uncertain factors, the reference point for analysis is the current and “near future” commercial and technological conditions. Yet, the copyright panel rejects treating the non-exercise of rights as indicative that a use is outside normal exploitation. Hence, it does not exclude from the concept of normal exploitation uses for which rights holders are unwilling or unable to exercise their rights. Read in this way, the second step is an economic test deprived of policy considerations.

Thus, according to this view, a conflict with the normal exploitation of works arises when newly exempted uses enter into “economic competition with the ways that right holders normally extract economic value” from the exclusive right affected, depriving them of “significant or tangible commercial gains.” As the hypothetical economic loss caused by the limitation is

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1487 Ibid., ¶6.172–173. The report adds that a rights holder is entitled “to exploit each of the rights for which a treaty, and the national legislation implementing that treaty, provides.” Ibid., ¶6.175. See also Kur, 2008, p. 25.
1490 Ibid., ¶¶6.184–6.185.
1491 See BIRPI, 1965, discussed supra at 2.3.2.1. This study group was composed of representatives of the Swedish Government and the United International Bureaux for the Protection of Intellectual Property (BIRPI), which was set up to prepare for the 1967 Stockholm revision conference. The report in question was adopted in 1965.
1492 WTO, US–Copyright, ¶179.
1494 Gervais, 2005, p. 16.
1497 Ibid., ¶6.188. The examples provided are those of “current licensing practices” and cases “where, due to lack of effective or affordable means of enforcement, right holders may not find it worthwhile or practical to exercise their rights”.
compared to the actual and potential full exploitation of the right, most limitations whose scope goes beyond de minimis use are outlawed.\textsuperscript{1500}

It is possible to find this type of strict interpretation in CJEU case law. In \textit{ACI Adam}, for example, the Court states that allowing reproductions from unlawful sources encourages piracy, “inevitably” reducing revenues from lawful sources and conflicting with the normal exploitation of works.\textsuperscript{1501} That is to say, the Court believes there is a substitution effect between reproductions made from lawful sources and those made from unlawful sources. Still, the judgment does not provide evidence for this claim or address the limitation’s justification, anchored on the fundamental right of privacy.\textsuperscript{1502} As noted in the previous chapter, this interpretation was restated in \textit{Copydan} and \textit{Reprobel}.\textsuperscript{1503}

In reaching this conclusion, the CJEU and the AG in \textit{ACI Adam} rejected an alternative reading. During oral observations, several stakeholders made the argument that a literal, systematic and teleological interpretation of the InfoSoc Directive would not exclude from the scope of the private copying limitation copies made from unlawful sources. Because such copies could not be prevented by technological means, the private copying levy was the sole means to effectively deal with mass unauthorised use, and should therefore qualify as a normal exploitation of works for the type of use in question.\textsuperscript{1504}

The application of the traditional view of normal exploitation, supported in \textit{US–Copyright} or \textit{ACI Adam} and its progeny, probably prevents the adoption of a statutory licence ACS. The basic argument for rejecting such a legalisation proposal could be structured as follows. A limitation for non-commercial online use of works by individuals privileges acts of downloading, streaming, uploading, and other forms of online dissemination of copyright works. It is irrelevant whether such use is susceptible of monetisation or enforcement; what matters is that it enters into economic competition with current and potential forms of exploitation of works. The limitation-based ACS has a negative impact on offline sales of protected content (e.g. CDs), and legal access channels online, including business models such as pay-per-use, pay-per-download, subscription, content streaming and content renting.\textsuperscript{1505} It results in a substitution effect for existing paid channels for the dissemination of the same content, and has a detrimental effect on potential markets. Both actual and potential markets are included in the concept of “normal exploitation”, with which the statutory licence conflicts. Because this condition is cumulative, the ACS does not comply with the three-step test.\textsuperscript{1506}

\begin{flushright}
\textsuperscript{1500} Kur, 2008, pp. 26–27; Senftleben, 2006, pp. 426, 429. See also Kur, 2008, p. 26 & n.98, noting that the lack of reference to reasonableness in Art. 13 TRIPS enables black-letter interpretations to bar limitations under the second step.


\textsuperscript{1502} For a critical assessment, see Quintais, 2015b.

\textsuperscript{1503} See supra 4.4.3.6.

\textsuperscript{1504} See Opinion AG in \textit{ACI Adam}, ¶¶35–36, 72–79, and Quintais, 2015b, p. 73.

\textsuperscript{1505} Examples of business models are taken from Samartzi, 2012, p. 67.

\textsuperscript{1506} Peukert, 2005, p. 34; Rietjens, 2006, pp. 331–332. Both authors anchor their analysis on the reasoning of \textit{US–Copyright} and reject a normative approach to normal exploitation. See also Colin, 2011a, p. 58; 2011b, p. 4, arguing that a non-voluntary licence removes the possibility of exclusive control of exploitation and is probably “in direct competition with the offers of legal downloads”.
\end{flushright}
5.3.2.2 Objections to the Traditional View of Normal Exploitation

The legal analysis of the second step in *US–Copyright* and the traditional view of normal exploitation are not without problems.\(^{1507}\) Beyond adhering to a strict interpretation doctrine, the report seems to rely on an “idealized” notion of normal exploitation, which includes unlicensed, non-monetised and unenforced uses.\(^{1508}\)

In the digital environment, the traditional view risks limitations being crystallised in time. For existing privileges, it disallows uses included in its spirit but not apparent from its letter.\(^{1509}\) For new limitations, the mere possibility that technological development creates new avenues of exploitation for previously uncontrollable uses will raise an insurmountable legal obstacle. At the extreme, if an online use is susceptible of technological control it will form part of the normal exploitation of works.\(^{1510}\) The result, as noted by Westkamp, is a chilling effect on domestic legislative freedom in the field of online copyright limitations and, more generally, communication and information law.\(^{1511}\)

A statutory licence ACS is aimed at restricted uses that are largely insusceptible of control or monetisation. For those uses, the conflict with normal exploitation does not result from the imposition of a limitation, but rather from difficulties with licensing or enforcement.\(^{1512}\) The conflict is a by-product of the fragmentation of exclusive rights.

In this scenario, normal exploitation should not correspond to the use covered by the limitation if (fictionally) controlled by rights holders. Rather, the conflict should refer to the extent to which a limitation “crowds out the normal markets controlled by copyright owners”\(^{1513}\), taking into consideration the relative positions of individual creators (authors and performers) and “exploiters”, i.e. corporate, subsequent or derivative rights holders, mainly legal persons.\(^{1514}\)

In that light, as with other compensated limitations and mandatory collective management, if an ACS includes a mandatory compensation claim for creators, it might improve their position as compared to the existing or prospective market exploitation in an exclusive rights regime.\(^{1515}\) If that is true, an ACS can contribute to achieving a fair balance of interests by enabling rights holders, especially creators, to obtain fair remuneration in the digital environment.

Critics of the traditional view also object to its disregard for the policy underpinnings of limitations.\(^{1516}\) As noted, a strict reading of the test is sequential and isolates policy

\(^{1507}\) Shabalala, 2010, p. 174, calling this the “the weakest part of a generally weak legal analysis”.


\(^{1509}\) Geiger et al., 2014, p. 594.


\(^{1511}\) Westkamp, 2008b, pp. 9–10, calling this proposition unacceptable.


\(^{1514}\) Geiger et al., 2008, pp. 708–710, 712. This is a conceptual simplification; under some national laws and for certain categories of works it is possible that a legal person technically qualifies as the “original” rights holder. Also, a producer may be an individual person and an original rights holder.

\(^{1515}\) This point is typically analysed when considering different legitimate interests in the third step. See *infra* 5.3.3.3.

considerations in the third step. If we follow that interpretation, few limitations survive to the second step. The result is to foreclose analysis of the public interest dimension of limitations that should ultimately justify the restriction on the exclusive right.

For its proponents, the advantage of normative analysis of the second step is to allow consideration of the social function of copyright and technological developments. The approach, which has historical pedigree, is not as radical as it may seem. Indeed, the BC recognises not only several public interest limitations but also the grandfathering of existing domestic exceptions. For Ricketson, the “omnibus” nature of Article 9(2) BC and the wider context of the convention lead to the “logical” conclusion that the three-step test includes “non-economic normative considerations”, namely whether a “particular kind of use is one that the copyright owner should control”.

Canada–Patent follows a similar reasoning, considering a form of exploitation to be normal if it is “essential to the achievement of the goals of patent policy”. Some commentators believe this interpretation is due solely to the policy-infused wording of Article 30 TRIPS, which mentions an “unreasonable” conflict. However, influential scholarship considers variation in the wording of Articles 13 and 30 TRIPS to be insufficient to justify different treatment between intellectual property regimes, and deems it desirable to extend a similar approach to copyright law.

If we accept this last interpretation, the question arises as to how to infuse normative content into the second step? One possibility is to make normal exploitation responsive to social norms in the online environment, for example by allowing limitations for private digital use and non-commercial transformative use. Other approaches include approximating the second step to the fourth factor of the US fair use test, taking into account reasonableness and proportionality in the analysis, requiring that the application of exclusive rights to exempted

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1517 An alleged benefit of US–Copyright’s approach is to avoid redundancy in the examination of different steps. See Griffiths, 2009, p. 16; Ricketson & Ginsburg, 2006, pp. 767–773.
1523 Geiger et al., 2014, p. 600.
1526 The fourth factor of the fair use doctrine, listed in Section 107 US Copyright Act, is “the effect of the use upon the potential market for or value of the copyrighted work”. See Koelman, 2006, pp. 411–412, and He, 2009, pp. 285–286, 294–300 (proposing an “adapted fair use test”).
forms of use be justified on policy grounds\textsuperscript{1528}, or incorporating competing considerations within the definition of normal exploitation.\textsuperscript{1529}

The common theme of these approaches seems to be the consideration of a limitation’s motivations in the balancing exercise. The motivations can be economic or non-economic. In the context of the InfoSoc Directive, where contractual and technical restrictions appear to predominate over limitations, economic market failure motivations for a limitation are inherently weaker.\textsuperscript{1530} As a result, to justify a restriction on exclusivity, a limitation-based statutory licence ACS should also be motivated by non-economic arguments.\textsuperscript{1531}

As noted, beyond addressing a failure of the market in the regulation of non-commercial online use of works by individuals, an ACS aims at providing legal certainty for end-users, improving access to works and the circulation of culture over the Internet, promoting technological development, ensuring fair remuneration of creators, and facilitating the respect for fundamental rights.

If international and EU copyright law indeed aim at striking a fair balance between competing rights and interests, the policy justifications for a limitation can be considered at either the second or third step. The crucial aspect is that they are considered before making a decision on the admissibility of a limitation under, in this case, EU copyright law. To avoid redundancy and for clarity reasons, this chapter conducts such a balancing exercise in the third step.

In sum, the combination of objections against the traditional view of the second step suggests that a more flexible interpretation of what constitutes a conflict with the normal exploitation deserves exploration. The remainder of this section takes up that challenge and applies a flexible lens to assess the legal admissibility of an ACS.

5.3.2.3 A Flexible Interpretation of Normal Exploitation

In a flexible reading of the second step, the reference point to measure conflicts with the normal exploitation is the effect of a limitation on the overall commercialisation of works, including the associated bundle of exclusive rights.\textsuperscript{1532} The range of actual and potential forms of exploitation is limited to typical major sources of rights revenue from the commercialisation of works. As a

\textsuperscript{1528} Senftleben, 2006.
\textsuperscript{1529} Geiger, 2007b; Geiger et al., 2008. See, similarly, He, 2009, pp. 294–300; P. Bernt Hugenholtz & Okediji, 2008, p. 21, who emphasise a proportionality assessment at this stage. The consideration of competing justifications in this step and in the context of its normative connotation is consistent with a balanced and comprehensive interpretation of the test, as suggested in Geiger et al., 2008. \textit{But see} Griffiths, 2009, p. 16 & n.114 (on the uncertainty risk of this approach), and Lucas, 2010, pp. 279–280 (against the consideration of non-economic motivations at this stage).
\textsuperscript{1530} See \textit{supra} 4.4.1, on the prevalence of contractual and technical restrictions over limitations in the InfoSoc Directive.
\textsuperscript{1531} Ginsburg, 2001, pp. 51–53. In this line, Peukert argues that some widely accepted limitations, like criticism or parody, only survive the second step in the digital environment due to their normative underpinnings. See Peukert, 2005, p. 34.
result, a conflict only arises when the proposed limitation causes substantial market impairment to those revenue sources.\textsuperscript{1533}

This flexible approach entails economic analysis for different types of work in order to estimate the impact of the limitation in areas where authors extract the most royalties.\textsuperscript{1534} The focus is on the economic core of copyright, rather than the imperfect legal construction of exclusive rights, which reflects the technical characterisation of digital use of works.\textsuperscript{1535}

There is a conflict with the normal exploitation if a limitation demonstrably deprives rights holders of substantive, reasonably expected and foreseeable sources of income under normal commercial circumstances.\textsuperscript{1536} These circumstances include the licensing of commercial or end-users for the use of works, ranging from making the content available, to pay-per-use, pay-per-download, subscription, content streaming and content renting. Streaming revenues are of particular importance, as this technology appears to be replacing digital downloads as the new model of normal exploitation. This shift is initially occurring in the online music sector but will presumably extend to other sectors.\textsuperscript{1537}

The following paragraphs assess, from a legal perspective, the effect of an ACS on the normal online markets controlled by rights holders. An attempt is made to couch the arguments with empirical research, especially the studies mentioned in Chapter 1 on the economic potential of ACS and users’ willingness to pay for such systems.\textsuperscript{1538} However, because an ACS is an “unknown quantity” with no directly comparable mechanisms in the market, such studies should be treated with caution. On the one hand, we should not put too much stock in empirical research that is not based on real life experiments. On the other hand, we should not assume that a limitation-based ACS has negative effects based on incomplete or non-existent evidence.

5.3.2.3.1 Normal Exploitation and Non-Commercial Use of Works

A statutory licence ACS privileges non-commercial online use of works by individuals. It targets activities that mirror the personal enjoyment of works over digital network platforms, which since the advent of the Internet have become part of the everyday life of users. Examples are the non-commercial sharing of images, as well as the accidental or transformative use of works on those platforms. Regarding the latter, Dreier makes the case for a new limitation clearly:

The sociological function of image-sharing in particular is more like a gesture of pointing at an image made by another, which as such was always unrestricted under copyright law. The fact that such a gesture of pointing is not performed physically in the age of Facebook, WhatsApp, tablets and smartphones, but requires more or less accidental reproduction

\begin{itemize}
\item \textsuperscript{1533} Senftleben, 2004, p. 177–194., 2006, pp. 427–429, 435–437. This seems to be the approach followed in Opinion AG Infopaq I, ¶¶137–138, which focuses on the effect of the limitation on a specific market (here, the newspaper market).
\item \textsuperscript{1534} This argument is based on Senftleben, 2004, pp. 184–193.
\item \textsuperscript{1535} Parts of this argument derive from Depreeuw, 2014; Senftleben, 2004, pp. 184–193.
\item \textsuperscript{1536} Severine Dusollier, 2005, p. 220; Geiger et al., 2014, pp. 603–604; Gervais, 2005; Griffiths, 2009, p. 457; Lucas, 2010, p. 277. See also P. Bernt Hugenholtz & Okediji, 2008, pp. 23–24, stating that this is the correct reading of US–Copyright in light of historic elements. The authors conclude: “there is a conflict with the second step if the exempted use would rob the right holder of a real or potential source of income that is substantive”.
\item \textsuperscript{1537} IFPI, 2015; Karp, 2014; Vallbé et al., 2015, p. 3.
\item \textsuperscript{1538} See supra 1.1.
\end{itemize}
processes devoid of any independent commercial value, should not play a role where aspects of copyright are considered in a purposeful manner.\textsuperscript{1539}

Of course, as the same author points out, where the commercial threshold for the exploitation of works is passed, the situation changes and the use should not be privileged. An example is where the use of another’s image generates a share of the advertising revenues of the platform provider for the user making it available online.\textsuperscript{1540}

In this respect, the statutory licence ACS does not privilege online use of works against profit and direct financial consideration, or use by institutions or legal persons (even if non-commercial). Compared to commercial platforms, the direct licensing of non-commercial use by individuals does not seem to be a major form of exploitation of works online that generates significant rights revenue.

Instead, an ACS aims to license and monetise a significant share of non-commercial online use of works that is currently uncompensated. In many cases, these online activities are unenforceable or too costly to enforce. In other instances, copyright owners choose not exercise their rights for this type of use, due for example to licensing practices or strategic choices, overlap between exclusive rights, and legal uncertainty on the status of the use. In an additional set of cases, the non-commercial use may be subject to gratis open access-type licences.

In this context, it is legitimate to ask: if a use is not susceptible of exercise or monetisation, or it is not foreseeable that it will in future constitute a major source of revenue, should it be considered part of the normal exploitation of works? In this scenario and for this type of use, exclusivity does not seem the only (or best) means to yield remuneration.\textsuperscript{1541} A system of remunerated access, on the other hand, could provide a more efficient legalisation and monetisation mechanism. If this is the case, what prevents the consideration of an ACS as a normal form of exploitation for a subset of non-commercial online use?\textsuperscript{1542}

This approach is not a radical departure from the EU copyright tradition. A compensated limitation coupled with a legal licence already constitutes a normal exploitation of works for certain types of non-commercial use in the acquis. Relevant examples are the payment of fair compensation for digital private copying for non-commercial purposes, reprography, specific acts of reproduction by social institutions, and certain permitted uses of orphan works, like digitisation and making available (provided the rights holder triggers that mechanism).\textsuperscript{1543} In the

\textsuperscript{1539} Dreier, 2015, p. 8.
\textsuperscript{1540} Dreier, 2015, p. 8.
\textsuperscript{1541} See Geiger & Schönherr, 2014b, pp. 475–476.
\textsuperscript{1542} Roßnagel et al., 2009, p. 25, arguing that there is no conflict with normal exploitation due the high cost or impossibility of enforcing these uses. See also Eckersley, 2004, p. 156, arguing that the pervasiveness of P2P file sharing, the ineffectiveness of TPMs, and the paucity of legal offers might qualify a blanket licence as a “normal exploitation” of the work. On this point, see Geiger & Schönherr, 2014a, p. 136, and Geiger, 2015b, p. 16 (“…it could be argued that the ‘normal’ exploitation in some cases can also be achieved by limitation-based remuneration rights…”).
\textsuperscript{1543} The private copying limitation in Art. 5(2)(b) InfoSoc Directive is limited to use for non-commercial purposes. The limitation for permitted use of orphan works is restricted to public interest aims of the beneficiary organisations, which are allowed to generate revenue in relation thereto “for the exclusive purpose of covering their costs of digitising orphan works and making them available to the public”. See Art. 6(2) Orphan Works Directive.
case of private copying, the privileged acts are similar to those in an ACS (but limited to the right of reproduction) insofar as they solely benefit end-users and cover non-commercial digital use.

If an ACS ensures compensation for non-commercial online uses that are not exercised or monetised, it is difficult to argue that it causes a direct conflict with the normal exploitation of works. This is because no major foreseeable source of income is affected; instead, the ACS creates new rights revenue. A different conclusion would imply that the test prevents a profitable market from replacing an inefficient one, which appears unreasonable and inconsistent with the objective of protecting and remunerating rights holders.

5.3.2.3.2 Indirect Effect on Commercial Exploitation

The main problem with a statutory licence ACS relates to its potential effects on commercial exploitation models on the Internet. The system would allow end-users to make and distribute perfect copies of digital works to other users. In doing so, it may indirectly affect existing models of online content dissemination by depreciating their value for rights holders. In other words, by regulating a “secondary” form of exploitation—non-commercial use by individuals—an ACS may affect the “primary” markets reserved to exclusivity.

A similar concern was expressed by the CJEU in *ACI Adam, Copydan* and *Reprobel*, eventually leading to the exclusion of reproductions from unauthorised sources from the scope of the private copying limitation. In the Court’s view, allowing these reproductions would force copyright holders “to tolerate infringements of their rights which may accompany the making of copies for private use”. Hence, permitting such copies would be tantamount to indirectly enabling the mass distribution of works through unlawful sources.

The Court was concerned with the effects on the market of indirectly fostering online dissemination of works. *Reprobel* makes the point clearly:

> to accept that such reproductions may be made from an unlawful source would encourage the circulation of counterfeited or pirated works, thus inevitably reducing the volume of sales or of other lawful transactions relating to the protected works, with the result that a normal exploitation of those works would be adversely affected…

Those risks are naturally greater in a statutory licence ACS, which also covers acts of communication to the public by end-users. One potential consequence is that certain online intermediaries enabling mass use of works benefit from the system and elude intermediary liability. This is a valid concern with *empirical and legal dimensions*. The first dimension relates to whether such a substitution effect will occur in practice. The second dimension links to the legal effects of the ACS on the liability of Internet intermediaries.

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1544 Bernault & Lebois, 2005, p. 35; Ricketson, 1999, p. 70. See also Gervais, 2005, p. 37ff., placing cases where users cannot obtain the content “through a normal commercial transaction” outside normal exploitation.

1545 Ricolfi, 2007, p. 304 & n.53.


1547 CJEU, *ACI Adam*, ¶36, 39; Opinion AG in *ACI Adam*, ¶¶72, 75, 83; CJEU, *Reprobel*, ¶59. Expressing a similar concern regarding a different limitation, see Opinion AG in *Ulmer*, 57 (“The danger of large-scale unlawful distribution, which is present in the case of digital copies, does not exist either.”).

In theory, an ACS can cause the negative effects described. Yet, in practice, whether such effects occur is an empirical question with no certain answer, leaving room only for educated speculation. A good starting point is research on the effect of unauthorised use on legal platforms, and on the supply of copyright works. This research, it is noted, is not consistent on the negative effect of unauthorised copying through file sharing on the revenues of rights holders. Most evidence suggests that file sharing has a relatively small effect on media sales, far from a “one-to-one displacement of sales by illegal copies”.

As noted in Chapter 1, existing studies do not support the claim that unauthorised online use has long-term negative effects on social welfare or the creation and supply of works. In fact, some studies report a positive effect, especially in the networked environment where costs of distribution are near zero. Positive effects leading to increased demand for works are also reported, and include the possibility of users “sampling” different works, and “purchasing related products or services, such as concerts or merchandise”. In a similar fashion, studies on competing legal offers show that free streaming or advertisement based channels have a reduced impact on the revenues of paid services. What to make of this?

The combination of results suggests that unauthorised or free (legal) use—the closest proxy we have for a statutory licence ACS—does not destroy the rights revenues generated by the online commercial market for the same type of use. Data showing an annual increase in the digital revenues of rights holders seems to reinforce this conclusion.

Thus, the evidence points towards the possibility that an ACS can co-exist with commercial exploitation, as many users remain willing to pay for commercial offers that are sufficiently appealing in terms of price, convenience, branding, aggregation, usability, quality, fairness, or simply due to lack of awareness of alternatives.

On the other hand, despite the deployment of enforcement measures and the growth of legal alternatives, unauthorised services continue to exist and develop. At this point, it is difficult to believe that the market provides the sole solution to the territorial and substantive fragmentation issues faced by EU copyright law in the digital environment. In this context, legal offerings will likely remain unable to cater to consumers’ expectations and demands for cultural access channels.

If unauthorised and authorised services can co-exist online while preserving the digital revenues of rights holders through online platforms, it is legitimate to ask whether an ACS for non-

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1550 Poort & Weda, 2015b, p. 65.
1552 Eijk et al., 2010; Grassmuck, 2010b; Huygen et al., 2009; Karaganis & Renkema, 2013.
1553 Poort & Weda, 2015b, p. 65.
1554 Aguiar & Martens, 2013; Papies, Eggers, & Wlomert, 2010; Vallbé et al., 2015, p. 3.
1555 See supra 1.1, with further citations.
1557 Ricolfi, 2007, p. 300, making a similar argument.
1558 Kantar Media, 2012; Poort & J. Leenheer, 2012; Vallbé et al., 2015. See also supra 1.1.
commercial use of works that is not exercised, enforceable, or remunerated will significantly hinder reasonably foreseeable major sources of rights revenue online.

The answer seems to hinge on the abovementioned legal dimension. Would a statutory licence ACS allow copyright owners to enforce their exclusive rights of reproduction and communication to the public against unauthorised websites that derive direct or indirect commercial benefits from the availability of works?

The answer to this question depends on the design of the system and the copyright limitation underlying it. To be clear, websites that host and make available copyright works without rights holders’ consent (e.g. unauthorised cyberlockers), take an active role in its online availability, and make a direct or indirect commercial use of said content will mostly remain infringing despite the proposed legalisation scheme. In fact, the services provided by these websites frequently go well beyond the mere storage of information provided by the individual recipient of the service. Therefore, it is difficult to envision that they would be completely exempt from liability as a result of the hosting “safe-harbour” in Article 14 E-Commerce Directive. 1559

However, the ACS may potentially benefit decentralised P2P systems using BitTorrent software. If end-users in such a system have a legal authorisation to copy and disseminate works online, it is less clear whether the provider of the software or platform is directly infringing. 1560 Assuming the legalisation of this type of P2P system has a greater potential to substitute for significant parts of the current online market, the likelihood that they escape any type of liability is problematic for the admissibility of a statutory licence ACS under the second step of the test.

In part, it is possible to solve this problem through the definition of the “non-commercial” use covered by the licence. The scope of the permitted “non-commercial” use could for example exclude P2P exchanges by the operator (individual, group of individuals or legal person 1561) of a platform that generates advertising or sponsorship receipts or any type of financial consideration in connection with the works exchanged. 1562 Such a definition would preserve the economic core of the right of communication to the public in EU law, and is very much an open issue before the CJEU in light of the pending

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1559 On the legal regime of Article 14 E-Commerce Directive, see Christina Angelopoulos, 2016b, pp. 51–61. N.B. “the safe harbours apply to the relevant activities, not to service providers per se.” Ibid., p. 46.

1560 Quintais, 2012. Outside copyright, it is possible to argue that the operation of such sites may be prevented on grounds such as unfair competition (in most EU jurisdictions) or passing-off (e.g. in the UK). See Lucie Guibault & Quintais, 2014, p. 21, discussing hyperlinking.

1561 N.B. in respect to certain operators, such as The Pirate Bay and Popcorn Time, whether they “actually exist de jure as natural or legal persons is doubtful. More likely, these actors are merely ‘brands’ that are used by fluid groups of loosely organized individuals”. See P. Bernt Hugenholtz & Quintais, 2016 (forthcoming).

1562 In this respect, see the specifications for the definition of commercial uses made by the French CMO SACEM in the context of a pilot project reported by Metzger & Heinemann, 2015, p. 16. See also the definition of “non-commercial” in the CC Non-Commercial 4.0 International Public License.
preliminary references mentioned in the previous chapter: GS Media, Filmspeler, and Stichting Brein v Ziggo.  

On the one hand, it is still unclear whether and to what extent linking to an unauthorised but freely accessible source (i.e. without technical restrictions) constitutes a communication to a new public. It is possible that this issue is somewhat clarified by the CJEU in GS Media and Filmspeler. However, after the Opinion of the AG in the first case, there is significant legal uncertainty as to the outcome and it may be naïve to assume that the Court will bring absolute clarity to this topic, rather than add further complexity to the legal analysis. On this point, it is noted some Member States’ courts have already ruled that these links are indeed restricted acts of communication to the public. 

On the other hand, if hyperlinking to an unauthorised freely accessible source is a restricted act of communication to the public, what prevents the qualification of the services provided by the operators of platforms like The Pirate Bay or Popcorn Time as acts of communication to the public? The Pirate Bay, for example, provides a system by means of which metadata on protected works is present on the users’ computers and indexed and categorised for users, so that the users can trace and upload and download the protected works on the basis thereof. The system is functionally and visually similar to the provision of links and in that sense could be argued to make works available for subsequent up/download. This issue is at the heart of the reference in Stichting Brein v Ziggo.

If the outcome of these cases is favourable to rights holders—by prohibiting hyperlinks to unauthorised sources or qualifying the unauthorised acts of operators of decentralised file-sharing systems as direct infringement—a statutory licence ACS would only afford a defence against infringement for end-users sharing works for non-commercial purposes, as well as to a limited set of online intermediaries, namely those that enable or facilitate the licensed use but do not themselves reproduce or make available the works online (e.g. mere software providers). As occurs under the current regime, those predominantly “passive” and “neutral” intermediaries that qualify for the safe-harbours in Articles 12 to 14 E-Commerce Directive will remain exempt from liability in relation to their services that benefit from such exemption, but not to other activities that fall outside that limited scope.

Thus, the statutory licence would not privilege for-profit acts of making available online by individuals or platforms, or the activities of operators of file sharing platforms, which would typically not qualify as “non-commercial” or “individual use of works by natural persons”. Rights holders could avail themselves of remedies against these individuals and platforms, most notably proceedings for direct infringement of the exclusive right and injunctions.

If these scenarios play out, the situation for rights holders under a statutory licence ACS would not be worse than the current status quo in terms of enforcement measures available against

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1563 See supra 4.3.2.1.
1564 See supra 4.3.2.3.
1565 In Germany, see BGH, 9.07.2015, I ZR 46/12 (“Die Realitaet II”), with commentary by J. B. Nordemann, 2016.
1567 On this point, see supra 4.3.2.3, and the argument of AG Wathelet in Opinion AG in GS Media, ¶75–79.
unauthorised platforms. If they do not play out, the limitation could be designed to include requirements that achieve a similar effect. Then, the relevant differences introduced by the ACS would be that end-users have a legal authorisation for non-commercial use, and the copyright owners receive remuneration for that use.

Furthermore, copyright owners and online intermediaries would continue to be able to pursue self-regulation through voluntary agreements for online copyright enforcement against unauthorised third party websites, possibly focusing on the “follow the money” approach endorsed by the Commission.\(^{1568}\) In those agreements, parties could define the scope of allowed “non-commercial” use in the terms described above (and in line with future interpretation of the concept by the CJEU) thereby ensuring the preservation of the core of the exclusive right for commercial exploitation.

### 5.3.2.3.3 Normal Exploitation and Compensation

Most interpretations of the second step hold that a conflict with the normal exploitation entails a level of economic loss to the rights holder. However—and therein lies the contradiction—that conflict may not be cured by the provision of compensation to rights holders. Rather, compensation operates only to make the prejudice to rights holders reasonable under the third step.\(^{1569}\) Although the CJEU is typically agnostic on this point, it has on occasion uncritically endorsed the approach.\(^{1570}\)

This position does not result from the ordinary meaning of the test but from the preparatory works of Article 9(2) BC and the consideration of equitable remuneration in the system of the test.\(^{1571}\) It is debatable whether such elements are determinative for the EU test. In principle, the rules of legal interpretation would not preclude considering compensation in the second step. In fact, some high-level national court decisions have done so and there have been increasing calls to that effect in academia.\(^{1572}\)

An influential example is the MPI Declaration, which states that limitations do not conflict with the normal exploitation where they reflect significant competing concerns, including of a

\(^{1568}\) See, endorsing this approach: Communication Digital Single Market 2015, pp. 6–8; SWD Digital Single Market Strategy 2015, p. 30; Communication on Modern European Copyright Framework 2015, pp. 10–11. International Literary and Artistic Association (ALAI), 2015. See also: P. Bernt Hugenholtz, 2010, describing the emergence of “self-regulation” as a mode of extra-judicial copyright enforcement online, with the participation of ISPs and other online intermediaries; and Pérez, 2015, for a recent example of a Memorandum of Understanding aimed at protecting copyright and related rights online”.


\(^{1572}\) On national case-law, see e.g. Geiger, 2007b, pp. 7–8 citing: BGH, 25.02.1999, I ZR 118/96 (“Re Supply of Photocopies of Newspaper Articles by a Public Library”), and BGH, 11.07. 2002, I ZR 255/00 (“In House Press Clippings Archive – Electronischer Pressespiegel”). For academic arguments, see: Geiger et al., 2008; Geiger, 2007b, pp. 7–8; He, 2009, p. 300, including adequate remuneration on the fourth factor of his adapted fair use test, used to examine the normal exploitation condition; Geiger & Schönerr, 2014a, pp. 135–136. Contra, see Lucas, 2010, p. 278, arguing that normal exploitation must be assessed by reference to the current rights owner.
normative nature, particularly if “adequate compensation is ensured”, for example through a legal licence. This aspect is important mainly where a traditional view of the test would foreclose analysis of a limitation based on a conflict with the normal exploitation, without considering the possibility that the same can fully compensate rights holders for the use allowed.

As noted in Chapter 1, a recent empirical study in the Netherlands concluded that a statutory licence ACS for the online rights of reproduction and communication to the public applying to recorded music has the potential to compensate rights holders fully. In concrete terms, a EUR 1.74 surcharge on the ISP subscription for all households with Internet connection in that country would equal the entire revenue of the Dutch physical and digital market for recorded music in 2012, including all conventional purchases of recorded music of approximately EUR 144 million. As users are willing to pay a monthly amount well above that price point, this system would be welfare increasing, even after correcting the results for overestimation.

If similar results apply to other content types and countries in the EU, a limitation-based statutory licence ACS would provide sufficient compensation to cure any conflict with the normal exploitation of works. Again, there is no certainty that the results hold across the board, as they merely reflect a snapshot of the moving target that is the online market for one type of content in one Member State. However, together with the uncertain negative effects of an ACS on online copyright markets, the study gives pause to question whether such a legalisation proposal would conflict with the normal exploitation of works.

5.3.3 Unreasonable Prejudice to Legitimate Interests

The third step of the test requires that limitations do not cause “unreasonable prejudice” to “legitimate interests” of authors or rights holders. Scholars read both expressions in quotation marks as opening the door for public interest considerations when assessing limitations. This allows a balancing exercise between the interests of copyright owners in retaining exclusivity and the larger public interest in benefiting from a limitation.

Striking a fair balance of rights and interests between the different categories of rights holders, as well as between them and users of works, is a central objective of the InfoSoc Directive. To achieve that objective and resolve conflicts between fundamental rights the CJEU uses the principle of proportionality. Proportionality is a general EU law principle that guides

1574 Revenues are calculated resorting to industry statistics, such as IFPI, 2013, which estimates rights holders revenues in the Dutch recorded music market at EUR 143.6 million. The focus is on revenues rather than profits due to the lack of reliable information on costs. Data on private copying levies collected in the Netherlands was taken from WIPO, 2013. The results assume the unlikely scenario that an ACS substitutes all current sales of recorded music (perfect substitution) and provides no cost savings. See Handke et al., 2015.
1575 See supra 1.1. See also Handke et al., 2015.
1577 See R. Hilty & Nérisson, 2012, and supra 5.2.1.
1578 Recital 31 InfoSoc Directive.
substantive interpretation of rights and calibration of remedies in the *acquis*.\textsuperscript{1580} Through the objective of fair balance, this principle is afforded additional relevance for the interpretation of limitations.\textsuperscript{1581}

For some scholars, the principle of proportionality should apply to the three-step test as a whole.\textsuperscript{1582} However, as previously argued, in the context of a flexible analysis, the third step seems a suitable place for the final examination of competing interests.\textsuperscript{1583} In this setting, a proportionality analysis involves an evaluation of the appropriateness of a limitation for achieving its purpose, the relevance of its policy justifications, and its impact on the interests of rights holders and the public.\textsuperscript{1584} Hence, this section carries out a balancing exercise between the conflicting legitimate interests and the reasonableness of the prejudice caused by a statutory licence ACS.

First, an examination is made of the meaning of the expressions “unreasonable prejudice” (5.3.3.1) and “legitimate interests” (5.3.3.2). This is followed by the balancing exercise proper, which scrutinises the interests of rights holders as a group and the issue of fair compensation (5.3.3.3), as well as the conflicting interests of creators and exploiters (5.3.3.4). The subsequent analysis follows an innovative approach to the third step by taking into consideration the public interest in an ACS. This includes first an examination of the interests derived from the promotion of creativity and dissemination of works (5.3.3.5) and, second, a consideration of the public interest in the respect and protection of fundamental rights of end-users and intermediaries (5.3.3.6).

### 5.3.3.1 Unreasonable Prejudice

The term “prejudice” means “damage, harm or injury”.\textsuperscript{1585} By requiring that prejudice to copyright owners is “not unreasonable” the third step is setting a threshold “slightly stricter” than

\begin{footnotes}

\footnotetext[1581]{See *supra* 4.4.1.3 and 4.4.1.4. Cf. CJEU, *Deckmyn*, \S 19-23; CJEU, *Murphy*, \S 162-164; Opinion AG in *Ulmer*, \S 38. See also Arnold & Rosati, 2015, pp. 13–14. At the international level, TRIPS requires observance of the principle of proportionality (in Arts XX GATT and XIV GATS), which is an inherent feature of the WTO system. See Grosse Ruse-Khan, 2008; Kur, 2008, pp. 1, 38–40.}

\footnotetext[1582]{Kur, 2008, p. 40, noting the adequacy of proportionality to interpret “gradual” criteria, like “certain special cases” and “normal exploitation”.}


\footnotetext[1584]{The analysis of this paragraph draws on Kur, 2008, pp. 39–40. See also: Roßnagel et al., 2009, p. 26; Fischman Afori, 2014, pp. 895–896, calling proportionality a new “mega standard” in European copyright law and identifying a four-factor test for proportionality in European law where the last factor – “balancing” – is often known as “proportionality *stricto sensu*”; and Christina Angelopoulos, 2015, pp. 78–79, noting that the CJEU approach in fundamental rights cases is to parse down proportionality to a balancing exercise.}

\footnotetext[1585]{WTO, *US–Copyright*, \S 6.225.}
\end{footnotes}
reasonable. Hence, a limitation may impose a certain amount of prejudice up to the point where it “causes or has the potential to cause an unreasonable loss of income to the copyright owner.”

As a result, the prejudice can be substantial without being unreasonable if copyright owners do not “bear costs that are out of proportion to the benefits derived by the public”. Only then should measures be put in place to countenance it, like the payment of compensation. Logically, where the prejudice is minimal, it is possible that no compensation is required. To make this assessment it is necessary to quantify the “legitimate interests” at stake. Copyright does so with reference to the economic value of exercising different exclusive rights, measured for example through licensing. Based on the BC preparatory works, the copyright panel states that the prejudice is restored to tolerable levels if compensation is provided, such as via “a system of compulsory licensing with equitable remuneration”. Compensation therefore plays a central role in the third step.

This position, however, is rather “arithmetic”, as it foregoes policy considerations. Beyond remuneration, the third step contains several flexibility tools, namely the legitimacy and unreasonableness filters. For that reason, the third step ought to account for the conflicting interests invoked by exploiters and creators against each other and “against the reasons justifying the use privilege”, like fundamental rights. Similarly, it should assess reasonableness in light of a limitation’s non-economic motivations, which mirror the legitimate public interest. This is relevant because a strong public interest motivation may provide sufficient justification for a limitation, even if the same causes loss of revenue to rights holders.

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1586 Ibid., ¶6.225. See also Records Stockholm 1967, p. 1145. This study adopts the position that the potential linguistic conflict between the originally proposed English language expression “unreasonable prejudice” and its French translation “préjudice injustifié” do not alter the interpretation of the third step. For an analysis of the linguistic issue with reference to Stockholm records, see Ficsor, 2002b, pp. 141–147; Geiger et al., 2014, pp. 584–585.


1588 Iuliano, 2011, p. 487.


1591 Ibid., ¶6.229 (& n. 205), citing the WIPO Guide to the Berne Convention, authored by Claude Masouyé (then-Director of WIPO’s copyright division). Cf. Senftleben, 2004, pp. 235–241. Professor Ulmer first suggested the approach in the 1967 Stockholm revision conference in his capacity as Chairman of Main Committee I, inspired by the then-recent German Copyright Act of 1965. See Records Stockholm 1967, pp. 1145-1146. This statement should be qualified as a supplementary means of interpretation. Cf. supra 5.2.1.

1592 Kur, 2008, p. 29 & n.108, noting the similarity of this approach with the second step analysis in US–Copyright. Kur also observes that the legislative motives behind the US “home-style” and “business” exemptions discussed in US–Copyright strengthened the position of rights holders.


1595 Ginsburg, 2001, p. 57; Lucas, 2010, pp. 277–278. See also Iuliano, 2011, p. 486; Senftleben, 2006, p. 436. At EU level, see Opinion AG in Infopaq I, ¶139, recognising the normative element (the “qualitative nature of the effect”) but failing to properly consider it in the analysis.

5.3.3.2 Legitimate Interests of Rights Holders and the Public Interest

The third step considers *interests* of rights holders taken together (creators and exploiters) that qualify as *legitimate*. An interest is the economic basis of the substantive right, meant to reflect the value of exclusive rights as measured by their possibilities of exercise.

Normatively, an interest is legitimate if “justifiable in the light of the objectives that underlie the protection of exclusive rights” or if “supported by relevant public policies or other social norms”. This view presupposes a balancing act and consideration of a limitation’s justification. Therefore, interests are legitimate if lawful and justifiable on normative grounds.

If this understanding is correct, it is necessary to identify the parties whose interests are legitimate because they reflect the public interest. In this respect, the industrial property three-step tests in TRIPS provide more clarity than the copyright tests, as they mention “third party interests”. This phrase denotes interests in the derogation of exclusive rights “in certain situations to encourage wider social access to and use of knowledge, information and cultural products”. “Third parties”, then, are those adverse in interest to the rights holder in the sense they are excluded from using works but for the limitation. They are the direct and indirect beneficiaries of a limitation.

Although the copyright tests only mention “authors” or “rights holders”, some influential scholarship posits that the balancing aims of international and EU copyright law require in addition a consideration of the public interest in the final step. Limitations serve the public interest by advancing the objectives of the copyright system and enabling its coexistence and coherence with fundamental rights or freedoms, allowing copyright to fulfil its social function.

As argued in the previous chapter, the public interest drives the function of copyright limitations as essential instruments to define the scope of copyright protection. Nowhere is that stated

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1598 Christie & Wright, 2014, pp. 428–429; Geiger et al., 2008; Senftleben, 2006, p. 436; R. Wright, 2009, p. 610. See also: Geiger et al., 2014, p. 595, arguing that legitimacy is “context-dependent”; and Senftleben, 2004, pp. 216–219, on the inclusion of licensees as holders of legitimate economic interests to be considered in the third step.


1600 WTO, *US–Copyright*, ¶6.224.


1604 Geiger et al., 2014, p. 587.

1605 R. Wright, 2009, p. 600.


1607 Geiger et al., 2008; Kur, 2008, p. 41. For a broad view of interests involved in the TRIPS patent test, see Lamping, 2014, pp. 687–688, 694.


1609 In this sense, see *supra* 4.4.1.1 and 4.4.1.3. See also Dreier, 2015.
clearer than in *Luksan*, where in connection with a film director’s claim for fair compensation the CJEU interpreted Article 17 Charter as follows:1610

Finally, it should be pointed out that, under Article 17(1) of the Charter of Fundamental Rights of the European Union, everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest. Article 17(2) provides that intellectual property is to be protected.

The CJEU sets aside the notion that the recognition of copyright as property and as a fundamental right implies its absolute protection in the form of an exclusive right. Instead, the Court states that exclusive rights may be replaced by a right to fair compensation “in the public interest and in the cases and under the conditions provided for by law”.

Because the introduction of limitations in the acquis is regulated by the three-step test, and the balancing of competing interests—including the grant of fair compensation—usually occurs in the third step, it seems that this is the place to take into consideration the public interest.

A statutory licence ACS legalises large-scale non-commercial online use of works by individuals, in relation to which the exercise of exclusive rights is costly, impossible or undesirable. Beyond the market failure argument explained throughout this study, the public interest in regulating this use potentially falls under two headings, recognised as expressions of such interest in the MPI Declaration. 1611

The MPI Declaration also refers to a third category: interests in competition. As noted in Chapter 2, competition law may justify restrictions to abusive or collusive use of exclusive rights, as well as motivate the adoption of limitations or compulsory licences. See, e.g., supra 2.4.2.2, on the justification for the broadcasting compulsory licence. See also Lucie Guibault, 2002, pp. 56–68.

In this respect, see Wittem Group, 2010, p. 127 & n.34, emphasising the legitimate interests of members of the public “in improving the access to the work.”

Similarly, see Roßnagel et al., 2009, p. 16.

Griffiths, 2013; Griffiths & McDonagh, 2013; Ramalho, 2014, pp. 87–92, with further development on the requirements of proportionality. See, inter alia: CJEU, *Germany v Council*, ¶78 (and cited case law); CJEU,
Furthermore, the CJEU recognises that fundamental rights can operate as justifications for limitations. As noted in Chapter 4, by virtue of the principle of effectiveness and the objective of legal certainty, consideration of fundamental rights prevents a restrictive interpretation of certain limitations and may warrant a widening of their scope.

5.3.3.3 The Interests of Rights Holders and Fair Compensation

The legitimate interests of rights holders are primarily economic. Exclusive rights are the traditional tools to protect them. As a group, rights holders have a legitimate interest in the commercial exploitation of works through digital platforms.

If an ACS causes prejudice to copyright owners, it is possible to return that prejudice to reasonable levels by providing remuneration or compensation through a statutory licence. Where an ACS provides an adequate, efficient and fair means to remunerate different groups of affected rights holders, it should not cause an unreasonable prejudice to their legitimate interests.

But how to define and calculate compensation in an ACS? As a principle, compensation should be fair and adequate to remunerate rights holders for the non-commercial online use of works by individuals. Because the statutory licence ACS examined here assumes the adoption of a compensated limitation in the acquis, it makes sense that it adopts the template of the existing and comparable autonomous EU law concepts of “fair compensation” or “equitable remuneration”. Of these concepts, fair compensation provides the sounder approach: not only because it attaches to the InfoSoc Directive’s limitations (and thus to the rights licensed in a future ACS), but also for the reason that recital 36 of the directive favours this concept for future compensated limitations on the directive’s exclusive rights.

Chapter 4 deals with fair compensation in some detail. That analysis shows that the right of fair compensation is unwaivable and its calculation based on the harm caused to copyright owners by the introduction of a limitation. That calculation takes into consideration different mitigating

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1615 Schmidberger, ¶80; CJEU, Kadi, ¶360. For a list of case law, see Geiger & Izyumenko, 2014, p. 322 & nn.27, 331; Sganga, 2015, p. 8ff. See also infra 5.5.2.
1616 CJEU, Promusicae, ¶¶61–68; CJEU, Painer, ¶113; CJEU, Bonnier Audio, ¶¶49–60; CJEU, Scarlet Extended, ¶¶43–46; CJEU, Netlog, 41; CJEU, UPC Telekabel, ¶61; and, by implication, CJEU, Luksan, ¶68. Cf. Christina Angelopoulous, 2015, pp. 72–73; European Copyright Society, 2014b, pp. 6–7; Geiger & Izyumenko, 2014, p. 334.
1617 For CJEU case law, see in particular CJEU, Murphy, ¶¶163–164, and CJEU, Painer, ¶133. See also Sganga, 2015, p. 19.
1620 The term “adequate compensation” is used in the MPI Declaration. See Geiger et al., 2008. For a different approach, see Art. 5.7 Wittem Code mentioning “fair and adequate remuneration”, which seems an attempt to avoid tension between the concepts of equitable remuneration and fair compensation in the acquis. Cf. Geiger & Schonherr, 2012, p. 165; Wittem Group, 2010.
1621 Art. 5(2) (a), (b) and (e), and recital 36 InfoSoc Directive. The Orphan Works Directive follows a similar approach in Art. 6(5) and Recital 18. For an outline of this concept and relevant case law, see supra 4.4.3.3.
factors: the *de minimis* nature of the use, whether the use was authorised (for free or against payment), and the application of TPMs.1622

The resulting harm corresponds to the “prejudice” mentioned in the third step of the test. Analysis of step two clarified that the potential prejudice to copyright owners from a statutory licence ACS includes its direct and indirect effects on normal modes of commercial exploitation online. As noted, it is unclear whether the licence will have direct negative effects on that commercial exploitation if the non-commercial use it covers is too difficult to enforce, exercise or monetise. The statutory licence will remunerate this use, generating a novel revenue stream for copyright owners, thus improving their situation from a financial standpoint.1623

However, it was also stated that such a legalisation scheme may have the indirect effect of removing liability from unauthorised for-profit websites, who either make works available over the Internet on a large-scale or, depending on the legal status of their activities, facilitate that availability for economic benefit (e.g. The Pirate Bay and Popcorn Time). If this occurs, legalisation may conflict with the normal exploitation of works and cause economic harm to rights holders. For that reason, different approaches were outlined that allow rights holders to retain effective remedies against unauthorised websites despite the adoption of an ACS. If those remedies remain at the disposal of rights holders, no significant prejudice should arise from the activities of those websites *as a legal consequence of an ACS, or that is attributable to its adoption*.1624 Rather, the only prejudice that should be examined in the context of the three-step test here is the economic harm caused by the licensed non-commercial acts of individual users on existing commercial legal offerings (e.g. on the revenues of streaming services like Spotify or Netflix).1625

Now, it is not possible to quantify this harm with certainty. In part, this is because harm is measured against the effects of the limitation on the market, which are difficult to assess for non-commercial online use.1626 A statutory licence ACS would apply to public goods or goods not yet released on the market,1627 and to forms of use for which there is no clear market due to lack of exercise or monetisation. Moreover, certain types of use licensed by an ACS are *de minimis* or already compensated through contractual means (i.e. priced into the purchase or licence of digital content); in these cases, fair compensation may be unwarranted due to the lack of harm to copyright owners.1628

One approach to calculate harm for non-commercial use is to determine its value to end-users benefiting from the ACS. This value would correspond to the prejudice suffered by copyright owners due to the inability to exercise and enforce their rights for that use. To pass the third step

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1622 See supra 4.4.3.3, 4.4.3.4, and 4.4.3.5. For the factors mentioned, see recital 35 InfoSoc Directive. The standard for equitable remuneration is the “economic value of the use in trade”. See supra 2.2.4.

1623 See, e.g., Geiger, 2014a, p. 21; Roßnagel et al., 2009, p. 14.

1624 See the analysis supra at 5.3.2.3.

1625 It is noted that by applying a limitation to acts of end-users an ACS would likely induce savings on administrative and enforcement costs. See Lescure, 2013, p. 31.

1626 Geiger et al., 2008, pp. 708–710, suggesting that adequate compensation may be set at or below market rate.

1627 Handke et al., 2015.

1628 Similar arguments are made in the context of private copying. See supra 4.4.3, and Quintais, 2015a.
of the test, then, an ACS would have to return that prejudice to reasonable levels, taking into account the aforementioned harm-mitigating factors.

If this approach is accepted, the value of the licensed non-commercial use with no clear market can be determined by gauging users’ willingness to pay through a method of contingent valuation.\textsuperscript{1629} This method was applied in the ACS research in the Netherlands mentioned in Chapter 1 and in the analysis of the second step of the test.\textsuperscript{1630} The limited findings of that study suggest that a statutory licence system can provide sufficient revenue to supplant the direct and indirect losses caused by the legalisation of the types of use in question.\textsuperscript{1631}

If these results remain valid for other types of work and across the territory of the EU, and in addition copyright owners are able to enforce their exclusive rights against unauthorised websites that enter into competition with authorised commercial channels over the Internet, the provision of fair compensation in the terms described above should reduce the actual or potential harm to reasonable levels. It may even afford fair compensation the character of an appropriate reward to promote creativity, which some authors believe to be required by the aims of the InfoSoc Directive.\textsuperscript{1632}

5.3.3.4 The Conflicting Interests of Creators and Exploiters

Rights holders are not a homogenous group with aligned interests. For the purposes of the third step, it is important to distinguish individual creators from exploiters.\textsuperscript{1633} This distinction, as one author puts it, "is one of the characteristics of modern copyright".\textsuperscript{1634}

The distinction finds legal basis in EU law, international law (the BC and WCT solely protect authors and do not consider the interests of exploiters), and even the fundamental rights framework, where authors are the sole beneficiaries of the human right to protection of authorship.\textsuperscript{1635}

The acquis, for its part, differentiates between categories of rights holders in their legal entitlements, and for the purpose of striking a fair balance.\textsuperscript{1636} The particular place of authors is recognised by the CJEU for example in \textit{Luksan} and \textit{Reprobel}, from where it is clear that the economic rights granted in EU law—including exclusive, remuneration or fair compensation

\begin{itemize}
\item Handke et al., 2015, adopting this approach to ACS through conjoint analysis and flagging the challenges of applying this method to a licence that is an unfamiliar and complex quasi-public good. In this way, the ACS would address a major criticism of legalisation proposals and, in general, compulsory licences: that calculation of an overall amount of compensation outside market conditions is inefficient. See Stan J. Liebowitz, 2003; Stan J. Liebowitz & Watt, 2006; Merges, 2004a.
\item See supra 1.1 and 5.3.2.3 (on normal exploitation and compensation).
\item Handke et al., 2015; Vallbé et al., 2015.
\item See Opinion AG in Padawan, ¶¶79–80, relying on the wording of recital 10 InfoSoc Directive (“appropriate reward”). Cf. Geiger & Schönherr, 2014a, pp. 132–133. See also infra 5.5.2 (on the remuneration aspect of copyright), and 5.5.3 (on adequate compensation as an objective of EU law).
\item Geiger et al., 2008, pp. 708–710, 712. This is a conceptual simplification, as under some national laws and for certain categories of works it is possible that a legal person technically qualifies as the “original” rights holder.
\item Kur, 2008, p. 12–13 & n.45.
\item Cf. e.g. recital 31 and Arts 1(1), 2 and 3(2) InfoSoc Directive.
\end{itemize}
rights—are originally owned by authors and rights holders expressly identified in the law and not subsequent or related rights holders, such as publishers.\footnote{1637}

Implicit in the distinction is the recognition of different sets of legitimate interests. Such interests can be \emph{concurrent}, for example regarding the prevention of unauthorised use, or \emph{conflicting}. An example of conflict is the case of compensated limitations, often viewed as beneficial to the material interests of creators but prejudicial to the ability of exploiters to maximise profits.\footnote{1638} This tension is central to the debate on legalisation proposals.

If a statutory licence is coupled with an unwaivable right to fair compensation, creators are likely to receive more remuneration for the licensed use than they would otherwise receive through the exploitation of assignable exclusive rights. Also, a statutory licence better protects creators from inequality in legal expertise and imbalance in bargaining power vis-à-vis third parties.\footnote{1639} This is especially true as emerging online access-based models of exploitation come in for criticism for their lack of transparency and failure to ensure fair remuneration to creators.\footnote{1640}

The benefits of compensated limitations, recognised by commentators and courts, are particularly salient when contrasted with the preference given by exploiters to addressing unauthorised use through enforcement measures that disregard remuneration.\footnote{1641} In light of these benefits, some scholars argue that a compensated limitation is a three-step test-compliant solution to conflicts between creators and exploiters.\footnote{1642} Underlying this position is the view that the prejudice to rights holders \emph{as a whole} can be reduced to reasonable levels if the benefit to creators from a statutory licence offsets the harm caused to exploiters by the imposition of a copyright limitation on a use previously covered by an exclusive right.

\subsection*{5.3.3.5 Public Interest in the Promotion of Creativity and Circulation of Works}

Copyright serves the public interest through the promotion of creativity, and dissemination of culture and knowledge.\footnote{1643} Access to cultural works—and thus information, knowledge and

\begin{footnotes}
\item[1637] CJEU, \textit{Luksan}, ¶67; CJEU, \textit{Reprobel}, ¶¶44–49.
\item[1638] Christie & Wright, 2014, pp. 429–430, referring also to conflicting interests in relation to moral rights and licensing scenarios.
\item[1639] See \textit{supra} 4.4.3.3, on the nature of the right of fair compensation in the \textit{acquis}. See also Europe Economics, Guibault, Salamanca, & Gompel, 2015, pp. 120–121; Geiger, 2010, pp. 528, 532; Geiger & Schönherr, 2012, pp. 166–167; Griffiths, 2009, p. 9; Shaheed, 2014, p. 20; Westkamp, 2008b, p. 38. At the institutional level, see SWD Digital Single Market Strategy 2015, pp. 30–31.
\item[1640] Consumentenbond & Bureau Brandeis, 2014, p. 3; Europe Economics et al., 2015. On streaming, see: Chalis, 2015; IFPI, 2015; Valliè et al., 2015.
\item[1642] Geiger & Schönherr, 2014a, p. 135 (n.102). See also: Westkamp, 2008a, pp. 58–59, following a similar approach under national constitutional law but noting that TPM protection makes the argument less persuasive vis-à-vis the InfoSoc Directive; and P. Bernt Hugenholtz & Okediji, 2008, p. 24, pointing out that the reference to “authors” in the BC and WCT leaves more ample space for a far-reaching compensated limitation than the reference to “rights holders” in TRIPS.
\item[1643] Sganga, 2015, p. 7, arguing that the promotion of creativity is a utilitarian function ascribed to copyright in the InfoSoc Directive, as demonstrated by recital 9 thereof. See also EP Resolution Implementation InfoSoc Directive 2015, ¶25.
\end{footnotes}
culture—is not only a goal of copyright law, but also has a human rights dimension, derived from the right to take part in cultural life and to enjoy the benefits of scientific progress, in itself a manifestation of the human right to science and culture.

The InfoSoc Directive establishes a link between intended creativity, remuneration, and the scope of copyright protection through exclusive rights and limitations. Recital 9 views the harmonisation of rights through a “high level of protection” of copyright and related rights as crucial to intellectual creation. This protection, it continues, “helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large”. Recital 10 adds that if creators “are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work.”

As argued in the previous chapter, a high level of protection cannot mean endorsing infinitely extendable protection. Doing so would contradict “the finding that overly strong exclusivity in the sense of ‘excessive protection’ can have a negative impact on creativity and innovation”. Therefore, a high level of protection should be interpreted as an “adequate” or “optimal” level of protection, aimed at providing remuneration for use of works that is in turn sufficient to incentivise creation, while maintaining a fair balance between private and public interest.

Infinite extension of protection would not only prejudice rights holders, but also the public interest. Limitations thus become essential tools to calibrate broadly interpreted exclusive rights and define an ideal scope of protection. A limitation-based statutory licence ACS for non-commercial use may promote creativity and access to works by providing remuneration for that use, improving legal certainty, and fostering the circulation of culture—all declared objectives of EU copyright law, often expressly identified as such by the CJEU.

Remuneration is central to intellectual creation. If an ACS provides an unwaivable right to fair compensation, creators gain a new rights revenue and an “appropriate reward for the use of their work”, consistent with recital 10 InfoSoc Directive. All the more so when, as argued before, exclusive rights and strict enforcement fail to provide that reward for mass non-commercial online use. A statutory licence system could improve the status quo in this respect, and in this way provide a boon to intellectual creation. Furthermore, it is not obvious that this system would result in an unreasonable prejudice to exploiters, since it would provide fair compensation to all

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1644 Geiger & Schönherr, 2014a, p. 141. On the circulation of culture as a goal of EU copyright law in the jurisprudence of the CJEU, see Marcella Favale et al., 2015, pp. 33, 66–67. See also supra 1.3 and infra 5.5.3.
1645 See Art 27 UDHR and Art. 15(1) ICESCR. See also Shaheed, 2014, pp. 3–5. On the access aspect of copyright and its role as an objective of the acquis, see infra 5.5.2–5.5.3.
1646 Dreier, 2015, p. 2.
1647 See supra 4.4.1.3 and 4.4.1.4.
1648 Dreier, 2015, pp. 2–3.
1649 Marcella Favale et al., 2015, pp. 33, 66–67.
1650 From a human rights perspective, the right to protection of authorship “does not imply perfect authorial control over creative works” and ought to be interpreted as requiring fair remuneration. See Shaheed, 2014, pp. 9–11, 13, 15, 20, 2015.
categories of rights holders in the InfoSoc Directive, precisely those whose legitimate interests are protected by Article 5(5).^{1651}

From a different perspective, a statutory licence system may enhance legal certainty and foster the circulation of works. Improvement at this level results from the licence authorising users to reproduce and communicate works to the public over the Internet in the EU territory, thereby releasing individuals from liability for these online activities. Individuals would benefit from a clearer and simplified set of rules governing their online use of works, in line with the InfoSoc Directive’s objectives, including the harmonisation of copyright law through the coherent application of limitations.^{1652}

This clarified legal framework naturally helps the dissemination of culture and should have the added benefit of improving the legitimacy of copyright law, by approximating it to prevailing online social norms, and mitigating the costly social conflict arising from litigation.^{1653} In this line, the additional legal certainty that a statutory licence brings to the regulation of the activities of end-users online would also contribute to the efficient administration of justice, especially as it relates to costs associated with copyright litigation against these users.

Finally, gains in legal certainty further contribute to intellectual creation by allowing authors to learn from, and build on, pre-existing knowledge and materials.^{1654} Authors benefit from the availability of such materials through limitations,^{1655} which operate as access mechanisms to “empower new creativity”.^{1656}

### 5.3.3.6 Public Interest in the Respect of Fundamental Rights and Freedoms

A main assumption of this dissertation is that strict enforcement of exclusive rights against individuals for non-commercial file sharing is problematic. This results in part from the potential conflict between enforcement measures, and fundamental rights and freedoms. If a statutory licence ACS can mitigate this conflict, it will serve the public interest, providing a counterbalance to the prejudice caused to rights holders by the imposition of a copyright limitation for non-commercial online use. This section therefore examines whether certain fundamental rights and freedoms of individuals and intermediaries—freedom of expression and information, respect for privacy and protection of personal data, and freedom to conduct a business—can justify the adoption of an ACS.

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^{1651} CJEU, *Reprobel*, ¶¶44–49, on the attribution of fair compensation to these rights holders.
^{1653} Grassmuck, 2012, on the social “turn” towards a sharing norm.
^{1656} Shaheed, 2014, p. 13. See also Westkamp, 2008b, p. 4 & n.7. N.B. if these uses cross the commerciality threshold they are outside the scope of the ACS. This design helps preserve the economic core of the exclusive right.
5.3.3.6.1 Freedom of Expression and Information

The right to freedom of expression and information is recognised at international, European, and national levels.\(^{1657}\) In the copyright acquis, recital 3 InfoSoc Directive identifies it as on a par with intellectual property and the public interest:

The proposed harmonisation will help to implement the four freedoms of the internal market and relates to compliance with the fundamental principles of law and especially of property, including intellectual property, and freedom of expression and the public interest.

Copyright promotes freedom of expression by fostering and incentivising independent intellectual creation.\(^ {1658}\) However, freedom of expression imposes restrictions on the scope and enforcement of the exclusive right. In fact, States have a positive obligation to protect this fundamental freedom from interference by private parties, such as in the exercise of copyright.\(^ {1659}\) The risk of conflict between these rights is particularly visible in the digital environment.

On the one hand, the Internet has become an essential medium for the enjoyment and effective exercise of freedom of expression and information.\(^ {1660}\) This freedom includes the possibility to impart, seek and receive information and ideas online.\(^ {1661}\) It extends to the individuals’ enjoyment of digital cultural goods, including activities like reading, listening, viewing, browsing, hyperlinking, and sharing works online.\(^ {1662}\)

On the other hand, many digital cultural and information artefacts qualify for copyright protection.\(^ {1663}\) However, through broad interpretation of exclusive rights and strict interpretation of limitations, EU copyright law restricts the space available for non-commercial use of works that would potential qualify as a legitimate exercise of freedom of expression and information. The result is a conflict between fundamental rights.\(^ {1664}\) If a statutory licence ACS assists in resolving the conflict, it may find a policy justification in this fundamental freedom.

To understand the operation of freedom of expression as a limit on the scope of copyright protection it is instructive to briefly examine judgments from the ECtHR and CJEU.\(^ {1665}\) In ECtHR case law, exceptions to freedom of expression, including those imposed by copyright, are subject to strict interpretation.\(^ {1666}\) A decision or sanction for copyright infringement that restricts a person or organisation’s freedom of expression must not only refer to an unauthorised and

\(^{1657}\) See Art. 19 UDHR, Art. 19 International Covenant on Civil and Political Rights, Art. 11 Charter, and Art. 10 ECHR.

\(^{1658}\) Lee, 2015, p. 12.

\(^{1659}\) ARTICLE 19, 2013, p. 7; Geiger & Izyumenko, 2014.

\(^{1660}\) ARTICLE 19, 2013, p. 7. Cf. ECtHR, Yildirim v Turkey, ¶54.

\(^{1661}\) ARTICLE 19, 2013, p. 13.

\(^{1662}\) European Copyright Society, 2013; Lee, 2015, pp. 16–17.


\(^{1664}\) See supra 4.4.1.4, 4.4.4.1, and 4.4.4.3. On freedom of expression and UGC, see, e.g., Lee, 2015, p. 16.

\(^{1665}\) As noted in Chapter 1, the EU fundamental rights framework includes principles derived from the ECHR, some of which are codified in the Charter, thus justifying the reference to it and to ECtHR judgments. See supra 1.3.

\(^{1666}\) European Copyright Society, 2014b, p. 6, with further references. See also ARTICLE 19, 2013, p. 9.
unprivileged use, but also “be pertinently motivated as being necessary in a democratic society, apart from being prescribed by law and pursuing a legitimate aim”.1667

In *Ashby Donald* and *The Pirate Bay*, the ECtHR interprets freedom of expression and information as an external limit to copyright capable of justifying infringing uses of works, even on a for-profit basis.1668 This consideration implies a reversal in the traditional analysis of restrictions to copyright as derogations to a general principle of exclusivity. In the ECHR framework, the exclusive right is perceived as “an exception to a broader principle of freedom of use”, which is the “point of departure” of analysis.1669

*Ashby Donald* offers further insight. It clarifies that the additional protection provided by Article 10 ECHR only attaches to “expression and content contributing to an issue of public debate or a debate of general interest for society” and not to commercial speech, i.e. “[s]peech, messages, pictures and content which are merely money driven”.1670 Although the ECtHR is not clear on the “commerciality” criterion, it is at least apparent that expressions of a non-commercial character will fare better on a balancing test as justified restrictions on copyright.1671 Thus, it is arguable that some (certainly not all) instances of non-commercial online use of works may benefit from added-value protection provided by this fundamental freedom against copyright.

Based on ECtHR case law, some scholars argue that in conflicts between copyright and freedom of expression, the rights holder should bear the onus of showing that the restrictions operated by copyright are proportionate.1672 In this light, freedom of expression and information functions as a justification to redefine the boundaries of exclusivity.1673

The interpretation of Article 11 Charter by the CJEU has significant parallels with that of the ECtHR. On an external level, the CJEU finds that freedom of expression and information imposes limits on remedies for copyright infringement, as illustrated by the restrictions on enforcement measures like filtering and blocking injunctions in *Scarlet Extended*, *Netlog*, and *UPC Telekabel*.1674 It is noteworthy in this respect that an increasing number of national courts interpret this fundamental freedom as a limit on exclusive rights.1675

On an internal level, freedom of expression and information functions as a justification to broaden the scope of certain limitations, which would otherwise be inconsistent with this fundamental right and, by derivation, the objectives of the InfoSoc Directive. Chapter 4 explains

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1667 Voorhoof & Høedt-Rasmussen, 2013. See also Geiger, 2014c, pp. 135–136; Geiger & Schönherr, 2014a, pp. 118–119, citing the ECtHR in *Pirate Bay* and *Ashby Donald* (“copyright law as a derogation of the principle of freedom of expression… needs to be prescribed by law and be necessary”). Cf. also Fischman Afori, 2014, p. 903.

1668 N.B. in those judgments the infringing uses were not considered justified by freedom of expression.

1669 Geiger & Izyumenko, 2014, p. 318–325, with analysis of the cases mentioned. But see Christina Angelopoulos, 2015, p. 85, noting that neither case involved Internet users’ rights.

1670 Voorhoof & Høedt-Rasmussen, 2013.


1672 The proportionality requirement would derive from the standard of “necessary in a democratic society” in Art 10(2) of the ECHR. See Christina Angelopoulos, 2015, p. 82; Lee, 2015, p. 22, with further references.


and exemplifies this approach, patent in the CJEU’s interpretation of the limitations of parody and quotation in *Deckmyn* and *Painer*.\(^{1676}\)

For the purposes of this dissertation, the core fundamental rights tension susceptible of offering a justification for a statutory licence ACS concerns the application of enforcement measures to non-commercial file sharing.\(^{1677}\) To illustrate this tension and the risk of disproportionate restrictions to freedom of expression and information, two remedies may be singled out: disconnection of access to the Internet, and filtering or blocking injunctions.

Disconnection from access to the Internet is usually discussed in the context of graduated response systems, although it may also be imposed through injunctions based on Article 8(3) InfoSoc Directive.\(^{1678}\) In either scenario, the measure has the potential to impose disproportionate restrictions on freedom of expression.\(^{1679}\)

The issue first came up in France. In a 2009 decision, the French Constitutional Council used freedom of expression and information to qualify Internet access as a fundamental right and reject the first iteration of the so-called HADOPI law, which allowed for individual subscribers to be disconnected from the Internet without prior judicial review.\(^{1680}\) The French Constitutional Council stated that

> in the current state of online means of communications and in light of the importance that these services have acquired for participation in democratic life and the expression of ideas and opinions, the right of freedom of expression implies the freedom of access to these services.\(^{1681}\)

As a result, in 2013 France passed a law prohibiting Internet disconnection as a sanction for copyright infringement.\(^{1682}\) The reasoning of the French court captures the importance of free access to Internet services in light of this fundamental right. It also seems to imply a value judgement favouring the preservation of freedom for online exchange of content embodying ideas and opinions.

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\(^{1676}\) See the discussion *supra* at 4.4.1.4, 4.4.1.1, and 4.4.4.3. See also European Copyright Society, 2014b, pp. 4–7.

\(^{1677}\) ARTICLE 19, 2013, pp. 15–18; Mazziotti, 2013, p. 133; Shaheed, 2014, p. 11.

\(^{1678}\) Husovec & Peguera, 2015.

\(^{1679}\) ARTICLE 19, 2013, p. 15.

\(^{1680}\) French Constitutional Council, 10.06.2009, Decision 2009-580DC, J.O. 9675 (“Loi favorisant la diffusion et la protection de la création sur internet”), referring to Law No. 2009-669 of June 12, 2009, promoting the Dissemination and Protection of Creation on the Internet, which set up the *Haute Autorité pour la Diffusion des œuvres et la Protection des droits d'auteur sur Internet* (HADOPI). The legal basis for the decision was the embodiment of the right of freedom of expression in Art. 11 of the French Declaration of Human Rights of 1789. For the second iteration of the HADOPI law, see Law No. 2009-1311 of October 28, 2009. On the topic, see Geiger, 2011, p. 466–ff. See also Lucchi, 2011, with an analysis of the HADOPI decision and legislative changes in light of the constitutional concept of freedom of speech, including Internet access.


The European Parliament supported an identical view in a 2010 resolution, adopted in the context of the ACTA negotiations. The resolution stated the need for judicial examination prior to any termination of users’ access to the Internet “in order to respect fundamental rights, such as the right to freedom of expression and privacy”. 1683

Article 1(3)(a) Framework Directive endorses this view in EU law. It imposes an obligation on Member States implementing measures that may restrict access and use by end-users of electronic communications networks, for example through a graduated response system. The obligation is to “guarantee to the affected parties a prior, fair and impartial procedure and an effective and timely judicial review” 1684 in conformity with the ECHR, fundamental freedoms and general principles of Community law. 1685

Similar arguments apply when considering Article 8(3) InfoSoc Directive as a valid ground for injunctions to order ISPs to disconnect allegedly infringing providers from Internet access. As argued by Husovec and Peguera, injunctions of this type raise issues of compatibility with the Charter and the ECHR, even when their effectiveness is low due to the possibility that users switch providers or obtain online access from a public space. Thus, the authors conclude, “it seems unlikely that this form of relief may end up being an attractive and effective tool to curb online infringement.” 1686

Serious freedom of expression concerns may also arise from a different type of injunction, notably filtering and blocking. Critics of these measures state that they lack effectiveness and pose serious risks, such as general monitoring and over-blocking. For example, blocking access to content or imposing a filtering system may hinder users’ right to receive information, and interfere with website operators or targeted ISPs’ freedom of expression. 1687

In *UPC Telekabel*, the CJEU showed openness to blocking injunctions that allow intermediaries to choose which measure to apply so long as the ISP *itself* strikes a fair balance between competing fundamental rights. The Court stated that in the implementation of an injunction the ISP must “ensure compliance with the fundamental right of internet users to freedom of information”, *inter alia* by adopting strictly targeted measures and subjecting them to immediate judicial review. 1688 To strike a fair balance, the ISP must meet two conditions. First, Internet users cannot be deprived unnecessarily of the “possibility of accessing the information available”. 1689 Second, the measures must have the effect of preventing unauthorised access to

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1686  Husovec & Peguera, 2015, p. 36.
1687  Council Guidelines on Freedom of Expression 2014, 18. Cf. ARTICLE 19, 2013, pp. 15–18; Husovec & Peguera, 2015, pp. 31–32, 35; Lee, 2015, pp. 17–20; Mazziotti, 2013, pp. 133–136. See also Christina Angelopoulos, 2015, pp. 88–90, noting that filtering systems are likely to fail the fair balance test due to their propensity to involve general monitoring of uses, as well as the risks of over-blocking.
1689  Ibid., ¶¶62–64.
copyright works “or, at least, of making it difficult to achieve and of seriously discouraging internet users” from accessing such works through the provider’s services.\textsuperscript{1690}

As noted by Angelopoulos, this case and its effects would “not easily be reproduced” outside its native jurisdiction of Austria, due to the idiosyncratic nature of the injunctive order at stake. Still, the case illustrates the ease with which the CJEU shifted the responsibility of striking a fair balance from the national courts to intermediaries. The result is further legal uncertainty, opening the door for potential violation of the fundamental freedom of information of Internet users.\textsuperscript{1691}

(It is possible that the CJEU’s direction in this respect will be adjusted in \textit{Mc Fadden}, if the Court follows the Opinion of the AG, according to whom even for “outcome” injunctions, national Courts must first ensure the existence of appropriate measures to achieve the objective of the injunction in compliance with EU law.\textsuperscript{1692})

The link drawn between the right to Internet access and freedom of expression and information of individuals online is reminiscent of Fisher’s main justification for an ACS, namely its potential to advance “semiotic democracy”.\textsuperscript{1693} This concept relates to the ability to “use and manipulate cultural artifacts… playfully or critically”\textsuperscript{1694} or the “power to make cultural meanings”.\textsuperscript{1695} By extending this power to a more generalised group that includes end-users, the Internet generated a qualitative and quantitative improvement in semiotic democracy.\textsuperscript{1696} From this perspective, access to the Internet and the ability to engage with copyright works outside the market sphere are essential to democratic culture and free speech.

In sum, a statutory licence ACS may facilitate freedom of expression and information online, preventing some of the negative effects of the strict enforcement measures. In a best-case scenario, it will foster follow-on creativity, the personal enjoyment of cultural goods, semiotic democracy, and the circulation of culture, information, ideas and opinions.\textsuperscript{1697} If it achieves these benefits and provides sufficient compensation to mitigate the financial harm caused to rights holders, an ACS will reflect a legitimate public interest based on freedom of expression and information, in a way that justifies the potential prejudice imposed on rights holders.\textsuperscript{1698}

\textbf{5.3.3.6.2 Protection of Privacy and Personal Data}

The fundamental rights to privacy and protection of personal data are guaranteed in the Charter and the ECHR.\textsuperscript{1699} CJEU case law on conflicts between these rights and copyright mostly relates to requests for injunctions by rights holders against ISPs pursuant to Article 8(3) InfoSoc

\begin{thebibliography}{99}
\item \textit{Ibid.}
\item Christina Angelopoulos, 2015, pp. 76, 88.
\item \textit{Opinion AG in Mc Fadden}, ¶¶119–124. See also Christina Angelopoulos, 2016a.
\item Benkler, 2006, p. 275.
\item Benkler, 2006, p. 276.
\item Lee, 2015, pp. 16–17, discussing freedom of expression and file sharing.
\item Arts 7 and 8 Charter, and Art. 8 ECHR.
\end{thebibliography}
Directive and Article 8 Enforcement Directive. In general, these injunctions require gathering of evidence through the monitoring (e.g. via filtering systems) of electronic communications of allegedly infringing Internet users, and the collection and processing of their IP addresses.

The right of information in Article 8 Enforcement Directive allows rights holders, following a justified and proportionate request, to obtain a judicial order directed at infringers or intermediaries to disclose “information on the origin and distribution networks” of infringing goods and services. For the provision to apply, those goods of services must be provided on a “commercial scale”. This requirement presents interpretative challenges, giving rise to distinct national implementations and judicial rulings. For example, it is not clear whether commercial-scale includes mass non-commercial online use of works by individuals, such as high-volume uploads in a decentralised P2P network.

One of the issues at stake on the intersection between copyright enforcement and the protection of privacy and personal data is that the injunction in question is aimed at IP addresses. Because these addresses qualify as personal data, the right of information in Article 8 Enforcement Directive must be applied without the prejudice of data protection rules on collection and processing in the Data Protection and E-Privacy Directives.

The CJEU tackled this issue in two very similar cases: Promusicae and LSG. The first case involved unauthorised P2P exchanges of works by ISP subscribers. In it, the CMO Promusicae requested that an ISP disclose its clients’ personal data on grounds of copyright infringement. The Court ruled that Member States may choose not to impose on ISPs an obligation to disclose their subscribers’ personal data in the context of civil copyright cases, thus restricting the right of property in copyright in light of the right of privacy in electronic communications. The CJEU further stated that where national legislators decide to implement such an obligation, the same should be proportionate and strike the required balance between property and the rights of privacy and personal data. This means that any national procedures for effective enforcement must respect data protection rights of individual users of electronic communication services. In essence, LSG reiterates this interpretation.

In Scarlet Extended and Netlog, the CJEU examined the imposition through an injunction of filtering systems on, respectively, an Internet access provider and a hosting provider. The broad filtering injunctions requested were aimed at identifying works exchanged on the providers’ networks for their subsequent blocking. As with L'Oréal v. eBay before, the Court confirmed

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1700 See, e.g., CJEU, Promusicae, CJEU, Scarlet Extended, CJEU, Netlog, and CJEU, Bonnier Audio. The earliest CJEU decision on injunctions against intermediaries and enunciating the “fair balance” principle was CJEU, L’Oréal v eBay, concerning trademarks.
1701 Mazziotti, 2013, pp. 138–139. See CJEU, Scarlet Extended, ¶51, classifying IP addresses as personal data because they allow for the precise identification of users.
1702 Iglezakis, 2012; Mazziotti, 2013, p. 142.
1703 Mazziotti, 2013, p. 140, suggests the provision would apply in this case.
1705 CJEU, Promusicae, ¶53. See also Iglezakis, 2012.
1706 Iglezakis, 2012.
1707 For a description of LSG, see Frabboni, 2010, pp. 130–133.
that the general monitoring prohibition in Article 15 E-Commerce Directive does not permit active monitoring of all customer data from a provider.\footnote{Christina Angelopoulos, 2013, 2015, pp. 74–76.} Because filtering systems tend to require general monitoring of use, they likely violate the rights of privacy and personal data of a provider’s customers, and as a result fail the fair balance test.\footnote{Christina Angelopoulos, 2015, pp. 88–89.}

Importantly, the CJEU follows the fair balance test whenever a conflict arises between copyright and privacy, even where the specific litigation does not touch upon the prohibition of general monitoring.\footnote{CJEU, \textit{Promusicae}, ¶68; CJEU, \textit{LSG}, ¶¶28–29; CJEU, \textit{Scarlet Extended}, ¶¶43, 45; CJEU, \textit{Netlog}, ¶¶41, 43; CJEU, \textit{UPC Telekabel}, ¶¶46–47. See, however, \textit{Bonnier Audio}, ¶¶55–57, reaching a different “fair balance” between privacy and copyright. For criticism, see Sganga, 2015, p. 13. N.B. in France, the issue of incompatibility of HADOPI’s graduated response system with the right of privacy was a central topic of discussion. Cf. Geiger, 2014c, p. 135 & n. 94, making a connection with the CJEU’s consideration of the right of privacy in \textit{Promusicae}.} The Court’s case law on this topic highlights the privacy risk of copyright enforcement, namely that available remedies become tools to monitor personal data and intrude on the privacy of telecommunications. That risk, it seems, lies primarily with measures going beyond the bounds of the legitimate purpose that justifies the treatment of personal data, without respect for the tests of proportionality and fair balance.

The examination of existing judgments suggests that the main areas of concern are over broad filtering injunctions and, in the opinion of some authors, graduated response systems that require the processing of IP addresses to deal with infringing users.\footnote{Mazziotti, 2013, p. 139. Whether targeted monitoring constitutes an acceptable measure must be assessed on a case-by-case basis.} In this light, the question arises whether the potential encroachment on an individual’s private sphere is fair, adequate and suitable in relation to the non-commercial use of works to be licensed through an ACS.

It is difficult to respond in the affirmative. The privacy risks involved in strict enforcement measures seem high vis-à-vis non-commercial use, and perhaps unjustified if an alternative model has the potential to ensure remuneration for the same activities. Of course, for this trade-off to make sense, the design of the statutory licence system ought to respect the privacy of users in electronic communications and prohibit any processing of personal data outside a legitimate purpose. For example, such a system should guarantee that monitoring of online exchanges is anonymous, with the sole purpose of enabling collection and distribution of rights revenue.\footnote{See \textit{ supra} 3.4.4, on ACS proposals emphasising the importance of a privacy respecting design.} If these requirements are met, an ACS could cater to the public interest in a way similar to that of private copying since its inception—by providing an alternative to strict enforcement for acts in relation to which individuals have a legitimate interest in the respect of privacy and personal data.\footnote{See \textit{ supra} 2.3, on the privacy underpinning of private copying.}

\subsection*{5.3.3.6.3 Intermediaries and Freedom to Conduct a Business}

Limitations have economic value to certain businesses, which rely on privileged uses to generate revenue. This is true even for compensated limitations, due to savings in search, negotiation and litigation costs.\footnote{Geiger, 2010, p. 526, noting that these businesses are sometimes called “added-value services”.} Online intermediaries may therefore benefit indirectly from the limitation for
non-commercial use introduced by a statutory licence ACS. However, at least ISPs may suffer prejudice from such a system if they are designated intermediate debtors of the broadband levy. It is therefore important to consider their legitimate interests in the balancing exercise of the third step.

From a fundamental rights perspective, the obvious basis for such consideration is Article 16 Charter. The provision recognises the fundamental freedom to conduct a business “in accordance with Union law and national laws and practices”, in light of its social function. The CJEU defines this freedom as “the right of any business to be able to freely use, within the limits of its liability for its own acts, the economic, technical and financial resources available to it”. In its jurisprudence on the InfoSoc Directive, the Court further identifies this freedom as a limit on copyright, giving rise to the need to strike a fair balance between the rights of economic agents—broadcasting organisations, ISPs, hosting service providers—and the proprietary interests of rights holders.

In *UPC Telekabel*, the CJEU stated that an injunction violates the freedom to conduct a business if it restricts the free use of the resources at the disposal of an ISP by obliging it to take measures representing a “significant cost”, having a “considerable impact on the organisation of his activities”, or requiring “difficult and complex technical solutions”. This begs the question of whether, in relation to the non-commercial online use of works, a statutory licence ACS translates into a less costly and complex measure for online intermediaries than copyright enforcement through injunctions or graduated response systems.

In this respect, the Opinion of AG Szpunar in *Mc Fadden*, a case involving an operator of a Wi-Fi network, is instructive, especially as it concerns the scope of permissible injunctions. The Opinion states that, when issuing an injunction against an intermediary service provider, national courts must ensure three requirements are met. First, the measures in question must comply with Article 3 Enforcement Directive; in particular, they should be effective, proportionate and dissuasive. Second, in accordance with Articles 12(3) and 15(1) E-Commerce Directive, these measures must be “aimed at bringing a specific infringement to an end or preventing a specific infringement and… not entail a general obligation to monitor”. Third, “that the application of the provisions mentioned, and of other detailed procedures laid down in national law”, must achieve “a fair balance between the relevant fundamental rights”, namely freedom of expression and information, freedom to conduct a business, and copyright as property (Articles 11, 16 and 17(2) Charter).

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1716  CJEU, *UPC Telekabel*, ¶49.
1718  CJEU, *UPC Telekabel*, ¶50.
1719  *Opinion AG in Mc Fadden*, ¶¶105–150.  
1720  Ibid., ¶115.
Applying these requirements, the AG found that none of the measures at stake in *Mc Fadden* were consistent with EU law, including (with relevance here) injunctions requiring Internet disconnection or broad filtering obligations. The termination of Internet connection was found to be incompatible with the requirement of fair balance, “since it compromises the essence of the freedom to conduct business of persons who, if only in ancillary fashion, pursue the economic activity of providing Internet access”. That measure is likewise inconsistent with Article 3 Enforcement Directive, as it creates a barrier to legitimate trade. Furthermore, the examination of all communications passing through that Internet connection was considered to amount to a general monitoring obligation, and therefore be incompatible with Article 15(1) E-Commerce Directive.

In light of these analyses, broad copyright injunctions aimed at preventing mass online use of works may be inconsistent with the fundamental freedom to conduct a business, mainly due to the costs imposed on the activities of Internet intermediaries. In contrast, it can be argued that an ACS would bring benefits to intermediaries, both in enforcement savings and by opening up “legal” space for provision of services aimed at facilitating lawful non-commercial use. Hence, and in the abstract, an ACS imposes lesser restrictions on the economic, technical and financial resources of intermediaries, as compared to strict enforcement measures, such as Internet disconnection and filtering injunctions.

Of course, this is not the whole story. Most legalisation proposals require the imposition of a levy on the Internet access subscription fee of households and include ISPs in the system. Therefore, at least for ISPs, an ACS imposes costs and, one might argue, a hindrance to their freedom to conduct a business.

*De lege lata*, ISPs do not engage in restricted acts and are not liable for the practices of end-users, despite being subject to injunctions. This makes their voluntary participation in an ACS unlikely. However, that participation is crucial to ensure effectiveness of the system, and would likely be required, *de lege ferenda*. ISP involvement in an ACS makes sense because it would be economically efficient. Not only does a (flat or metered) surcharge on the Internet subscription payment for households raise the least transaction costs among users, but it also facilitates the provision of adequate compensation to rights holders. It is improbable that the ISP business model would suffer, as a reasonably priced subscription fee (i.e. a broadband levy lower than end-users’ estimated willingness-to-pay) will probably not have strong adverse effects on demand for these services.

From a fairness perspective, ISPs derive value from non-commercial exchanges of works, which significantly increase their traffic and demand for their services. ISPs can choose to pass on (at least part of) the levy or absorb it—while bundling it with other products—thereby having a

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1724 Séverine Dusollier & Colin, 2011, p. 832, arguing that the most feasible contractual model is one “in which P2P users contract with and pay fees to the CMOs”.
1725 Handke et al., 2015, analysing the recorded music market in the Netherlands.
1726 Handke et al., 2015.
competitive advantage to increase their subscription base; competition at this level benefits end-users.  

Through their inclusion in the system, ISPs should be involved in shaping it into a fair and efficient mechanism, together with CMOs and user representatives, under government and/or judicial supervision. For example, these negotiations could define the fraction of the levy that ISPs may retain to cover their administrative costs. If these costs are covered, participation of ISPs in an ACS should not impair their freedom to conduct a business, in the sense of *UPC Telekabel*. Whether this is a better option than the status quo in light of ISPs’ freedom to conduct a business is unclear. A correct answer would likely require empirical research into the costs of ISP participation in the system. However, it is important to note that the current policy orientation of EU institutions and industry stakeholders is towards increasing the role and collaboration of online intermediaries in enforcement measures, such as filtering and blocking, which entail costs and additional liability exposure for these intermediaries. If such a future scenario materialises, ISPs may come to view ACS as a benign proposition.

5.3.4 Summary: Application of the Three-Step Test to Alternative Compensation Systems

This paragraph summarises the main findings of each step’s analysis and highlights the space available for a limitation-based statutory licence ACS in the *acquis* under the three-step test. A limitation is a certain special case if generally determinable, not overly broad, with a reasonably foreseeable scope of application, and justified on a sound policy basis. The first step should not be so strict as to foreclose a comprehensive overall assessment of a limitation pursuant to the subsequent steps.

The scope of an ACS is delimited by several exclusions. The system only benefits natural persons, usually excludes different categories of works (at least software, videogames and databases), commercial use of works, and non-commercial use already covered by existing limitations, like private copying, quotation, parody, and incidental inclusion.

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1727 The possibility to pass on the levy is a feature of the private copying system. Cf. CJEU, *Padawan*, ¶¶46, 48. See *supra* 2.3.4, 3.4.6, and 4.4.3.


1729 Aigrain, 2008.


1731 Geiger, 2007b, p. 4; Geiger et al., 2008, p. 711; P. Bernt Hugenholtz & Okediji, 2008. See also Bernault & Lebois, 2005, p. 33, regarding the need to consider normative justifications, such as “freedom of speech, information of the public, teaching and research. But see Griffiths, 2009, p. 20”, doubting whether the test incorporates a standard of foreseeability.

1732 See *supra* 3.4.1, identifying the subject matter scope of selected ACS proposals.
Furthermore, an ACS has economic and non-economic motivations relevant for copyright policy. The economic motivations reflect a market failure argument stemming from the high transaction costs of imposing full exclusivity, individual management and enforcement on the non-commercial online use of works. The non-economic motivations concern the public interest dimension of an ACS. They range from the promotion of creativity and dissemination of knowledge, to the protection of the fundamental rights and freedoms of individuals (access to science and culture, privacy, personal data, and freedom of expression and information) and online service providers (freedom to conduct a business). The analysis of step three looks in detail at these motivations.

In sum, the above characteristics may be sufficient for a potential ACS to constitute a qualitative and quantitative “certain special case” and meet the first condition of the test. However, doubts remain as to whether the exception is overly broad as it pertains to types of work and subject matter covered.

The traditional interpretation of the second step views “normal exploitation” as an economic competition standard to judge the actual and potential impact of a limitation on the market. This standard compares the hypothetical losses caused by a limitation to an idealised full exploitation of exclusive rights.

In a strict and sequential reading of the test, this traditional view prevents most online limitations from passing the second step. The result is to reject limitations irrespective of their policy rationales, remunerative potential, or consistency with the objectives of copyright. This interpretation likely precludes a limitation such as that envisioned here. However, by ignoring policy rationales, the traditional view may prevent a fair balance between the interests of copyright owners and the public interest. If this balance is one of the principal objectives of EU copyright law and the three-step test, it is worth exploring a flexible interpretation of the second step.

The flexible interpretation redefines normal exploitation and recognises the need to conduct a balancing exercise in the third step—the place to consider the non-economic motivations of a limitation—regardless of the results of the analysis in step two. This interpretation focuses on the effect of a limitation on the overall commercialisation of works. From this perspective, a conflict with the normal exploitation arises if a limitation deprives creators and exploiters of major and foreseeable sources of income under regular commercial circumstances. These sources of revenue include the online licensing of the exclusive rights of reproduction and communication to the public to commercial and end-users through digital download and streaming platforms. Excluded are uses already privileged in the acquis and de minimis use.

A statutory licence ACS is aimed at non-commercial online use by individuals, which for the most part does not generate remuneration or is exercised by copyright owners. In relation to this type of use, a statutory licence would create new rights revenue and constitute a normal form of exploitation, like other compensated limitations in EU copyright law. Regardless, relevant legal and empirical doubts subsist in relation to the compliance of an ACS with the second step. One main concern is with the (unknown) indirect effects of such a system on the overall commercial exploitation of works. Another relates to the enforceability of exclusive rights against unauthorised for-profit commercial websites capable of impinging on the normal exploitation of works.
Empirically, the issue is whether legalisation causes users to abandon lawful channels. The magnitude of such a substitution effect is unknown. The best available proxy is the effect of unauthorised use on the market; on this, empirical research suggests that the long-term effect is uncertain. In addition, unauthorised websites subsist despite the steady growth of digital revenues and available enforcement measures. The result is that authorised and unauthorised channels already co-exist in the online environment. The implication is that an ACS will not replace the commercial market, but rather offer consumers an alternative means to access and use works beyond the constraints of territorial and substantive fragmentation of copyright.

However, if compliance with the second step hinges on the statutory licence preserving the economic core of the commercial exploitation of works, it should allow rights holders to enforce their copyright against unauthorised websites. This is especially true if those websites become immune to intermediary liability as a result of the adoption of a statutory licence.

The challenge, then, is to devise a system that preserves these enforcement avenues but still provides the legal authorisation for non-commercial acts by end-users and remuneration for copyright owners. One possible way to do so is to define the allowed non-commercial use strictly, expressly excluding online exchanges by platform operators against—or linked to—financial consideration. Other options, currently under consideration by the CJEU, are to define the scope of the right of communication to the public so as to include linking to unauthorised sources and/or qualify the activities of platform operators as acts of communication to the public, which would not be covered by the limitation.1733 A supplementary approach could be the institutional endorsement of self-regulation (of copyright owners and online intermediaries) aimed at enforcement against unauthorised for-profit third party websites.

If these scenarios are actualised, the scope of the statutory licence will only benefit end-users and a limited set of online intermediaries, namely those enabling or facilitating the licensed use, but not directly reproducing or communicating the works to the public. The licence would also not affect the legal status of those mostly “neutral” intermediaries that benefit from the E-Commerce Directive’s safe-harbours, in relation to the specific activities exempt from liability under those provisions. All other online intermediaries (or intermediary services) are outside the scope of the legalisation scheme. Thus, for-profit online platforms that make available works without the authorisation of rights holders (e.g. The Pirate Bay and Popcorn Time) will remain liable for copyright infringement and subject to strict enforcement measures. Of course, current legal commercial online service providers (e.g. Spotify and Netflix) will continue to require authorisation from rights holders to offer their services. De lege lata, only this circumscribed scope would seem to enable a statutory licence ACS to avoid a conflict with the normal exploitation of works, even under a flexible reading of the second step.

The third step prevents limitations that cause an unreasonable prejudice to legitimate interests. This assessment requires a multi-level balancing exercise guided by the principle of proportionality. The exercise takes into account the reasonableness of the prejudice caused and

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1733 The pending preliminary references in question are the following: CJEU, Reference for Preliminary Ruling, Case C-160/15, GS Media; CJEU, Reference for Preliminary Ruling, Case C-527/15, Filmspeler; CJEU, Reference for Preliminary Ruling, Case C-610/15, Stichting Brein v Ziggo.
attempts to strike a fair balance between interests viewed as lawful and justifiable on normative grounds.

It is necessary to assess the concurrent and opposing interests of creators and exploiters, on the one hand, and the individual and collective public interest—as manifested in the interests of third parties that are beneficiaries of the limitation—on the other. Although disputed, the consideration of third party interests seems aligned with the objectives of copyright law, and a corollary of the principle of fair balance in the InfoSoc Directive. In relation to a limitation-based statutory licence ACS, relevant public interests stem from the promotion of creativity and dissemination of works, and the protection of fundamental rights.

A limitation causes unreasonable prejudice if the harm suffered by rights holders from its introduction is out of proportion to the benefits derived by the public. The potential harm caused by an ACS refers primarily to its indirect effects on the normal forms of exploitation of works online. Payment of fair compensation through a statutory licence is an acceptable means to reduce that harm to reasonable levels. The empirical research cited suggests that an ACS may provide sufficient revenue to compensate affected rights holders for non-commercial online use of works. However, the existing research has its limitations, making it crucial to examine the different policy arguments that justify the prejudice caused.

Creators and exploiters have conflicting interests. The main concern of creators is fair remuneration. Because remuneration is elusive in the digital environment, an unwaivable fair compensation right could be more favourable to creators than an assignable exclusive right. Conversely, exploiters typically have a bias against legalisation proposals; they prefer to maintain their exclusive rights and promote enforcement measures to reign in infringement.

In safeguarding the material interests and bargaining power of creators, a statutory licence system favours their interests over those of other rights holders in exclusivity and enforcement. This choice makes sense in the system of the test if the benefit to creators offsets the harm to exploiters, thereby reducing the prejudice to rights holders as a whole to tolerable levels.

Beyond the legitimate interests of creators in fair remuneration, the main justification for an ACS lies in its public interest dimension. Further to addressing a market failure in the regulation of mass-scale non-commercial use of copyright over the Internet, an ACS promises improvement over the status quo in the promotion of creativity and access to works, and thus the circulation of culture and knowledge online.

In addition, a well-designed statutory licence seems preferable to strict enforcement measures (filtering, blocking and Internet disconnection) in relation to the fundamental rights of Internet users to privacy in telecommunications, and freedom of expression and information online. It is also arguable that subjecting online intermediaries to injunctions and intermediary liability for their customers’ non-commercial use may interfere with the fundamental freedom to conduct a business. In the specific case of ISPs, it is not clear if an ACS is a superior alternative to the status quo, as the system requires their participation in the system as intermediary debtors. However, if the system allows ISPs to recover their administrative costs and pass on the broadband levy to users, it should interfere less with this fundamental freedom than broad injunctions and participation in graduated response systems.

In conclusion, there are valid arguments to suggest that a fairly compensated limitation for non-commercial online use of works and the accompanying statutory licensing system are compliant
with EU copyright law. The option for an ACS rests on a fair balancing of interests that emphasises the public interest and fair compensation over exclusivity, and rests partly on the internal effect of fundamental rights in shaping the scope of copyright protection.

However, doubts linger as to whether such a system can overcome potential conflicts with the normal exploitation of works, even following a flexible reading of normal exploitation and the test as a whole. In other words, the proposed flexible reading is controversial, especially in light of some CJEU case law that posits a strict interpretation of limitations. Therefore, it is important to explore whether certain legal mechanisms can be combined with a statutory licence ACS to ensure that it overcomes potential conflicts with normal exploitation, thereby providing a more viable model of copyright reform.

5.4 Overcoming Conflicts with the Normal Exploitation of Works

The main obstacle to the adoption of a limitation-based ACS in the acquis is step two of the test. The risk is that copyright owners’ major sources of revenue suffer by the migration of users from online commercial channels to the new system. In this scenario, to ensure compliance with the three-step test, an ACS could contain rules to avoid a conflict with the normal exploitation of works. The taxonomy of ACS in Chapter 3 identifies mechanisms providing additional flexibility to legalisation schemes. Particularly promising are embargo periods and opt-out rules. This section examines these mechanisms as supplements to a statutory licence ACS and their compliance with international and EU law in order to assess whether they may help overcoming potential conflicts with normal exploitation.

5.4.1 Embargo Periods

Embargo periods are rules that subject the availability of works to a temporal condition. For example, in the field of academic publishing, an embargo period refers to a situation where an article is first available for paid online subscription and only later on open access. In that contractual context, this period of embargo corresponds to the amount of time required for journals to “deliver value to subscribing customers before a manuscript becomes available for free to the public”; the period “begins from the date the article is formally published online in its final and fully citable form (i.e. online publication date).”

An example of an embargo period in copyright law is found in Article 38(4) of the German Copyright Act. This provision allows authors of scientific contributions resulting from “a research activity publicly funded by at least fifty percent” previously published in some types of periodic publication, “to make the contribution available to the public in the accepted manuscript version upon expiry of 12 months after first publication”.

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1734 For a number of authors, provided the fair compensation paid to rights holders covers their losses, the public interest motivation of an ACS-type limitation justifies restricting exclusivity under this step. See Bernault & Lebois, 2005, pp. 36–41; Geiger & Schönherr, 2014a, pp. 136–137; Peukert, 2005, p. 43.

1735 See supra 3.3.3 and 3.4.1. See also Senfleben, 2014, pp. 10–18, for an analysis of embargo periods and “opt-out formalities” in the context of the test.

publication cannot be for a commercial purpose and must indicate the source of the first publication.\textsuperscript{1737}

In relation to copyright limitations, an embargo period is a legal rule that causes a limitation to come into effect after a period of time has elapsed from the first lawful publication or making available of the work.\textsuperscript{1738} Thus, an “embargoed limitation” functions as a procrastinated statutory licence (see Figure 6). Ideally, the limitation comes into force after a grace period corresponding to the normal exploitation of works, thereby avoiding conflicts with the second step of the test.\textsuperscript{1739}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{Embargo_Period_alternative_compensation_system.png}
\caption{Embargo Period Alternative Compensation System}
\end{figure}

For example, if an ACS has an embargo period of six months, end-users are only free to exchange a film online six months after its release date. Downloading or making the work available before that date amounts to copyright infringement.

A rule of this nature could assist in overcoming conflicts with the normal exploitation by preventing or significantly reducing harm to rights holders during the period in which they extract the most rights revenues from the online exploitation of works. With a properly defined period, the risk of a limitation conflicting with significant online sources of revenue is low. In the example above, if a film makes most of its revenue in the months following release, the embargo period ensures that during those months the work benefits from full exclusivity, even for non-commercial online use.

Is such a rule consistent with international and EU law?

The preparatory works of the BC do not mention embargo periods, so there is no historical argument that prevents their consideration as a means to overcome conflicts in step two of the test.\textsuperscript{1740} In addition, normal exploitation refers to significant or tangible rights revenue for use of considerable economic significance. If the major sources of revenue from exploitation are reaped

\begin{flushleft}
1737 Peukert, 2015, p. 383.
1740 As noted above, such an argument is often made in relation to equitable remuneration. See supra 5.3.2.3 and 5.3.3.1.
\end{flushleft}
in the months following commercial release, a rule that preserves their integrity should be legally acceptable.\textsuperscript{1741}

There are no clear-cut examples of embargo period rules in the EU \textit{acquis}. However, Senftleben sees the outline of such a rule attached to the limitation that permits certain uses of orphan works by qualified institutions on the condition that the rights holder is not found after a diligent search.\textsuperscript{1742} In his opinion, the orphaned status of a work, the failure to find the rights holder, and the application of the limitation, are all unlikely to occur during the period of normal exploitation.\textsuperscript{1743} Furthermore, the rights holder can choose to put an end to the orphan work status and receive fair compensation for the privileged uses.\textsuperscript{1744} Drawing on the mechanism in the Orphan Works Directive, Senftleben considers embargo periods as flexible tools to allow digital use in compliance with the three-step test. To that effect, he recommends their adoption for mass digitisation projects and UGC.\textsuperscript{1745}

The literature on legalisation systems contains proposals for embargo periods on audio-visual works.\textsuperscript{1746} These proposals build on existing practices in the EU to organise film exploitation chronologically in a system of release windows. Applied to a limitation-based ACS, the embargo period could correspond to an EU-wide release window permitting online non-commercial use of works after their first commercial release or online availability. The system could extend to one or more types of work, depending on the potential impact of the limitation on their normal exploitation. The specifics ought to be subject to periodically reviewed stakeholder agreements. In particular, the duration of the embargo should allow for the preservation of the core exploitation of a work following its release on the market affected by the limitation. In this way, the ACS would prevent cannibalisation of major revenue sources and aspire to monetise the long tail of works.\textsuperscript{1747}

A rule of this type may have additional (and unintended) benefits. One is to incentivise clearance of rights for multi-territorial commercial exploitation of works in the EU, which would be advantageous to rights holders and consumers.\textsuperscript{1748} Another is that coupling a statutory licence with such a rule could offer partial relief to the access problems created by the excessive term of protection, at least for end-users.\textsuperscript{1749}

However, despite the potential benefits, an embargo period rule is not without its problems. On the one hand, it is probably too simplistic to assume that a “one-size-fits-all” embargo rule makes sense for all types of work covered by an ACS. Assuming that differentiated embargo rules per category of work are more suitable, it may be difficult to implement a system that is

\begin{footnotes}
\footnote{1741}{Senftleben, 2014, pp. 10–11.}
\footnote{1742}{Senftleben, 2014, p. 11, referring to Arts 3 and 6 Orphan Works Directive.}
\footnote{1743}{Senftleben, 2014, p. 11.}
\footnote{1744}{Art. 6(5) Orphan Works Directive.}
\footnote{1745}{Senftleben, 2014, p. 12.}
\footnote{1746}{See, e.g., Creation-public-internet, 2011; L’ALLIANCE public.artistes, 2006b, 2006c.}
\footnote{1747}{With similar proposals, see Kamina, 2012; L’ALLIANCE public.artistes, 2005; Modot et al., 2011, p. 14.}
\footnote{1748}{Mazziotti, 2013, pp. 59–67, discussing several policy options to create a digital single market for audio-visual content.}
\footnote{1749}{See Peukert, 2005, p. 56, making a similar argument in favour of his bipolar copyright system. See also Senftleben, 2014, p. 11.}
\end{footnotes}
comprehensible for end-users across different EU Member States, even assuming they are aware of it (many will probably not be). For example, it will already be difficult for users to identify the release or making available date of a sound recording for the purposes of calculating when an embargo period elapses; asking them in addition to calculate different embargo periods for music, films, and e-books is likely too cumbersome. The legal certainty issues here are problematic.

On the other hand, it is fair to wonder whether end-users are willing to accept and pay for an ACS with embargo periods. A statutory licence of this type hopes to solve *inter alia* the problem of large-scale copyright infringement, a substantial amount of which seems to refer to newly released works. Would users accept an embargo rule preventing them from access to these works? Or, assuming awareness of the rule, would they disregard it, continuing to unlawfully download and share these works?

Perhaps surprisingly, at least one study shows consumers are willing to accept a licence including some sort of temporal restrictions on access to catalogues of at least recorded music and audio-visual content, if the price is right. However, without further empirical research on specific designs for an embargo period rule and its EU-wide application, it is not possible to be certain on this point. In particular, it is unclear whether such a rule would in fact contribute to the decline of unauthorised file sharing for the period of its duration. Unless that is the case, the addition of such a rule to a statutory licence will fail to prevent an existing conflict with the normal exploitation of works.

### 5.4.2 Opt-Out Rules

In an ACS with an opt-out rule, the non-commercial use of works is subject to a statutory licence and the copyright owner is entitled to opt out of a regime where the same use is subject to exclusivity. The opt-out allows rights holders to switch from a liability rule to a property rule for the type of use in question. The choice of rule, through action or omission, makes the ACS optional for rights holders.

#### 5.4.2.1 Opt-Out Rules and Alternative Compensation Systems

An opt-out rule allows rights holders to render a limitation inapplicable to their works through a reservation of rights. The textbook example in international copyright law is Article 10bis(1) BC, which allows legislators to impose an uncompensated exception for reproduction, broadcasting and communication to the public of certain articles and broadcast works. These uses correspond to normal forms of exploitation of the works in question. The BC provision allows copyright owners to reserve their rights in relation to the initial exploitation period, applying to “the use of fresh articles with news value”. This can be done, for example, through a statement in a published article similar to “all rights reserved”, as prescribed for in German copyright law.

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1750 Handke et al., 2015. The specific length of the temporal restriction was not defined, with participants instead being informed through a tooltip that “some rights holders prefer to wait with the online release of their works till they have broken even through other channels. A certain time after their release, all works will be available in the system, but using them before that is illegal”. (Translated from Dutch.)

1751 Proposals of this type include Eckersley, 2004; Fisher, 2004; Gratz, 2004; Litman, 2004; Partido Comunista Português (Grupo Parlamentar), 2012; Peukert, 2005.

1752 Peukert, 2005, p. 66.
By allowing a reservation of rights during the period of normal exploitation, the rule mitigates the potential for conflict under the second step of the test.1753

The limitation in Article 10bis(1) BC is justified on the freedom of the press, and has a strong public interest dimension. That justification has allowed the rule to survive challenges during the 1967 revision conference in Stockholm and to this day.1754 The TRIPS and the WCT incorporate the BC provision and subject it to the respective three-step tests. At no time during the negotiation of those treaties was the consistency of Article 10bis(1) BC with the second step challenged, a fact some authors attribute specifically to the reservation of rights rule.1755

In light of this international framework, Senftleben proposes the adoption of opt-out rules for new online limitations applicable to search engine services and UGC. In his view, these rules would make the limitations legally admissible and provide the policy benefit of examining rights holders’ perception of the effects of the exemption on the normal exploitation of works.1756

In the realm of ACS, proposals containing opt-out rules vary in the detail they offer. Most leave the design of the rule to further legislative action or administrative acts of a central agency, the mandated CMO, or stakeholder agreement.1757 Eckersley suggests an opt-out right for creators in his “virtual market system” as a solution to overcoming potential vulnerabilities related to government dependence for income.1758 Fisher’s “tax-and-reward system” allows rights holders to opt out by releasing a work solely with TPMs, which retain legal protection.1759 Rights holders are allowed a “digital reservation of rights” for adaptations, by excluding the right to prepare derivative works when registering works in the system.1760 In Baker’s system, the opt-out rule requires that beneficiaries can only exit after a certain amount of time from the last payment of compensation.1761

One of the most detailed schemes is advanced by Litman. Her notice based opt-out mechanism requires the work to be in a specific DRM format, as well as “affirmative but relatively modest steps” from the rights holder to exclude it from the system and inform consumers of the status change through electronic rights management information. Works only made available online “under the copyright owners’ authority” with that “*.drm” digital file format would be “ineligible for sharing or compensation”; to opt back into the system, owners would need only to

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1753 Senftleben, 2014, pp. 12–14, with a historical background of Art. 10bis(1) BC.
1756 Senftleben, 2014, pp. 14–15, proposing that search engines are allowed to provide image searches of copyright works by default, while preserving the possibility to use technical tools to exclude the work a posteriori. For an argument against the admissibility of opt-out to make a limitation compliant with the test, also in light of BC’s no formalities proviso, see Ginsburg, 2013, pp. 1604–1611
1757 See, e.g., Beltrandi et al., 2008; 2007; Dimita, 2010; Partido Comunista Português (Grupo Parlamentar), 2012; Rocha, 2010.
1759 Fisher, 2004, pp. 247–248. Fisher’s expectation is that his tax and reward system generates greater revenues and thus convinces rights holders to release works without technical protection.
1760 Fisher, 2004, p. 242: “By checking a box on the registration form, registrants could retain the entitlements they currently enjoy to control the preparation of derivative works (entitlements qualified, of course, by the fair-use doctrine).”
release the work again without such a format. Works already released are subject to a “presumption of shareability” in favour of users. Furthermore, to remove incentives to opt out, the process of withdrawing a work from the licence is purposefully burdensome.

Figure 7 illustrates the basic workings of an opt-out rule in a statutory licence ACS, including the necessary grace period between opt-out and its effectiveness.

From the perspective of normal exploitation, the possibility of opting out restores legal exclusivity, either at the time of online availability of the work or later. As Sprigman puts it, even if the liability rule is set up as the default, the requirement for “authors to opt out to preserve their ability to exploit the property rule” means that “the system—unlike the usual system of compulsory licenses—is still voluntary” because it merely extends the rights holder’s options for exploitation. By placing rights holders in an identical situation to the status quo as from the effective date of withdrawal, the opt-out rule mitigates the risk of violating step two of the test.

Nevertheless, the opt-out variant of ACS is not immune to criticism. If the legal default is a liability rule as from the first lawful publication of a work, the ACS will regulate non-commercial use of works during the initial—typically more profitable—period of exploitation. To prevent potential economic harm, rights holders may opt out of the system. However, it may

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1763 Litman, 2004, p. 48. The process would require consensus from all owners, involve recalling the work in non-“*.drm” format, a 24 month grace period to produce legal effects and, at the infringement level, the burden of proof that consumers had knowledge of the withdrawal. See also Gratz, 2004, pp. 421–423.
be impossible to avoid a conflict with the normal exploitation if the opt-out process is too cumbersome, or if the grace period between withdrawal and its effectiveness is too long.\textsuperscript{1765}

One solution is to implement a streamlined and relatively short grace period, making the opt-out as simple as possible for rights holders. To that effect, the rule could follow the best practices from the field of ECL and the ongoing national implementation of Article 5 Orphan Works Directive.\textsuperscript{1766} Ideally, an opt-out rule should deal efficiently with challenges related to fragmented ownership of copyright, especially in the film and music sectors.

The downside of an effective opt-out is that it provides a strong incentive for rights holders to exercise it, diminishing the attractiveness of the ACS for end-users. In addition, users would be subject to legal uncertainty and increased exposure to liability, as it would be difficult to identify works withdrawn from the system.

Different measures could mitigate these problems. First, the system could ensure that information on works, and names and contact details of the rights holder opting out is recorded in a publicly accessible database.\textsuperscript{1767} Rights holders could be required to give constructive notice of withdrawal through a simplified one-time declaration effective in all Member States, registered on publicly accessible databases (either by rights holders or the responsible CMO), and possibly signal their choice through DRM on digital copies of works.\textsuperscript{1768}

In particular, incentivising the accessibility of opt-out information in a publicly accessible online registry contributes to the effectiveness and fairness of the system, by ensuring that reference is made to the work itself (instead of a specific copy thereof), and that users are informed.\textsuperscript{1769}

To protect good faith end-users, the system should recognise a reasonable grace period between the moment of opt-out and effective exclusion of a work from the ACS.\textsuperscript{1770} Users would not be liable for use prior to the effective date of opt-out, as the same is covered by a statutory licence and subject to fair compensation (see Figure 7).

Even then, the solution may remain unattractive to users if a great number of rights holders choose to withdraw their most popular works from the system. To curtail this risk, it is possible to introduce embargo periods that disincentivise early opt-out from the ACS. However, such a

\textsuperscript{1765} For works made available online before the licence is implemented, it would be necessary to recognise a legislative transitional period where rights holders can opt out before the limitation comes into force.

\textsuperscript{1766} Senftleben, 2014, pp. 15–16. On the desirability that prospective formalities be simple, universally applicable and affordable, see van Gompel, 2011, pp. 297–298. See also Carroll, 2013, p. 1523, arguing that in a dynamic interpretation of BC a formality that is easy to comply with in the digital environment—e.g. a mandatory notice or registration formality—is not prohibited.

\textsuperscript{1767} See Eechoud et al., 2009, p. 280 & n.859, making the suggestion in relation to ECL in general. In this respect, any limitations applicable to making the personal data of authors and copyright owners accessible to the public, for example by privacy regulations, must be respected. See van Gompel, 2013, p. 1429.

\textsuperscript{1768} Litman, 2004, pp. 48–49 & n.177, arguing that, under Art. 5(2) BC, “it should be possible to establish an optional registry of withdrawn works, and provide that listing of a work on the registry for 24 months would allow the copyright owner to show constructive notice of withdrawal.” Failing that, the author suggests “copyright owners suing for infringement of withdrawn works would need to prove actual notice.”

\textsuperscript{1769} In this way the system would address the criticism levied at the proposals of Lessig and Sprigman by Séverine Dusollier, 2011, pp. 88–89.

\textsuperscript{1770} Colin, 2011a, p. 96.
solution would introduce additional complexity to the management of the system, and suffer from the same problems raised above vis-à-vis embargo periods.1771

5.4.2.2 Are Opt-Out Rules Prohibited Formalities?

In his objection to the opt-out variant of an ACS, Peukert ties the examination of normal exploitation to that of formalities, concluding that a violation of the test results from the qualification of opt-out rules as prohibited formalities.1772 It is worth exploring this critique, as it may prevent the adoption of an opt-out rule altogether.

Formalities aim at filtering protected from unprotected subject matter, clarifying subject matter and scope of protection, identifying subject matter and informing users of its existence, establishing a link between owners and protected works, and providing information on works, ownership and rights to third parties.1773 There are different types of formality, spanning registration of works, recordal of transfers of copyright ownership, notice requirements, and deposit of works.1774

Article 5(2) BC prohibits formalities that affect the “enjoyment” or “exercise” of protected rights in relation to non-domestic works. The prohibition is not absolute.1775 The enjoyment dimension relates to author’s rights coming into existence and being recognised absent any formality. Enjoyment therefore means “existence”, including the coming into being and continuation of copyright.1776 The exercise dimension links to the possibility of enforcing rights.1777

The term “exercise” was introduced in the 1908 Berlin revision conference with the objective of clarifying that the prohibition extended beyond constitutive formalities to those that “are prerequisites to sue”, i.e. to initiate an enforcement action.1778 Hence, exercise is meant to preserve the “process by which a liability finding is made” but not “what follows from such a finding”, namely the “means of redress”.1779

This meaning is different from the broader use of the term “exercise” in this dissertation, which also includes the transfer and management of copyright. Unsurprisingly, the term has given rise to problems of interpretation.1780 It is submitted that, in the context of Article 5(2) BC, prohibited formalities as to “exercise” of rights refer solely to formal requirements on the initiation of enforcement of copyright.1781

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1771 See supra 5.4.1.
Consequently, banned formalities are those that relate to the “coming into existence, the maintenance and enforcement of copyright”, but not those that merely affect its options of exercise. The prohibition includes mechanisms that prevent acquisition of protection or entail its loss “during the existence of copyright”; in essence, the prohibition rules out constitutive and maintenance formalities in respect of works of non-domestic origin, as well as those that function as “conditions to sue for infringement”. Conversely, certain declaratory formalities are allowed, for example if they present only evidentiary or procedural advantages, operating as incentives rather than obligations.

In ACS proposals, the possibility to opt out is typically exercised through so-called new-style formalities. These are “legal tools that establish a link between works, their creators, and/or the current copyright owners”, including “metadata-tagging of digital works, the storage of rights management information in digital repositories”, and other digital tools.

One possibility consists of a reservation of rights attached to the digital copy of the work through electronic rights management information. Another consists of a simple declaration with the CMO in charge of the system, similar to the current operation of the mechanism in ECL. The declaration is then reflected on a publicly accessible database, signalling the status of works to users.

These mechanisms do not impose conditions for the enjoyment or enforcement of copyright, but merely enable its exercise through collective management under the statutory default, or individual exercise (following opt-out). They therefore allow for the efficiency benefits of collective licensing, while offering copyright owners the option to regain full exercise and individual management of their rights. In this sense, they constitute an additional Berne-compliant legal tool for the exploitation of copyright.

However, not all opt-out rules have the same effect, making it necessary to draw a distinction between different types of ACS. In legalisation proposals that rely on ECL, the opt-out mechanism does not restore exclusivity. Instead, it offers copyright owners a choice between two models for exploitation of exclusive rights: collective versus individual. Thus, the opt-out regulates the extent of protection.

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1786 See supra 5.4.2.1., for a brief description of opt-out through new-style formalities. Gervais, 2010, pp. 25–27, suggested that the opt-out declaration can be as simple as an email. The author further notes that Art. 5(2) BC does not include “all civic and judicial formalities” concerned with the exploitation of works, neither does it include formalities that are not government related, as would occur with those imposed by CMOs, which are mostly private entities. Therefore, the prohibition does not extend to the ECL opt-out feature.
1787 Gervais, 2010, pp. 22–27, supporting his arguments on the basis of a thorough analysis of the drafting history of Art. 5(2) BC. See also Koskinen-Olsson, 2010, pp. 303–304, discussing the legislation in Denmark and arguing that the opt-out mechanism exists to ensure conformity with international treaties and EU directives.
1788 Colin, 2011a, pp. 56–63, 2011b, p. 4, referring to ECL.
1789 van Gompel, 2011, p. 209, debating ECL.
The opt-out mechanism in a statutory licence ACS is different—the choice to exclude the work restores exclusivity (see Figure 7 above, signalling a switch from a liability to a property rule). For some authors, opt-out is only admissible where the limitation otherwise meets the conditions of the three-step test. According to this school of thought, because the international system—and in particular the BC—is built to preserve exclusivity, the purpose of the test is only met if the exclusive right is “the statutory default rule”.

In this line, new-style formalities, such as opting-out through a DRM notice or requiring copyright owners to register works, relate to the “genesis” and enforcement of the right. As a result, they are formalities “for the enjoyment of minimum exclusive rights”. This position promotes exclusivity to a totemic status, mandating its default imposition even if detrimental to the interests of authors. In doing so, such interpretation appears to conflate the tests applicable to formalities (Article 5(2) BC) and copyright limitations (Article 9(2) BC). Indeed, if a limitation passes the test, the discussion of opt-out becomes “redundant” vis-à-vis its effects on exclusivity. Only where the opt-out is the key feature that makes the limitation compliant with the test is the issue relevant.

From the conceptual standpoint, an opt-out is an internal condition akin to a method of exercising rights. For statutory licences, it eases compliance with the three-step test by allowing owners to regain exclusivity, mitigating the effects of the limitation. Article 10bis(1) BC provides a strong indicator that an opt-out right is an admissible means to make a limitation compliant with the test, where otherwise it would not be. Both the opt-out right and the no formalities rule aim to protect authors and their ability to exploit works. If they share this rationale, adoption of an opt-out should not violate the prohibition on formalities. Article 5(2) BC should therefore not impede a rule that allows authors to switch from a liability to a property rule.

In sum, the BC prohibition on formalities does not prevent the adoption of an opt-out rule in a statutory licence system. Such a rule is therefore consistent with international copyright law and may, in theory, help an ACS overcome conflicts with the normal exploitation of works. It is even conceivable that through a combination of CMO expertise, electronic rights management information, and publicly accessible databases, the system could be efficient, while providing legal certainty for copyright owners and users. However, the question that remains is whether the

1793 Peukert, 2005, pp. 65–67, concluding that both Litman and Fisher’s opt-out models with default legal licences would violate Art. 5(2) BC. It is on this basis that Peukert proposes his opt-in “bipolar copyright system”. See Peukert, 2005, p. 69. See also Séverine Dusollier, 2011, p. 91, tentatively agreeing with Peukert, without however considering the possibility that such a limitation would be compliant with the three-step test.
1797 Senftleben, 2014; van Gompel, 2011, p. 211
1799 Sprigman, 2004; van Gompel, 2011, p. 211.
availability of such a tool would incentivise mass opt-out by rights holders, thereby reducing the ACS repertoire and, by extension, its value for end-users.\footnote{See \textit{supra} 3.3.3.2, pointing out this issue in relation to ACS proposals based on ECL.}

### 5.5 The normative choice between exclusivity and remunerated access

A choice between exclusivity and remuneration implies a normative reference point or benchmark. This dissertation has argued that the current system falls short of meeting the objectives of EU copyright law as it concerns the regulation of non-commercial online use by individuals. The question therefore is how to rethink the \textit{acquis} to adapt its rules to reflect those objectives.

The present section contains the second—and markedly normative—part of this chapter, which builds on the previous compliance analysis. It addresses the question of whether and to what extent a model of access and remuneration, such as an ACS, is consistent with the general aims of copyright and the objectives of EU copyright law. To answer the question, this section draws on and recasts the findings of this study to present a normative argument for a right of access and remuneration in relation to non-commercial online use of works in EU copyright law. The argument proceeds in three stages. The first stage takes a step back from the \textit{acquis} and examines whether such a right is consistent with the dominant theories or rationales of copyright law; as Strowel puts it, “in situations of uncertainty, there is a need to refer to the basic philosophy of copyright.”\footnote{Strowel, 1994, p. 240.} The analysis pays particular attention to the natural rights and utilitarian arguments that form part of the European legal tradition, in order to present an argument about what the law should be (5.5.1). The second stage discusses why and how normative considerations support a right for access and remuneration for mass non-commercial use (5.5.2). The third stage assesses whether such a right is consistent with the objectives of EU copyright law (5.5.3).

#### 5.5.1 Copyright Theories, Exclusivity and Remuneration

The literature on the foundations of copyright is vast and a proper review of the same is beyond the scope of this dissertation. The objective of this section is to provide a brief overview of such theories and consider their value in determining the role of exclusivity, access, and remuneration in copyright protection. As the main research question of the study concerns EU copyright law, the focus is on the natural rights and utilitarian theories, which have the greatest relevance in the European legal tradition.

Theoretical attempts to justify copyright are derivations of more general theories of intellectual property, and property rights in general. These can be classified in four categories or clusters: utilitarianism or welfare, labour or fairness, personality or personhood, and culture or social planning.\footnote{Fisher, 2001. More recently, the same author has renamed these categories as welfare (previously utilitarianism), fairness (previously labour theory), personhood (previously personality theory), and culture (previously social planning). Cf. \textsc{William Fisher}, \textit{Maps of Intellectual Property, Theories of IP}, \url{http://cyber.law.harvard.edu/people/tfisher/IP/IPTTheory.swf} (accessed 30.04.2016).} This last theory, it is noted, is comparatively recent and is by far the least...
influential, especially in Europe. In their application to copyright, these theories provide both the rationale for protection and the meta-objectives of the copyright system.

All theories have a philosophical basis, sometimes dating back to the seventeenth century; the application of these theories to intellectual property and copyright, however, is much more recent.\textsuperscript{1804} The works of Bentham, Mill and Pigou influence utilitarianism.\textsuperscript{1805} Locke’s theory of property in his “Second Treatise of Civil Government” is the touchstone of the labour or fairness theory.\textsuperscript{1806} The works of Kant, Fitche, and Hegel are the main inspiration for the personality theory.\textsuperscript{1807}

The utilitarian or welfare theory combines utilitarianism and economic analysis of law to make the general argument that copyright protection should have as a central objective the promotion of the social good through the creation and supply of works.\textsuperscript{1808}

The fairness theory contends that individuals are entitled to the fruits of their intellectual labour. In essence, this is a manifestation of a broader equity argument with ample support in Western culture, according to which individuals deserve “a share of the fruits of a collective project proportionate to the magnitude of his or her contribution to the venture”.\textsuperscript{1809}

The personality theory understands intellectual creations as manifestations or even extensions of the creator’s personality. In this conception, “property provides a unique or especially suitable mechanism for self-actualization, for personal expression, and for dignity and recognition as an individual person.”\textsuperscript{1810} Therefore, the approach of the fairness theory is oriented towards the object, whereas that of the personality theory is oriented to the subject.\textsuperscript{1811}

Both fairness and personality arguments are commonly placed under the umbrella of natural rights arguments for copyright protection, providing arguments for the protection of material and moral interests of creators respectively.\textsuperscript{1812} From a natural rights perspective, then, the law does not create a (positive) right but is rather a formal act of recognition of an existing (natural) right.\textsuperscript{1813}

\textsuperscript{1804} See, e.g.: Fisher, 2001, Hughes, 1988 (on the Lockean and Hegelian theories), van Gompel, 2011, pp. 215–284 (on the fairness and personality theories), Goldstein & Hugenholtz, 2013, pp. 17–21 (briefly exploring the philosophical arguments underpinning the common law and civil law copyright traditions).

\textsuperscript{1805} The reference works in this respect are Bentham’s “A Manual of Political Economy” (1800), Mill’s “Principles of Political Economy” (1848), and Pigou’s “The Economics of Welfare” (1920).

\textsuperscript{1806} Locke, 1988. Locke’s reference work in this area dates from 1690. The most relevant part of his Second Treatise of Civil Government for our purposes is Chapter 5 (“Of property”).

\textsuperscript{1807} The reference works in this respect are Kant’s “On the Injustice of Reprinting Books” (1785), Fitche’s “Proof of the Illegality of Reprinting” (1793), and Hegel’s “Elements of the Philosophy of Rights” (1821).

\textsuperscript{1808} Some authors distinguish these two arguments in their analysis. See, e.g., Lucie Guibault, 2002, pp. 10–15, treating separately the utilitarian and economic arguments.

\textsuperscript{1809} WILLIAM FISHER, CopyrightX: Lecture 2.2, Fairness and Personality Theories: Fairness, \url{https://www.youtube.com/watch?v=HYJ4d0F9s5k&feature=youtu.be} (accessed 30.04.2016), referring to the modified form of the Equity Theory.

\textsuperscript{1810} Hughes, 1988, p. 330. See also Geller, 1994, pp. 168–169, on Kant’s general theory of authorship of norms.

\textsuperscript{1811} van Gompel, 2011, p. 218.

\textsuperscript{1812} Lucie Guibault, 2002, p. 8, refers to the “personality rights” and “reward” elements of the natural rights argument.

\textsuperscript{1813} Ginsburg, 1994; van Gompel, 2011.
The culture theory “is rooted in the proposition that... intellectual-property rights...can and should be shaped so as to help foster the achievement of a just and attractive culture.”\textsuperscript{1814} This theory would likely support the adoption of an ACS for non-commercial online use of works. Indeed, two scholars whose works are identified within this theory, William Fisher and Neil Netanel, are also early and influential proponents of ACS.\textsuperscript{1815} However, it is undeniable that the culture theory is of little application, influence or acceptance in European copyright law, policy or scholarship. Even in its native US, the application of this theory to copyright and its conceptual development are at an early stage. Therefore, it is not possible to classify it as a “dominant” or “influential” theory from which to derive rationales to assess an ACS, especially if the ultimate aim of the legalisation model is reform of EU copyright law.\textsuperscript{1816} This section will therefore not further examine the culture theory.

As we shall see, there is no one true theory that provides a full justification for intellectual property rights. Instead, it is common for law-making in this field to combine multiple theories, sometimes inconsistently. Yet, existing theories tend to compartmentalise core themes of intellectual property—“fairness, incentives, culture-shaping”—that are frequently perceived by legislators and policy makers as interrelated and complementary, with obvious detrimental effects to their usefulness.\textsuperscript{1817}

This conceptual severability can perhaps be traced back to academic theorisation according to political and legal science axioms (e.g. the parallels drawn with property in general), where the above-mentioned theories are perceived as canonical “rival perspectives”.\textsuperscript{1818} The effects of such severability are twofold. First, these theories are inconsistent insofar as they denote “gaps, conflicts and ambiguities”.\textsuperscript{1819} Second and consequently, their value as interpretative guidelines for the legislative and judicial powers is hampered, limiting their practical use.\textsuperscript{1820}

Despite their indeterminacy, these theories have significant normative value, especially in informing doctrinal discussions, legislation and policy making in the field of intellectual property.\textsuperscript{1821} As such, they provide a valid platform for discussions on the optimal design of copyright law when faced with new technological and social paradigms.

\textsuperscript{1814} Fisher, 2001, p. 172.
\textsuperscript{1820} See Fisher, 2001, pp. 195–196, arguing that the value of intellectual property theories is not so much to “provide comprehensive prescriptions concerning the ideal shape of intellectual property law” but to assist in the identification of “nonobvious attractive resolutions of particular problems” and “foster valuable conversations among the various participants in the lawmaking process”.
\textsuperscript{1821} Fisher, 2001, pp. 194–199.
In the area of copyright proper, the underlying rationales for its grant are customarily divided between principles of natural right (integrating fairness and personality arguments), traditional to civil law jurisdictions, and principles of utilitarianism, followed by common law countries.\textsuperscript{1822}

While in civil law countries the natural rights approach conceives the “authorial entitlement… as a juridical recognition of rights inherent in the act of authorship as such”, common law countries regard copyright “as a policy instrument designed to serve the public interest in the production and dissemination of works of authorship”.\textsuperscript{1823} Hence, the distinction between “author’s rights” (or \textit{droit d’auteur}) and “copyright”.\textsuperscript{1824} The former term follows a “deontic” approach, focusing on the link between creator and expression. The latter term is “instrumental”, emphasising the effect of copyright on creativity.\textsuperscript{1825}

These distinctions are important for understanding substantive legal differences between the copyright systems of countries belonging to each tradition. However, they should not be overstated, for several reasons. First, because even representative copyright systems of different theoretical currents like the French and US laws have, since inception, had far closer principles and goals than generally acknowledged.\textsuperscript{1826} Second, because international harmonisation of copyright law, initiated with the BC, has led to the convergence of legal theories and traditions.\textsuperscript{1827} On this point, some authors view copyright law as “a product of nineteenth-century Western culture”, which found its modern identity “with the conclusion of the Berne Convention, in 1886”.\textsuperscript{1828} Third, as Goldstein and Hugenholtz observe, because the evolution of copyright law is predominantly shaped by economic forces. In that process, the main role of philosophical theories is to provide arguments for the creation of new rights or the imposition of limits thereto.\textsuperscript{1829}

Beyond providing philosophical foundations for copyright protection, the legitimacy of these theories in the field of copyright stems from references made in the legislative texts, such as preambles, and judicial decisions, which often rely on teleological interpretation.\textsuperscript{1830} Herein as well lies a basis for this study’s focus on the objectives of EU law as a normative reference point to evaluate a statutory licence ACS.

It is possible to find manifestations of utilitarian arguments, for example in recital 4 InfoSoc Directive, where it indicates that harmonisation of EU copyright law

\textsuperscript{1822} Goldstein & Hugenholtz, 2013, p. 6.
\textsuperscript{1823} Drassinower, 2012, p. 108. See also Ginsburg, 1994.
\textsuperscript{1824} Drassinower, 2012, p. 108. On the distinction between these legal traditions, see, e.g., Strowel, 1994.
\textsuperscript{1825} Balganesh, 2012, p. 1678, exemplifying with the works of Landes and Posner.
\textsuperscript{1828} Grosheide, 1994, pp. 206–207, considering that the different normative considerations of copyright stem from the different legal traditions brought together in international copyright law, with their diverse philosophical underpinnings. A similar point is made by Strowel, 1994, p. 249: “the differences between \textit{droit d’auteur} and copyright can be explained not by positive or natural law conceptions but by more fundamental divergences between civil law and common law: differences which are located at the level of the drafting and interpretation of legislative and judicial texts”.
\textsuperscript{1829} Goldstein & Hugenholtz, 2013, pp. 8, 15.
will foster substantial investment in creativity and innovation, including network infrastructure, and lead in turn to growth and increased competitiveness of European industry, both in the area of content provision and information technology and more generally across a wide range of industrial and cultural sectors. This will safeguard employment and encourage new job creation.

Conversely, recitals 10 and 11 InfoSoc Directive emphasise the material interests of creators, echoing natural rights arguments. This is apparent from references to the “high level of protection” mantra (also featured in recital 4) in connection with incentives for creativity and the material interests of (inter alia) creators, especially to “receive an appropriate reward for the use of their work”.

These recitals, it is noted, also mention the interests of “producers, consumers, culture, industry and the public at large”, thereby incorporating investment protection and the public interest as motivation for adequate copyright protection, which again brings a utilitarian flavour to this mix. Investment protection, it is noted, is usually considered in the EU to be the main justification for affording protection to producers and broadcasters through related rights.\textsuperscript{1831} The situation is different for performers, whose protection is considered justified on similar fairness and personality arguments to authors, and whose skills have been compared to creative authors of derivative works.\textsuperscript{1832} From this perspective as well, then, there are grounds to draw a distinction between the legitimate interests of creators and exploiters, as previously done in this chapter.\textsuperscript{1833}

In the end, both utilitarian and natural rights theories are reflected in the goals of the acquis and provide justification for copyright protection in the EU, as they do in copyright regimes of the droit d’auteur and common law copyright tradition.\textsuperscript{1834} It is up to the lawmaker and interpreter to bring coherence to the copyright system by striking a fair balance between different interests. In this respect, the predominance of utilitarian or natural law principles in a legal regime may provide “an indication as to where the balance rests between conflicting interests of the rights holders and the public”.\textsuperscript{1835}

This realisation, together with the recognition of the importance of both arguments in the European legal tradition, justifies exploring further the normative considerations of natural rights and utilitarianism. The analysis of both theories demonstrates how the public interest can shape copyright protection and justify restrictions to the exclusive right in favour of a right of access and remuneration for non-commercial online use of works.

5.5.1.1 Natural Rights

As noted, it is possible to ascribe to the natural rights theory “fairness” and “personality” dimensions. These reflect a more individualistic approach to copyright protection than in utilitarianism. The fairness dimension reflects the material interests of authors in copyright protection for the commercial exploitation of works. The personality dimension applies to the

\textsuperscript{1831} Eechoud et al., 2009, pp. 190–193.
\textsuperscript{1832} See, e.g., the discussion in Eechoud et al., 2009, pp. 186–190.
\textsuperscript{1833} See the distinction drawn in the analysis of the three-step test supra at 5.3.3.4 and infra at 6.1.5.
\textsuperscript{1834} See, regarding the latter point, Strowel, 1994, p. 248.
\textsuperscript{1835} Lucie Guibault, 2002, p. 7.
non-material interests of authors, reflected strongly in the protection of their moral rights most common in countries of the droit d’auteur tradition.\textsuperscript{1836}

As the \textit{acquis} does not harmonise moral rights and an ACS does not aim at such harmonisation, the Lockean fairness theory is more relevant for this study than the Hegelian personality theory.\textsuperscript{1837} However, fairness and personality arguments are compatible. Insofar as they provide support for the material and moral interests of authors in their creative works, their combination supplies a capable natural rights justification for copyright protection.\textsuperscript{1838}

The traditional Lockean desert-for-labour argument posits that an individual who labours on resources that are free of ownership or held in common has a natural right of property on the results of that effort, i.e. the fruits of their labour, which right should be recognised and enforced by the state.\textsuperscript{1839}

This natural right is largely justified in the negative by two conditions or caveats, commonly known as “provisos”. The provisos operate as delimitations on the scope of protection, and “are designed to reconcile the rights of individual creators with the larger claims of society in general”,\textsuperscript{1840} i.e. the public interest.\textsuperscript{1841}

The first is known as the “sufficiency” proviso or “enough and as good condition”. According to this, a property right in the results of one’s labour is admissible “...at least where there is enough, and as good, left in common for others”.\textsuperscript{1842}

The second, referred to as the “spoilage” proviso or “non-waste condition”, “prohibits the accumulation of so much property that some is destroyed without being used.”\textsuperscript{1843} Where such spoilage does not occur, the right is justified. With the introduction of the money economy as a means to prevent waste (e.g. by selling the surplus production), this condition assumes less relevance. In the field of copyright, due to the quasi-public good nature of intellectual works, this proviso is for the most part irrelevant.\textsuperscript{1844}

At the outset, it is not obvious that Locke’s theory of property applies to intellectual property. Fisher, for example, considers such application to depend on “which aspects of his original

\textsuperscript{1837} On the Hegelian justification of intellectual property rights, see Hughes, 1988, pp. 330–365; Radin, 1982. More generally on the personality rights theory of copyright, including references to the influences of Kant, Fichte, and Hegel, see van Gompel, 2011, pp. 247–268.
\textsuperscript{1839} Locke’s argument for a natural right to physical property is contained in Chapter V (Sections 25–51), of his “Second Treatise of Government”.
\textsuperscript{1840} Merges, 2009, p. 104.
\textsuperscript{1843} Hughes, 1988, p. 298. See Locke, 1988, pp. 294–295 (Second Treatise of Government, Chapter V, Section 37).
\textsuperscript{1844} Hughes, 1988, pp. 325–329, noting that “[i]n intellectual property systems, manifestations of a non-waste condition are few and far between”. But see Damstedt, 2003, and van Gompel, 2011, p. 222 (noting the possible justification of a limited term of protection in this proviso).
theory are considered dominant.” Yet, legal scholarship generally accepts the extension of the fairness argument to intellectual property.

To be sure, ideas (unlike physical property) are non-rivalrous and non-excludable. At first glance, these characteristics raise doubts as to the extension of Locke’s theory to copyright. But such doubts are dissipated by looking deeper into Locke’s notion of “common”, and recognising that it implies an inexhaustibility condition, which is better satisfied by ideas than by physical goods held in common ownership.

In the words of Becker: “if it is the case that people can ‘deserve’ property in the (unowned) tangible objects they improve with their labor, then surely the case is no weaker for their deserving property in the intellectual objects they create.” The intuitive appeal of using Locke’s theory to “propertize” ideas is made clear by Hughes:

We can justify propertizing ideas under Locke's approach with three propositions: first, that the production of ideas requires a person's labor; second, that these ideas are appropriated from a ‘common’ which is not significantly devalued by the idea's removal; and third, that ideas can be made property without breaching the non-waste condition.

As it relates to copyright, the raw materials that provide the material input for the creative labour are ideas, facts or concepts. The labour of the creator in relation to these materials “held in common” would contribute to the value of the finished product—the expressive work—and be rewarded through a proprietary entitlement over that expression.

The expression, as the reflection of the executed labour (rather than the idea or fact), is the object of copyright protection. That protection comprises the elements of prohibition (exclusivity) and reward (remuneration or compensation) inherent in exploitation rights. However, this protection can be limited.

The sufficiency proviso, for example, limits the grant of copyright insofar as it constrains the scope of “common”. The application of the proviso to copyright would then entail a series of restrictions on the scope of protection, including the exclusion of protection for ideas per se,

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1847 On the meaning of these terms, see infra 5.5.1.2.
1848 Hughes, 1988, p. 315.
1850 Hughes, 1988, p. 300
1851 Hughes, 1988, pp. 296–297, explaining that different interpretation of the theory view of reward as a condition for labour (“we must provide rewards to get labor”) or, from a normative standpoint, as a recompense (“labor should be rewarded”). For an in depth discussion on the different possible interpretations of this theory, see Hughes, 1988, pp. 296–330. See also Gordon, 1992, arguing that Locke’s theory has multiple strands and that a natural rights dimension can only be extracted from a “no-harm principle” as a “fundamental law of nature”.
1852 Hughes, 1988, p. 314.
concepts, and algorithms. The proviso would also justify the adoption of copyright limitations, such as parodies, and durational limits on protection.  

The sufficiency proviso embodies public interest concerns that may operate to limit the scope of copyright, including its power to exclude. However, in the context of the fairness theory, limitations on the right and its exclusive element in the public interest seem to derive more clearly from the social and political contract that accompanies a transition from the state of nature to a civil and political society. In contrast with what occurs in the state of nature, “Locke emphasizes that in the civil society, a representative government may always restrict the enjoyment and exercise of property by positive law, if the public interest so requires.”

In the context of a civil and political society, then, the public interest (or “common good”) functions as both rationale and limit for restrictions operated by positive law on property rights. To accommodate the public interest, that restriction operates on the prohibition element of the right, while retaining the reward element as an essential safeguard of the author’s material interests.

As shown earlier in the analysis of the three-step test, such an approach would be consistent with a balanced consideration of legitimate manifestations of the public interest within copyright law. The analysis of precedents in Chapter 2 provides two clear illustrations—private copying in Germany and the broadcasting compulsory licence in the BC—where protection was extended to a use based on natural rights arguments, and consequently limited to a right of access and remuneration due to public interest concerns.

This is also the approach followed in the ECHR and the Charter when considering the possibility of public interest limitations to copyright as part of the fundamental right of property, possibly subject to payment of fair compensation, as highlighted by the CJEU in *Luksan*.

Therefore, from a natural rights fairness perspective, the main justifications for a model of remunerated access over exclusivity are twofold. First, the concept of desert or reward for (intellectual) labour requires compensation or remuneration for the use of creative works, but not necessarily absolute protection in the form of exclusive rights. Second and related, the definition of copyright protection around the reward element and to the detriment of the power to exclude is justified on the public interest. In this light, to the extent we can apply the Lockean  

1854 Hughes, 1988, pp. 315–323.
1856 van Gompel, 2011, pp. 219, 225.
1857 van Gompel, 2011, p. 227: “…from a Lockean viewpoint, copyright can always be statutorily restricted if that would be in the public interest”.
1858 See supra 5.3.3 and 6.1.5.
1859 See supra 5.3.3 and 6.1.5, and infra 5.5.2. In the CJEU’s jurisprudence, perhaps the best example of this is *Luksan*, ¶68.
1860 See: Becker, 1992; Gordon, 1992 (noting that a compulsory licence, as a liability rule mechanism, “could offer the laborer some reward while preserving for the public its liberty to use the common.”); WILLIAM FISHER, *CopyrightX: Lecture 2.2, Fairness and Personality Theories: Fairness*, [https://www.youtube.com/watch?v=HYJuhPf9s5k&feature=youtu.be](https://www.youtube.com/watch?v=HYJuhPf9s5k&feature=youtu.be) (accessed 30.04.2016) (discussing this issue from minute 29 onwards). Contra Merges, 2011, arguing that monetary compensation for authors is insufficient under the fairness theory, and that affording them a property right must entail the power to exclude.
theory to copyright, this theory ought to accommodate a statutory licence for non-commercial use of copyright works.\textsuperscript{1861}

In fact, if the mechanism of the exclusive right fails to provide the creators with financial reward for their labour, a model of remunerated access and use appears better suited to safeguard their material interests in a fair and proportionate manner. The restriction of the authors’ power to exclude is justified not only because the same is ineffective in the digital environment, but primarily on public interest grounds, namely the respect of fundamental rights and freedoms, and the promotion of creation and dissemination of works over digital networks.\textsuperscript{1862} That restriction is further justified as it applies to non-commercial online use of works, and is less susceptible of affecting the material interests of authors, as results from the previous three-step test analysis.\textsuperscript{1863}

\section*{5.5.1.2 Utilitarianism}

The utilitarian theory provides a framework for the traditional economic view of copyright. According to this theory, the attribution of temporary copyright protection to creators has the purpose of providing incentives for creativity and dissemination of works.\textsuperscript{1864}

The utilitarian argument fundamentally diverges from its natural rights counterpart. On the one hand, as regards its orientation, it does not provide a \textit{retrospective} reward for intellectual labour, but rather focuses on \textit{prospective} incentives for the creation and dissemination of works. On the other hand, the utilitarian theory has a \textit{collective} focus on societal welfare, which differs from the more \textit{individualistic} approach of the natural rights argument.\textsuperscript{1865}

This theory does not understand copyright as a derivation of natural law but as a positive right granted to further societal goals, which can and should be balanced with public interest policy concerns to shape the scope of protection.\textsuperscript{1866} The utilitarian theory thus approximates the Benthamite goal of “the greatest good for the greatest number”, setting as the purpose of copyright the stimulation of “production of the widest possible variety of creative goods at the lowest possible price.”\textsuperscript{1867}

In this framework, the exclusive right is a legal device to solve a public goods or free-rider problem in the production and dissemination of information goods, enabling its transfer to the “highest valued use” through efficient market transactions.\textsuperscript{1868} “Public goods” are defined as non-rivalrous (or inexhaustible) and non-excludable. A good is non-rivalrous if the benefit each individual derives from it is not affected or diminished when others simultaneously access it. A

\begin{thebibliography}{99}
\bibitem{1861} To be sure, the Lockean theory includes too many ambiguities to provide more than a general answer to the types of problem faced by contemporary copyright law in the digital environment. See \textsc{William Fisher}, \textit{CopyrightX: Lecture 2.2, Fairness and Personality Theories: Fairness}, \url{https://www.youtube.com/watch?v=HYJuhP9s5k&feature=youtu.be} (accessed 30.04.2016).
\bibitem{1862} See the discussion \textit{supra} in 5.3.3 and 6.1.5.
\bibitem{1863} See \textit{supra} 5.3 and 6.1.5.
\bibitem{1866} Lucie Guibault, 2002, pp. 11–12. In this conception, copyright is sometimes described in the common law tradition as a legal monopoly. See Strowel, 1994, pp. 236–237.
\end{thebibliography}
good is non-excludable when upon its creation and public availability it becomes difficult or impossible to prevent others from accessing or using it.\textsuperscript{1869}

Copyright shares some characteristics of public goods.\textsuperscript{1870} Although fluid and difficult to recognise in physical embodiments of traditional copyright subject matter (e.g. books, paintings, CDs), it is undeniable that the acts involved in their creation—such as authorship and composition—possess a substantial amount of both the non-rivalrous and non-excludable characteristics. Therefore, such acts are categorised and economically modelled as either quasi- or fully-fledged public goods.\textsuperscript{1871} The case is clearer still for works manifested in digital embodiments (copies) and made available online.\textsuperscript{1872}

The non-excludability feature implies that third parties can freely access and use works without payment to the creator or rights holder, meaning that the price of their use would fall below the price of creation. Hence, non-excludability would prevent private market actors from charging prices allowing a return on investment and, as a consequence, from providing these goods.\textsuperscript{1873}

This scenario entails a risk of under-supply or underproduction, as the price creators must charge for recouping their costs would be higher than the market price for the use of a copy of the work.\textsuperscript{1874} The problem is clear in the case of digital recordings of music or films. The low marginal cost associated with their reproduction and dissemination (e.g. through file sharing) exacerbates the public goods problem and creates a risk that copies of works are spread without compensation to creators, affecting their incentives for creating works in the first place.

A major assumption of this model is that creators are motivated by the prospect of economic reward which is only achievable through the making available of the work. In that configuration, a good to which access cannot be excluded is susceptible of lacking the incentives required for its creation.\textsuperscript{1875} However, this assumption is subject to criticism in copyright scholarship on the basis that there are alternative motivations for creation.\textsuperscript{1876} This is particularly true in the online environment in the context of what Peukert calls an “access culture”, which is for the most part “fed by non-commercially motivated contributions”, both public and private.\textsuperscript{1877}

Hence, it is more accurate to argue that the promise of a reward is but one of different motivating factors; “without it, some works would not be produced, and some authors might not create at

\begin{footnotesize}
\begin{enumerate}
\item[1869] Cohen et al., 2010, p. 6.
\item[1872] Eckersley, 2012, pp. 23–24.
\item[1873] Landes & Posner, 1989. See also Drexl, 2010, pp. 159–161, using the alternative terms “public”, “common” and “collective” goods to categorise copyright from an economic perspective.
\item[1874] Gordon & Bone, 1999, p. 192.
\item[1876] \textsc{William Fisher}, \textit{Economic Analysis of Law}, \url{http://cyber.law.harvard.edu/people/tfisher/IP/EAL.swf} (accessed 30.04.2016), identifies the following “alternative motivations for production” in the broader context of intellectual property: passion, prestige, tenor, norms of science, advertising, and collaborative voluntary creation. Regarding the latter, Benkler, for example, argues that in models of peer-production the organisational framework of certain projects triggers non-monetary social-psychological rewards securing sufficient individual participation. See Benkler, 2002, pp. 378–380, 2004.
\item[1877] Peukert, 2015, p. 369.
\end{enumerate}
\end{footnotesize}
Alternative motivations for creation—especially non-monetary incentives—are important because they mitigate the public goods problem, thereby weakening the utilitarian argument for legal protection.\textsuperscript{1879}

To solve the problem of non-excludability efficiently, copyright law uses as a default the legal mechanism of exclusivity.\textsuperscript{1880} The expectation is that by recognising a property-like enforceable right to prohibit use absent authorisation (or at least payment) the free-rider problem is eliminated in a way that is compatible with a Coasean market model.\textsuperscript{1881}

Through the exclusive right, copyright owners get a legal monopoly allowing them to suppress competition in the creation and distribution of (copies of) works, and to charge prices for the use of the same that are sufficiently high to offset and recoup the costs of creation (so-called “costs of expression”). In theory, this legal entitlement allows price discrimination by copyright owners in the commercialisation of their works well above their costs of expression, leading to profit maximisation. (In practice, only imperfect price discrimination is available to copyright owners.) The social welfare beneficial result of this legal design would be to induce future creative activities and maximise the output of works, which would otherwise not occur.\textsuperscript{1882}

In essence, the legal recognition of exclusivity is an artificial imposition of scarcity grounded on a concern to secure and incentivise the creation and supply of works. In a world where these are mostly or partially embodied in physical objects such a construct is difficult to achieve, but arguably possible. However, when the same logic is applied to digital use over the networked information environment, the complexities of legally imposed digital scarcity grow exponentially.\textsuperscript{1883}

The question that then arises is whether the benefits of property rights protection and exclusivity outweigh its costs, especially as regards the regulation of mass non-commercial online use of works by individuals. From a different perspective, it is possible to consider the costs as disadvantages of exclusive rights in relation to alternative legal solutions.\textsuperscript{1884}

To make this assessment, we must identify the costs introduced by the grant of property rights, especially when their scope is too broad. Gordon and Boone group these costs into four categories: monopoly pricing, chilling effects on follow-on creativity, transaction costs, and

\textsuperscript{1878} Cohen et al., 2010, p. 7.
\textsuperscript{1879} \textsc{William Fisher}, \textit{CopyrightX: Lecture 4.1, Welfare Theory: The Utilitarian Framework}, https://www.youtube.com/watch?v=3ISstJYsCWs&feature=youtu.be (accessed 30.04.2016), identifying in addition the following mitigating circumstances: lead time for first movers, custom or extra-legal norms that protect first movers, self-help through technological measures and/or contract, and philanthropy.
\textsuperscript{1881} Gordon & Bone, 1999.
\textsuperscript{1882} \textsc{William Fisher}, \textit{CopyrightX: Lecture 4.2, Welfare Theory: The Incentive Theory of Copyright}, https://www.youtube.com/watch?v=r9wqQNCC-Vs&feature=youtu.be (accessed 30.04.2016). NB “consumer surplus” is the difference between the maximum price a consumer is willing and able to pay for a work as a good or service (indicated by the demand curve) and the actual market price they in fact pay for that good or service.
\textsuperscript{1883} Eckersley, 2012, p. 24.
administration and enforcement costs. Some of these costs or disadvantages justify restrictions on the exclusive right.

The first category of costs—monopoly pricing—is characterised by the deadweight losses (i.e. foregone consumer surplus or allocative inefficiency) derived from the impossibility of perfect price discrimination, amplified by the non-rivalrous nature of intangible copyright goods. In other words, because copyright owners use the exclusive right to set a price for their works well above marginal cost, a significant group of potential consumers will be priced out of the market.

The second category of costs refers to chilling effects on future creativity. It is linked to the cumulative nature of information goods, particularly salient for online use. Creative expression builds on pre-existing materials, many of which are subject to copyright protection. By establishing a property interest in creative goods, copyright imposes a cost on subsequent creators that require pre-existing works as input for their own expressive works.

To limit the reach of this cumulative effect and the related social cost of exclusivity, copyright law employs devices such as the delimitation of its subject matter scope (e.g. the idea/expression distinction), and the adoption of limitations, which can be unremunerated (free uses) or remunerated. Remunerated limitations, such as in a statutory licence ACS, translate into liability rules. This economic argument for copyright limitations is echoed somewhat in normative considerations related to promotion of access and dissemination of works, and freedom of expression and information online, used in this study as normative justifications for the adoption of an ACS.

The third category relates to transaction costs of licensing, namely those associated with negotiations. These costs are usually mitigated by the clear definition of rights, consolidation of ownership interests and, if individual licensing is too costly, by the intervention of CMOs or the adoption of liability rules.

The fourth category is administration and enforcement costs. Whereas administration costs are dependent on the existing regulatory infrastructure for their management and operation, enforcement costs are calculated with reference to the frequency of copyright infringement and the relative cost of enforcement in each instance thereof. That is to say, the proper functioning of the incentive mechanism for copyright depends on the existence of reasonably effective enforcement measures. As noted throughout this dissertation, this condition is not

1885 Gordon & Bone, 1999, p. 194–ff. Some of these costs are mentioned also in Cohen et al., 2010, p. 7.
1886 See WIKIPEDIA, Deadweight loss, https://en.wikipedia.org/wiki/Deadweight_loss (accessed 30.04.2016): “In economics, a deadweight loss (also known as excess burden or allocative inefficiency) is a loss of economic efficiency that can occur when equilibrium for a good or service is not achieved or is not achievable. Causes of deadweight loss can include monopoly pricing (in the case of artificial scarcity), externalities, taxes or subsidies, and binding price ceilings or floors (including minimum wages).”
1888 Gordon & Bone, 1999, p. 196, providing the example of fair use in US copyright law.
1889 See supra 5.3.3.5 and 5.3.3.6.
1890 Gordon & Bone, 1999, p. 196,
satisfied in relation to unauthorised file sharing over digital networks, and the legislative fortification of enforcement measures has failed to change that situation.  

The third and fourth categories of costs are usually at the centre of market failure justifications for the adoption of limitations or collective rights management of copyright. They likewise provide the core economic motivation for an ACS for non-commercial online use by individuals, as used throughout this study.

In essence, the above-described costs of exclusive rights provide admissible justifications for deviations from the principle of exclusivity in light of the utilitarian goal of incentivising the creation and supply of works. These costs also reflect public interest considerations that may dictate whether social welfare is better served by an adjustment of the incentive element to achieve the utilitarian goal of copyright.

In the case of mass online use by individuals carried out for non-commercial purposes, where direct licensing and enforcement are socially costly and/or ineffective, a legal alternative to exclusivity in the form of a right of access and remuneration appears consistent with the utilitarian rationale of copyright.

In purely economic terms, whether an ACS does in fact provide such a solution will then depend on empirical research that assesses its relative costs and benefits as compared to the status quo for the Copyright regulation of the use in question. As noted throughout this study, although further research is required, there are indicators that such a system may increase social welfare. Therefore, as with the natural rights theory, utilitarianism seems to leave policy makers an eminently normative choice between retaining the status quo of exclusivity or, as suggested here, promoting reform through an access and remuneration model for non-commercial online use.

5.5.2 The Access and Remuneration Dimensions of Copyright

In Europe, different philosophical approaches translate into a plethora of theories on the legal nature of copyright. As noted, especially in continental Europe, copyright laws are

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1892 On market failure as justification for an ACS, see supra 2.5, 3.3.4.1, 3.3.5.1, 4.4.1.3, 5.3.2.2, 5.3.4, 5.5.1., and infra 6.1.5.


1894 William Fisher, Maps of Intellectual Property, Theories of IP, http://cyber.law.harvard.edu/people/tfisher/IP/IPTheory.swf (accessed 30.04.2016), identifying his ACS proposal as a possible mandatory solution in copyright to a public goods problem (“Incentive Theory”, “Possible Solutions”, “Solution #3: Government Issues Prizes to Successful Private Producers”). N.B. the mention of “prizes” in this context better applies to what the taxonomy in Chapter 3 refers to as “State Systems”, but the argument would apply also to ACS based on legal licences and mandatory collective management.

1895 See supra 5.3.2.3, 5.3.3.3, 5.3.3.4, and infra 6.1.1 and 6.1.5.

1896 These include, to name a few, the intellectual property theory of Poulliet, Drone and Klosterman, the personality rights theory of Gierke, the doppelrecht theory of Kohler, the exclusive rights theory of Piccard, the monopoly theory of Roguin, Roubier’s clientele rights theory (later developed by Desbois), the immaterial rights theory of Greco, the dualist theories of Plassant, De Sanctis and Le TarneC, Savatier’s concept of “parallel rights”, De Boor and Ulmer’s monism (and its openness to Hubman’s geistiges Eigentum), and Recht’s property-creation theory. See Pereira, 2008, pp. 83–168, for a discussion of these theories,
predominantly of an authors’ rights tradition and follow a natural rights legal conceptual approach. At its core, this approach is guided by the objective of guaranteeing a just reward for creators, using the grant of an exclusive right as the principal legal instrument for that purpose.\footnote{Goldstein & Hugenholtz, 2013, pp. 7, 14, 19–21.}

Since the mid-twentieth century, authors (but not exploiters) have enjoyed the human right to benefit from the moral and material interests that result from their works, pursuant to Article 27(2) UDHR and, later, Article 15(1)(c) ICESCR.\footnote{This level of protection of material and moral interests appears to mirror the fairness and personality prongs of the natural rights theory, as well as the traditional distinction between economic and moral rights in copyright. See, e.g., Gervais, 2015, p. 19. On Art. 15(1)(c) ICESCR, see G. W. Austin & Zavidow, 2015, pp. 313–321, 331.} Furthermore, the fundamental rights protection of copyright as property in Europe is well established.\footnote{See Goldstein & Hugenholtz, 2013, pp. 23–26, with examples of how different Member States’ laws protect copyright as a fundamental right. On the consideration of copyright as a human right see, generally, P. L. C. Torremans, 2015.} It derives from the “property clause” in Article 1 Protocol No. 1 ECHR,\footnote{Art. 1 Protocol No. 1 ECHR (“Protection of property”) states: “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.” On ECtHR jurisprudence applying this provision to copyright, see: ECHRR, Melnychuck v Ukraine; ECtHR, Balan v. Moldova; ECtHR, Ashby Donald; ECtHR, The Pirate Bay.} from the express mention in Article 17(2) Charter that “intellectual property shall be protected” (as part of the general guarantee of property in paragraph 1 of that provision), from references in recitals 9 InfoSoc Directive and 32 Enforcement Directive, and from various CJEU judgments.\footnote{CJEU, Laserdisken, ¶¶64–65; CJEU, Promusicae, ¶62; CJEU, Scarlet Extended, ¶¶43–44; CJEU, Deckmyn, ¶¶27–32.}

This approximation to the right of property suggests that copyright requires a power of exclusion of third parties from access and use of works absent authorisation, i.e. a right of prohibition. Yet, such a contention is at odds with the existence of legal structures within copyright law that allow restrictions to the exclusive right.

Beyond the realisation that utilitarian and fairness arguments admit public interest limitations to copyright (see 5.5.1), this dissertation contains multiple examples of admissible restrictions on the exercise and nature of copyright. They include voluntary and mandatory models of collective rights management, statutory and compulsory licences, and even uncompensated limitations to copyright, all of which are consistent with EU copyright law.\footnote{Examples of such restrictions are the non-voluntary licences discussed in Chapter 2, the different types of collective rights management described in Chapter 3, and the copyright limitations explained in Chapter 4. See also infra 6.1.2–6.1.4.}

Furthermore, the legal framework contains a normative filter for the future inclusion of limitations to exclusive rights: the three-step test. The very existence of such a norm suggests that it is possible to ensure copyright protection outside the template of the exclusive right. In
that line, this dissertation argues that a flexible interpretation of the test admits a properly delimited statutory licence ACS.  

The possibility of imposing restrictions on the exclusive right while retaining the core of copyright protection as a fundamental right is consistent with calls to rethink copyright as an access right, rather than a prohibition right. To do so, according to Geiger, requires adapting the rules of copyright to its initially dual character: 1) of a right to secure and organize cultural participation to creative aspects (access aspect); and 2) of a guarantee that the creator participates fairly in the fruit of the commercial exploitation of his works (protection aspect).

This proposition bridges the utilitarian and natural rights justifications for copyright, and recasts them in a fundamental rights framework. It emphasises not only the social dimension of copyright but also “the inclusive rather than the exclusive nature of copyright protection.”

The positive definition of an “access right” as focusing on the availability of works and cultural participation is in stark contrast with the more traditional definition of copyright in the online environment as a “negative” right. That is to say, a legal entitlement to prohibit the access and subsequent use of copyright works, achieved through exclusivity with legal protection of TPMs and the prohibition of their circumvention.

As is apparent, the positive meaning of the access right is consistent with the privilege afforded to end-users in an ACS. Borrowing the terminology of Peukert with a twist, a statutory licence ACS would adapt copyright law to foster an online “access culture”, rather than an “exclusivity culture.”

In Geiger’s proposal, an access right is justified by a combination of the social function of copyright with the public interest. This social function stems from the notion that the law requires a measure of balance in order to regulate private and private-public relationships within society. If that is accepted, then a right cannot be absolute, as it is constrained by competing interests within a set community. The result, then, is that subjective rights are “limited in social terms” and, regarding copyright, that the scope of protection—including the objectives and conditions of its exercise—is drawn in light of the public interest.

The argument set forth in this chapter is that the best approach to define the public interest as a limit on the exclusive or prohibition element of copyright is through the identification of its

1903 See supra Chapter 5 and infra 6.1.5.
1904 Geiger, 2015a, p. 4.
1906 Geiger, 2015a, p. 4 (n.9).
1907 Peukert discusses the use of copyright to foster access or exclusivity as two cultures of online communication. The twist here is that Peukert’s proposal, in line with his earlier bipolar copyright system, is for a system that allows rights holders to choose between obtaining remuneration for online use of their works either through “individual license fees (exclusivity culture) or by statutory levy (access culture). The levy would be reserved exclusively for subject matter that is available without technical barriers on the internet.” See Peukert, 2015, p. 393.
1908 Geiger, 2015a, pp. 5–7. See also G. W. Austin & Zavidow, 2015, p. 320, mentioning the social function of copyright in the context of Art. 15(1) ICESCR.
1909 See supra 5.5.1. See also Geiger, 2015a, pp. 7–8, referring to “the interest of society and the common interest”.

291
collective and individual manifestations, qualified as legitimate interests in the third condition of
the three-step test. This approach allows consideration of such interests within a balancing
framework designed to assess restrictions on copyright protection.\textsuperscript{1910}

However, it is also possible to consider the public interest from an \textit{external} perspective,
identifying foundations for a right of access in the international human or fundamental rights
framework and domestic constitutional law.

In the first place, these foundations derive from the recognition in Articles 27(1) UDHR and
15(1) ICESCR of a universal right to culture and science.\textsuperscript{1911} Such rights, as noted before,
provide strong public interest arguments in favour of a right of access as an element of an ACS,
related to the promotion of creativity and circulation of works, and freedom of expression.\textsuperscript{1912} In
this respect, Gervais notes that

\begin{quote}
…the UDHR in particular would allow exceptions that demonstrably augment access where
such access (enjoyment) is not commercially reasonable or possible, and the right to reuse
and thereby participate in the cultural life of the community. This seems to justify both
consumptive use exceptions where commercial access is undesirable or impracticable… and
exceptions for transformative uses…\textsuperscript{1913}
\end{quote}

In the second place, the elevation of copyright to human or fundamental rights status as a
property right implies restrictions based on the social function of the right and the application
of competing fundamental rights. Both sets of restrictions play a role in justifying a right of access
and remuneration.

Regarding copyright’s social function as a justification for a right of access,\textsuperscript{1914} Article 1
Protocol No. 1 ECHR, for example, in its first paragraph allows natural or legal persons to be
deprived of their property “in the public interest and subject to the conditions provided for by
law and by the general principles of international law.” It further allows States to enforce laws
“necessary to control the use of property in accordance with the general interest”.

In the same line, we must note the social limits identified in the general property clause of
Article 17(1) Charter, which restricts the regulation of property to what is “necessary for the
general interest”. This reference, as noted in the preparatory works of the Charter, applies to the
protection of intellectual property in Article 17(2) Charter, considered a manifestation of the
general property right. In this way, the non-absolute character of intellectual property rights is
apparent.\textsuperscript{1915}

\begin{flushright}
\footnotesize
\textsuperscript{1910} See \textit{supra} 5.3.3. See also Gervais, 2015, p. 21, arguing that human rights principles can “inform the determination of
the proper scope of exceptions” under the third step of the test.
\textsuperscript{1911} Art. 27(1) UDHR states: “Everyone has the right freely to participate in the cultural life of the community, to enjoy
the arts and to share in scientific advancement and its benefits.” Art 15(1) ICESCR states: “1. The States Parties to
the present Covenant recognize the right of everyone: (a) To take part in cultural life; (b) To enjoy the benefits of
scientific progress and its applications; (c) To benefit from the protection of the moral and material interests resulting
from any scientific, literary or artistic production of which he is the author.”
\textsuperscript{1912} See \textit{supra} 5.3.3.5 and 5.3.3.6.1.
\textsuperscript{1913} Gervais, 2015, p. 21.
\textsuperscript{1914} Geiger, 2015a, p. 15.
\textsuperscript{1915} Geiger, 2015a, pp. 16–17, with further references. See also \textit{supra} 5.3.3.6.
\end{flushright}
In addition to the social function dimension, the operation of competing human or fundamental rights as external limits to copyright protection provides justification for an access right. In this respect, the present dissertation illustrated several instances where the balancing of conflicting fundamental rights resulted in the exclusive right having to cede in the interests of privacy, protection of personal data, freedom of expression and information, and freedom to conduct a business.\textsuperscript{1916}

In the context of the three-step test analysis, this chapter has derived from these external limits internal fundamental rights-based justifications for a right of access and remuneration for non-commercial online use of works, which are coherent with the CJEU’s teleological interpretation of existing acquis limitations, illustrated in Painer and Deckmyn.\textsuperscript{1917}

The CJEU elucidates the point in Luksan. In that judgment, the Court accepts the property qualification of copyright, but recognises the possibility of restrictions “in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss”. The Court further notes, “[t]he use of property may be regulated by law in so far as is necessary for the general interest”.\textsuperscript{1918} In this light, the public interest and respect for fundamental rights are admissible grounds to justify a restriction on the nature of the exclusive right in favour of a right of access and fair compensation.\textsuperscript{1919}

That restriction, if effectuated through a statutory licence, may in fact serve the creative incentive goal of copyright and further the circulation of culture online. As noted, statutory licences have a productive function, due to their ability to foster creative use by securing access to existing works and, thus, afford a degree of freedom to authors in their creative processes. As is apparent, from this perspective, such a licence would have a basis in freedom of (artistic) expression in Articles 10 ECHR and 11 Charter.\textsuperscript{1920}

The contention of this study is that these non-economic motivations, when considered in the normative framework of the three-step test, support the adoption of a model of remunerated access for non-commercial online use of works, in the form of a statutory licence ACS. This has implications for the access and remuneration aspects of copyright in the acquis.

From the access perspective, the question arises as to whether such motivations, especially those related to fundamental rights, are sufficient to qualify the privilege of end-users as a positive user right of equal value to the exclusive right. This would entail, for example, the ACS-limitation

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{1916}] See supra 4.4.1.4, 4.4.1.5, 4.4.4.1, 4.4.4.3, and 5.3.3.6. On ECHR jurisprudence and the possibility of imposing limitations on the grounds of freedom of expression (Art. 10 ECHR), see ECHR, Ashby Donald, and ECHR, The Pirate Bay. On CJEU jurisprudence in this respect, see: CJEU, Promusicae, ¶65–68; CJEU, LSG, ¶28–29; CJEU, Bonnier Audio, ¶56; CJEU, Painer, ¶105, 132; CJEU, Scarlet Extended, ¶53; CJEU, Netlog, ¶51; CJEU, UPC Telekabel, ¶46; CJEU, Deckmyn, ¶26–27.
\item[\textsuperscript{1917}] See supra 4.4.1.4, 4.4.1.5, 4.4.4.1, 4.4.4.3, and 5.3.3.6.
\item[\textsuperscript{1918}] CJEU, Luksan, ¶68.
\item[\textsuperscript{1919}] Geiger, 2015a, p. 20.
\item[\textsuperscript{1920}] Cf. supra 5.3.3.5 and 5.3.3.6.1. See also Geiger, 2015b, pp. 9–20, proposing a statutory licence for creative reuses of derivative works.
\end{itemize}
\end{footnotesize}
being mandatory and privileged, i.e. not subject to contractual disposition or pre-emption by technological measures.\textsuperscript{1921}

As described in Chapter 4, the InfoSoc Directive mostly opens the door for contractual disposition of limitations by end-users and affords priority to TPMs over limitations. The possibility of contractual disposition can be set aside by the definition of limitations as imperative (e.g. as occurs in Portugal and Belgium), or by the application of imperative rules protecting end-users (e.g. consumer law). In relation to some limitations, Article 6(4) InfoSoc Directive mandates Member States to put in place appropriate measures to ensure exercise of limitations despite application of TPMs. However, that possibility is not available for works made available online on agreed contractual terms.\textsuperscript{1922}

This priority of contract and especially TPMs over limitations is not required by the international law provisions (in the WIPO Treaties) that Article 6 InfoSoc Directive implements. It is therefore a choice by the EU legislature. In that light, the different public interest manifestations of the access dimension of copyright discussed to this point (namely those arising from fundamental rights), together with the lack of efficiency of TPMs, the lack of proportionality of their application to non-commercial online acts, and the requirement of effectiveness of limitations, all justify a different approach for a limitation-based ACS.

One possible approach could be to build on the “appropriate measures” language of the directive and the general proposal of Article 5.8 Wittem Code. Rather than an outright prohibition on these measures, rights holders would be allowed to apply TPMs, subject to an obligation to make available means of benefiting from the ACS-limitation. That obligation would in turn be subject to the condition that those means are necessary to fully exercise the limitation.\textsuperscript{1923} If the rights holder fails to meet such obligations, end-users or their representatives (including consumer associations or state entities) could judicially enforce this right to exercise the statutory limitation. Whether such a set-up creates a “subjective right” to the ACS-limitation is up for discussion; however, this approach appears to be consistent with the normative considerations that inform the access dimension of copyright under EU copyright law.\textsuperscript{1924}

However, the promotion of the access dimension of copyright for the regulation of non-commercial online use through a limitation, at the expense of the exclusive nature of the right, does not necessarily entail transforming prohibited uses into free uses. In fact, the CJEU in \textit{Luksan} accepts a restriction on the exclusive dimension of copyright “in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss”.\textsuperscript{1925} In requiring that the enhancement of access be accompanied

\footnotesize{\begin{itemize}
\item \textsuperscript{1921} Geiger, 2015a, pp. 21–22, and references cited.
\item \textsuperscript{1922} See supra 4.4.1.2, and 4.4.3.5. For an analysis of the impact of digital technology on the position of consumers of licensed digital content from the perspective of EU law on copyright, contract and consumer protection, see Lucie Guibault, 2016.
\item \textsuperscript{1923} See Wittem Group, 2010 (Article 5.8).
\item \textsuperscript{1924} Geiger, 2015a, p. 22, suggesting the possibility of enforcing limitations as a “subjective right”. In EU law, further support for the consideration of user rights as enforceable rights of equal value to the rights of copyright owners could arguably derive from CJEU, \textit{Ulmer}, ¶43, CJEU, \textit{Deckmyn}, ¶26, CJEU \textit{UPC Telekabel}, ¶57, CJEU \textit{Painer}, ¶132. See also European Copyright Society, 2014b; Geiger, 2015a, pp. 22–23.
\item \textsuperscript{1925} CJEU, \textit{Luksan}, ¶68 (emphasis added).
\end{itemize}}
by a remuneration condition, the Court emphasises the central role of that condition in securing the material interests of rights holders in general, and creators in particular.

This approach is coherent, first, with the role of remuneration in both utilitarian and natural rights theories, as either creative incentive or a fairness reward for intellectual creations. Second, it mirrors the focus on the material interests of creators in the human and fundamental rights framework of copyright, especially in the UDHR and ICESCR, which do not require copyright protection to include a power to exclude users. That is to say, under these instruments, the material and moral interests of creators can be secured through a right of access and remuneration, rather than a pure exclusive right.

To this effect, the present dissertation has argued that a statutory licensing system for non-commercial use would likely provide better protection to creators than a non-enforceable exclusive right for the same use. The reasons are essentially twofold. First, the exclusive right in this scenario will generate little rights revenue and, where it does, the same will accrue mostly to exploiters to whom creators have transferred the right. Second, the remuneration or compensation right attached to the statutory licence system is typically (in the EU at least) unwaivable and distributed on fair terms in the institutional setting of a CMO, ensuring that the rights revenue generated in the system finds its way to creators.

On this point, the fact that similar results can in theory be achieved through improvements in contract law should be considered as a supplement, rather than an alternative, to the deployment of statutory licences as tools to improve the position of creators in enjoying the benefits of the digital exploitation of works.

Affording special attention to creators is fully justified not only by their role—especially that of authors—in the international and EU legal frameworks, but also on philosophical grounds. From a natural rights perspective, it is the creator (not the exploiter) that has a direct moral and material link to his intellectual creations. From a utilitarian perspective, “if one wants to reach an optimal promotion of creativity, it is absolutely consistent to allocate a special role to the person who performs the social added value, i.e. the creator.”

The CJEU’s wording in *Luksan* points towards qualifying the remuneration element within the system of EU copyright law as a right of fair compensation, rather than a right of equitable remuneration. Following an analysis of the *acquis*, this study makes a similar suggestion when defining the element of compensation attached to a prospective limitation for non-commercial use of works in a statutory licence ACS.

Furthermore, after *Luksan* and *Reprobel*, it appears that the fair compensation element of such an access right belongs only to the rights holders of the restricted exclusive right, i.e. the rights of reproduction and communication to the public in the InfoSoc Directive. This means that the right

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1926 See *supra* 5.5.1.
1928 See *supra* 5.3.2.3.3, 5.3.3.3, 5.3.3.4, and 5.3.4 (and references cited). See also G. W. Austin & Zavidow, 2015, p. 330; Geiger, 2015b, pp. 5–7.
1929 Geiger, 2015a, pp. 33–34, making a similar point.
1930 Geiger, 2015b, p. 5.
1931 See *supra* 5.3.3.3 and 5.3.4.
of fair compensation for non-commercial use attributed *ab origine* to creators is unwaivable and not transferable to exploiters. In this fashion, the right ensures an adequate or appropriate level of compensation, remuneration, or reward required to incentivise creation, in line with the objectives of the InfoSoc Directive.\footnote{See supra 4.4.3.3 (on fair compensation), 5.3.3.1–5.3.3.4, and infra 5.5.5. On the use of the compensation or remuneration terminology see *Opinion AG in Padawan*, ¶¶79–80, and Geiger, 2015b, pp. 7–9 (endorsing the term “limitation-based remuneration rights” or “claims” instead of “levies” or “statutory licences”).}

### 5.5.3 Normative Consistency with EU Copyright Law

It is not an easy task to identify a clear set of objectives for EU copyright law. The view expressed throughout the dissertation is that the best way to do so is by extracting those objectives from the *acquis*, namely the existing copyright directives and their interpretation by the CJEU in over forty cases.\footnote{See supra 1.1 and 4.4.1. See also Marcella Favale et al., 2015, pp. 38–39.}

The Court often relies on the recitals of directives for teleological interpretation and identification of normative arguments that elucidate its objectives. Such arguments are informed by several concerns, including different philosophical justifications (utilitarianism v. natural rights), distinct legal traditions (civil law v. common law), respect for fundamental economic freedoms in EU law, and respect for fundamental rights and freedoms in the Charter.\footnote{P. Bernt Hugenholtz & Quintais, 2016 (forthcoming). See supra 1.1, 4.4.1, 5.5.1 and 5.5.2. See also recital 3 InfoSoc Directive, stating that the “[t]he proposed harmonisation will help to implement the four freedoms of the internal market”.}

The InfoSoc Directive is of particular importance in this respect, as it is based on principles and rules already laid down in the directives in force in the area of intellectual property.\footnote{See recital 20 InfoSoc Directive, and CJEU, *Murphy*, ¶187 (and case-law cited). Marcella Favale et al., 2015, pp. 33, 66–67. This list omits the objective of “fair competition” listed by the authors, as the same is not called into question by the adoption of an ACS. The authors note also the Court’s preference for the teleological method and that these arguments, while possibly rhetorical, may provide an indication of whether the outcome of a case is favourable to rights holders or users. See also Lucie Guibault et al., 2007a, pp. 4–6, for the use of recitals as a means to identify the objectives of the InfoSoc Directive.}

For the present purposes, it is doubly important because it harmonises the exclusive rights and limitations within which framework an ACS would integrate.

In this light, it makes sense to rely on the empirical research on the CJEU’s copyright jurisprudence by Favale, Kretschmer and Torremans (mentioned in Chapter 1), which identifies a range of interpretative or rhetorical arguments followed by the Court that mirror objectives of the *acquis*. The arguments/objectives identified by the authors are listed here in a different order:\footnote{Marcella Favale et al., 2015, pp. 33, 66–67. This list omits the objective of “fair competition” listed by the authors, as the same is not called into question by the adoption of an ACS. The authors note also the Court’s preference for the teleological method and that these arguments, while possibly rhetorical, may provide an indication of whether the outcome of a case is favourable to rights holders or users. See also Lucie Guibault et al., 2007a, pp. 4–6, for the use of recitals as a means to identify the objectives of the InfoSoc Directive.}

1. Fair balance between the rights and interests of authors and the rights of users,
2. High level of protection for copyright holders,
3. Adequate compensation or appropriate reward,
4. Circulation of culture,
5. Resolution of legal uncertainty,
6. Technological development (including the promotion of the information society), and
Harmonisation of copyright law to achieve a functioning internal market.

To be sure, these objectives operate at different levels of concreteness, may overlap, and at times seem contradictory. For example, it is not always apparent how to reconcile the aims of technological development and circulation of culture with a high level of protection, while safeguarding the “independence and dignity of artistic creators and performers.” Thus, it is difficult to derive from this list of objectives or the preamble of the InfoSoc Directive a unitary and coherent benchmark from which to assess a reform proposal.

Regardless, if a statutory licence ACS is to be normatively consistent with EU copyright law, it should generally conform to these objectives. The remainder of this section briefly examines whether that is the case, recasting the main findings of this study in light of each objective.

**Objective 1: Fair balance**

The different dimensions and applications of the concept of fair balance (objective 1) are sufficiently explained in this and the previous chapter. Extant legal rules subject non-commercial online use of works to exclusive rights, TPMs and strict enforcement measures. Such rules do not sufficiently consider the interests of creators and the public interest. On the one hand, they fail to secure remuneration for creators. On the other, they create legal uncertainty, fail to promote the circulation of creative works online, and subject end-users to liability for online activities of personal enjoyment and expression. This comes at a high social cost, illustrated by the decreasing legitimacy of copyright law in the eyes of the public, and the erosion of the rule of law in this area.

This chapter carried out a balancing exercise of the legitimate interests at stake in an ACS in the context of the three-step test. The analysis suggests that such a system could contribute to restoring the balance in the acquis regarding the regulation of non-commercial online use. The introduction of a properly delimited right of access and fair compensation would not significantly harm rights holders, should add a revenue stream (by monetising hitherto uncompensated uses), and would likely improve the position of creators. Furthermore, a statutory licence ACS would better serve the public interest by improving legal certainty for end-users, reducing their liability exposure, facilitating the circulation of works online, and respecting individuals’ fundamental rights and freedoms, namely privacy in telecommunications, personal data, and freedom of expression and information. (Regarding intermediaries’ freedom to conduct business, the impact of such a reform would be at worst neutral.)

**Objectives 2 and 3: High level of protection and Adequate compensation or appropriate reward**

Perhaps the objective of EU law that is most difficult to reconcile with a legalisation scheme is that of a high level of protection for copyright holders (objective 2). It is on this basis that the CJEU interprets exclusive rights broadly and limitations strictly. Still, this dissertation argues throughout that it is a misconception to equate the objective with an “absolute” level of protection. Such interpretation is harmful to rights holders and contrary to the public interest, as

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1938 Recitals 3 and 31 InfoSoc Directive. See supra 4.4.1.4, 4.4.1.5, 4.5, 5.1, 5.2.2, 5.3.3, and 5.3.4.
1939 Objective supported by recitals 4, 9, and arguably 11 (referring to “[a] rigorous, effective system for the protection of copyright and related rights”) InfoSoc Directive. See also recital 16 Rental Right Directive.
it supports broadening of exclusive rights *ad infinitum* irrespective of the possibility and desirability of individual management and enforcement of copyright.

Rather, a systematic and teleological interpretation of the preamble of the InfoSoc Directive shows that what is meant is a level of copyright protection that ensures adequate compensation or an appropriate reward for rights holders (objective 3), \(^{1940}\) while allowing space for the fulfilment of the remaining objectives of EU copyright law, including the aforementioned fair balance of interests. This articulation between protection and remuneration, patent in recitals 9 and 10 of the directive, is crucial in designing an optimal scope of protection for copyright aimed at fostering creativity and the dissemination of works.

A statutory licence ACS in this mould will not directly affect the exclusive rights of creators for commercial use of works. The system focuses on non-commercial online use by individuals in relation to which exclusivity is ill suited for monetisation and/or too costly to enforce (at economic and social levels). Hence, a statutory licence system affords a level of protection that better serves the material interests of creators.

It is debatable whether other rights holders will see their financial situation improve. That will largely depend on whether the new rights revenue received under the ACS supplants the potential harm caused by its adoption on online commercial channels. On this point, existing research shows the potential of a statutory licence to generate sufficient revenue to offset any losses. Furthermore, a proper definition of the scope of the limitation could mitigate potential negative (indirect) effects on the normal exploitation of works.

**Objective 4: Circulation of culture**

If we accept that a carefully designed limitation for non-commercial online use will not negatively affect incentives for creation, then it is difficult to argue that it will not improve the circulation of culture online (objective 4).\(^{1941}\) A statutory licence ACS will provide users with breathing space for lawful acts of enjoyment of cultural works online in a non-market sphere; it will also provide creators with novel rights revenue, which may incentivise further creation and dissemination of works. Those same activities were previously prohibited (or shrouded in legal uncertainty) and generated no remuneration.

It is true that in some private copying judgments the CJEU considered it “apparent from recital 22 in the preamble to Directive 2001/29 that the objective of proper support for the dissemination of culture must not be achieved by sacrificing strict protection of rights or by

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\(^{1940}\) Objective supported by recitals 10 (appropriate reward) and 35 (adequate compensation) InfoSoc Directive. Note that Marcella Favale et al., 2015, p. 33, mention solely “adequate compensation”. In this respect, see the *Opinion AG in Padawan*, ¶¶79–80, relying on the wording of recital 10 InfoSoc Directive (“appropriate reward”). Cf. Geiger & Schönherr, 2014a, pp. 132–133.

\(^{1941}\) Objective supported by recitals 14 and 22 InfoSoc Directive. The link between creativity and culture was from an early stage recognised in in the Green Paper on Copyright and the Challenge of Technology 1988, p. 6 (¶1.4.4): “Intellectual and artistic creativity is a precious asset, the source of Europe’s cultural identity and of that of each individual State. It is a vital source of economic wealth and of European influence throughout the world. This creativity needs to be protected; it needs to be given a higher status and it needs to be stimulated”. See also Art. 167(1) TFEU, containing the so-called “culture clause”.

298
tolerating illegal forms of distribution of counterfeited or pirated works”. However, this statement and the consequent interpretation of recital 22 need to be qualified.

First, the reference to “strict protection of rights” is uncannily similar to the absolutist view of a “high level of protection” rejected above. Where we interpret this phrase to mean adequate protection to generate appropriate remuneration, it becomes clear that a statutory licence for non-commercial online use—under the terms discussed here—is not a measure that unjustifiably sacrifices copyright protection.

Second, the effect of an ACS is not to tolerate “illegal forms of distribution of counterfeited or pirated works”. Rather, it is to promote the access and remuneration aspects of copyright protection, while safeguarding exclusivity and enforcement against for-profit unauthorised platforms. This distinction between individuals’ non-commercial use of works (privileged in a limitation-based ACS) and their unauthorised commercial use thereof (subject to the exclusive right) is an important part of the system and one of the reasons why it can comply with the three-step test.

Objective 5: Resolution of legal uncertainty

It is also clear from the analysis so far that the adoption of a statutory licence ACS would contribute to resolving legal uncertainty in EU copyright law (objective 5). It is true that the flexible interpretation of the acquis and especially the three-step test, proposed in this dissertation, may be detrimental to legal certainty. But this risk is easily offset by the advantages the system would bring. As amply demonstrated in Chapter 4, rules in the acquis give rise to considerable uncertainty regarding the application of exclusive rights and limitations to individuals’ online use of copyright, for example in the cases of reproduction from unauthorised sources and hyperlinking. In this context, a limitation clearly covering some of these uses would remove uncertainty in the online application of copyright.

Objective 6: Technological development (including the promotion of the information society)

An important objective of EU copyright law is to foster technological development, including the promotion of the information society through a flexible interpretation of the legal framework (objective 6). This objective is a clear manifestation of the InfoSoc Directive’s raison d’être: to adapt EU copyright law to the digital networked environment and the information society. It also has a clear public interest component, as the future development of a technological society, such as ours, is undeniably served by a well-functioning Internet.

In this light, the interpretation of copyright ought to provide stimulus for the development of digital technologies within a “general and flexible legal framework at Community level”, in line

1942 CJEU, Reprobel, ¶59; CJEU, ACI Adam, ¶36. For criticism on the use of the Court’s interpretation of this recital in the context of its private copying jurisprudence, see supra 4.4.3.6.
1943 See supra 5.3.2 and 6.1.5.
1944 Objective supported by recitals 4, 6, 7, 21, and 25 InfoSoc Directive.
1945 See supra 4.3.1.2, 4.3.2.3, and 4.4.3.6.
1946 Objective supported inter alia by recitals 2, 5, 6, 7, 20, and 38 InfoSoc Directive. Recitals 2 and 5, in particular, emphasise the need for a flexible legal framework in respect of this objective.
1947 Peukert, 2015, p. 380, citing BGH, 17.07.2003, I ZR 259/00 (“Paperboy”), which identifies search engines and hyperlinking as essential components to secure the proper functioning of the Internet.
with recital 2 InfoSoc Directive. This would seem to require, for example, a technology neutral and functional approach to the interpretation of exclusive rights, thus responding “adequately to economic realities such as new forms of exploitation” (recital 5).\(^{1948}\)

However, the *acquis* falls short of this objective. As shown in Chapter 4, exclusive rights are mostly interpreted broadly and, to a significant extent, in a technical way. The result is that they extend to a substantial array of forms of online use by individuals, many of which are instrumental to the online enjoyment of works, and do not constitute forms of commercial exploitation. Furthermore, the priority of contract and technological measures in defining the scope of protection, and the use of opaque concepts (e.g. “unauthorised source”), further hinder the space available for online use.\(^{1949}\)

Perhaps the best example of how this approach can be harmful to the development of the Internet is the application of the right of communication to the public to hyperlinking.\(^{1950}\) As noted by the European Copyright Society in its opinion prior to the *Svensson* judgment,

> Although hyperlinking takes many forms and has multiple functions, there can be no doubt that it is the single most important feature that differentiates the Internet from other forms of cultural production and dissemination. Hyperlinking is intimately bound to the conception of the Internet as a network, and hyperlinks constitute paths leading users from one location to another. As the Supreme Court of Canada has stated “[h]yperlinks … are an indispensable part of [the Internet’s] operation.

> The legal regulation of hyperlinking thus carries with it enormous capacity to interfere with the operation of the Internet, and therefore with access to information, freedom of expression, freedom to conduct business, as well – of course – with business ventures that depend on these types of linkages. Europe has developed a significant sector of SMEs, many of whose web operations depend on the use and provision of links. The Court must not under-estimate the importance of its ruling in this case.\(^{1951}\)

Unfortunately, the Court’s judgment in *Svensson* and its application of the new public criterion not only failed to recognise the importance of placing standard hyperlinks completely outside the scope of copyright, but also added further uncertainty. This uncertainty led to further preliminary references, including the question of whether linking to an unauthorised source is a restricted act. In his Opinion in *GS Media*, AG Wathelet made clear the technological development issues of the question, including potential chilling effects, when he mentioned that

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

\(^{1948}\) See Velze, 2015, pp. 74–75, making a similar point regarding the right of communication to the public.

\(^{1949}\) See *supra* 4.3.1.2, 4.3.2.3, and 4.5.

\(^{1950}\) This issue is analysed *supra* at 4.3.2.

\(^{1951}\) European Copyright Society, 2013, p. 1 (¶¶3–4) (footnotes omitted).
more reticent to post them, which would be to the detriment of the proper functioning and the very architecture of the internet, and to the development of the information society.\footnote{301}

By placing these and other types of non-commercial use of works under a statutory licence system, the ACS will curtail some of the negative effects arising from the overbroad and technologically determined interpretation of online rights. From this perspective, the system will preserve the functioning of the Internet and foster its development.

Another way in which an ACS may promote this objective is by eliminating the risk of intermediary liability of (certain) intermediaries whose services enable end-users to exercise the limitation. This argument, it merits pointing out, is reminiscent of one rationale underlying the creation of the private copying system in Germany.\footnote{1953} As it now stands, intermediaries may be subject to enforcement measures in relation to their clients’ use of their services, which impose significant burdens on their operation, e.g. filtering or blocking injunctions. The increased focus of EU institutions and rights holders on bolstering the role of intermediaries in copyright enforcement will likely add to the strain, with negative implications for their ability to innovate.\footnote{1954}

The mere threat of enforcement likely has a chilling effect on the development of new online technologies that may involve the reproduction and communication to the public of works by end-users, even in a context where the intermediary’s activity is not considered a normal form of exploitation of works. The ACS may provide breathing space to such technology providers, while retaining the possibility of enforcement of the exclusive right against unauthorised for-profit online platforms.

**Objective 7: Harmonisation of copyright law to achieve a functioning internal market**

Finally, an overall objective of the directive is the harmonisation of copyright and related rights as a means to achieve an internal market (objective 7).\footnote{1955} In recent communications, the Commission refers to this ultimate target as the “digital single market”.\footnote{1956}

Harmonisation refers to the co-ordination or approximation “of different legal solutions through the elimination of major differences and the creation of minimum requirements or standards”.\footnote{1957} The EU path to harmonisation of copyright and related rights is briefly described in Chapter 1. Nothing in this study indicates that the adoption of a statutory licence ACS is detrimental to the existing level of harmonisation in copyright law or the digital single market goal.

If anything, the experience of the patchwork design and national implementation of limitations in the InfoSoc Directive suggests that a new limitation for non-commercial online use would better promote these goals, especially if such a limitation is defined as mandatory. This would ensure

\footnotesize{1952} Opinion AG in GS Media, ¶78. (This passage is cited supra at 4.3.2.3).

\footnotesize{1953} See supra 2.3.

\footnotesize{1954} See supra 1.1 and 5.3.3.6.3. See also P. Bernt Hugenholtz & Quintais, 2016 (forthcoming).

\footnotesize{1955} Other than in the title of the directive, the harmonisation objective is mentioned in recitals 3, 4, 6, 7, 9, 23, 25, 31, 32, 47, and 56 InfoSoc Directive. Recitals 31 and 32 refer in particular to the goal of harmonising limitations (on which see supra 4.4.1.3).

\footnotesize{1956} See, e.g., Communication on a Digital Single Market 2015, and Communication on Modern European Copyright Framework 2015.

\footnotesize{1957} Christina Angelopoulos, 2016b, p. 8.
that the limitation is implemented in all Member States, therefore guaranteeing a higher level of harmonisation than if the limitation is qualified as optional. However, even in this latter case, it is difficult to argue that an ACS would hinder the current level of harmonisation, as the vast majority of existing limitations in the _acquis_ are facultative.

In addition to the objectives discussed thus far, it is important to consider briefly the _requirement_ that an ACS complies with international copyright law, as this plays a role in the Court’s interpretation of the _acquis_.\(^{1958}\) On this point, the analysis in the first part of this Chapter argues that a flexible interpretation of the three-step test is more consistent with international law (and in particular with Article 10 WCT and its Agreed Statement) than the strict interpretation sometimes followed by the CJEU. That flexible interpretation allows a statutory licence ACS to comply with the three-step test and informs the design of all elements of the corresponding limitation.\(^{1959}\) Therefore, if such a flexible interpretation is accepted, the statutory licence ought to be consistent with international copyright law.

In conclusion, the foregoing analysis shows that a limitation-based ACS for non-commercial online use of works is consistent with the normative objectives of EU copyright law. This conclusion results from a flexible reading of the law in light of the public interest and the concept of fair balance. Other, stricter, readings are certainly possible, and could lead to a different conclusion. As with the legal interpretation of positive EU copyright law, the final position on the admissibility of an ACS may depend on one’s normative preferences and view of how copyright law should look in the future.

### 5.6 Conclusions

This chapter examines two related questions at the heart of this dissertation. First, it looks at whether and to what extent a limitation-based statutory licence ACS for non-commercial online use of works by individuals is admissible under EU copyright law, namely the three-step test. Second, it examines whether and how such a legalisation model is consistent with the general aims of copyright and the objectives of EU copyright law.

From a compliance perspective, the main legal challenge to an ACS-limitation is the three-step test. The chapter proposes a framework for the interpretation of the test in light of international copyright law, which considers the different versions of the test—with an emphasis on Article 10 WCT and its Agreed Statement—and spectrum of interpretations. The analysis concludes that a flexible interpretation of the test and its conditions is more consistent with the aims of copyright law, as it enables consideration of the public interest and the fair balance of competing claims. Using that flexible lens, this chapter examines a statutory licence ACS against each step of the test, with a view to its comprehensive overall assessment.

Under the first step, a potential limitation must constitute a qualitative and quantitative “certain special case”. Its scope of application should be reasonably foreseeable and not overly broad. Furthermore, the limitation should be justified on a sound policy basis.

\(^{1958}\) Lucie Guibault et al., 2007a, pp. 4–6. On compliance with international law, see recitals 15 and 44 InfoSoc Directive. See also _supra_ 1.1 and 5.2.1.4.

\(^{1959}\) See _supra_ 5.3 and _infra_ 6.2, and 5.5.2. On the proposed design for an ACS, see _infra_ 6.2.
The aim of a statutory licence ACS is to privilege use for personal enjoyment and expression online. Its scope is restricted to natural persons, certain types of work, and non-commercial acts of reproduction and communication to the public over the Internet (not already exempted by existing limitations). Compliance with this step is contentious as regards the subject matter scope, which may require exclusion of categories of work beyond software, databases, and videogames.

On the qualitative side, the limitation is soundly justified not only by the failure of exclusive rights to regulate non-commercial online use of works, but also on non-economic public interest grounds. These include the promotion of creativity and circulation of culture, and the respect for the fundamental rights and freedoms of individuals—freedom of expression and information, privacy, and personal data—and, to a lesser extent, intermediaries’ freedom to conduct a business.

The main obstacle to a statutory licence ACS lies with the second step of the test, and more specifically with the traditional view of normal exploitation of works, anchored on the principle of strict interpretation. After exploring this view, it is argued that the same is not only overly restrictive, but also foregoes consideration of policy rationales, remunerative potential and the consistency of a limitation with the policy objectives of copyright. On that basis, in accordance with the principle of fair balance, it seems preferable to adopt a flexible understanding of the second step.

In this reading, there is a conflict with the normal exploitation if a limitation deprives creators and exploiters of major and foreseeable sources of income under normal commercial circumstances. These sources include revenue generated through online commercialisation of the exclusive rights of reproduction and communication to the public to commercial and end-users via digital network platforms.

An ACS targets non-commercial online use by individuals, which is in many cases not exercised or monetised by rights holders, and in other instances can be classified as de minimis. The introduction of a statutory licence to regulate this type of use has the potential to create new rights revenue, and to constitute a normal form of exploitation thereof. On the other hand, it is possible that the licence has negative indirect effects on downloading and streaming channels. However, the scale of these negative effects is unknown and can only be speculated at. Based on empirical research on the effect of unauthorised use on the market, it is conjectured that a properly designed system could co-exist with authorised commercial channels. (This conjecture, naturally, requires empirical testing.)

An adequate system, in any case, requires that exclusive rights are enforceable against unauthorised for-profit websites capable of impinging on the normal exploitation and the commercial core of copyright. One avenue to achieve this is through the strict definition of what constitutes an authorised non-commercial use in an ACS, and the corresponding exclusion from the scope of the licence of online exchanges by unauthorised platform operators for financial consideration. Other options, currently under consideration by the CJEU, are to include in the
scope of the right of communication to the public acts of linking to unauthorised sources and/or the activities of platform operators.\textsuperscript{1960}

If it is possible to delimit the scope of the statutory licence in this way, the ACS will only legalise the activities of end-users and a limited number of online intermediaries, such as those enabling or facilitating the licensed use but not directly reproducing or communicating the works to the public. Also, the licence will not affect those mostly “neutral” intermediaries that benefit from the E-Commerce Directive’s safe-harbours, in relation to their activities that are exempt from liability under those provisions. \textit{De lege lata}, only this circumscribed scope would seem to enable a statutory licence ACS to avoid conflicting with the normal exploitation of works, even under a flexible reading of the second step. Of course, to the extent that such a legalisation scheme is limited vis-à-vis online intermediaries, it raises the (different) question of whether this is a desirable or satisfactory system \textit{de lege ferenda}.

Examination of the third step involves a multi-level balancing exercise guided by the principle of proportionality, which considers the reasonableness of the prejudice caused and conflicting legitimate interests. These include, on the one hand, the concurrent and opposing interests of creators and exploiters. On the other hand, and in line with the principle of fair balance, they include the individual and collective public interest of users stemming from the promotion of creativity and dissemination of works, and the respect of fundamental rights.

A limitation causes unreasonable prejudice if the harm suffered by rights holders from its introduction—mainly its indirect effect on the overall exploitation of works online—is out of proportion to the benefits derived by the public.

Payment of fair compensation through a statutory licence is an acceptable means of reducing that harm to reasonable levels, and there is research suggesting this is feasible. Following such research, it is proposed that compensation is calculated based on harm (including the mitigating factors described in the InfoSoc Directive) but pursuant to a contingent valuation method that approaches the notion of appropriate reward for creativity. However, the shortcomings of empirical research and the rapid evolution of the market warrant caution and emphasise the need to examine the policy motivations of the ACS, expressed in different legitimate interests.

The main concern of creators is fair remuneration for online use, whereas exploiters favour assignable exclusive rights and stricter enforcement measures. By imposing an unwaivable fair compensation right, an ACS would support the material interests of creators. However, because it also creates a novel revenue stream for exploiters, it would potentially not prejudice their financial interests. In any case, this trade-off should be acceptable if the benefit to creators offsets the harm to exploiters.

\textsuperscript{1960} The pending preliminary references in question are: CJEU, Reference for Preliminary Ruling, Case C-160/15, \textit{GS Media}; CJEU, Reference for Preliminary Ruling, Case C-527/15, \textit{Filmspeler}; CJEU, Reference for Preliminary Ruling, Case C-610/15, \textit{Stichting Brein v Ziggo}. A supplement to both options discussed in the text could be the promotion at EU level (e.g. through a Commission communication or Memorandum of Understanding) of self-regulation measures between rights holders and online intermediaries aimed at curtailing the activities of unauthorised for-profit platforms.
On the normative level, an ACS promises to serve the public interest by promoting access to culture and knowledge in the digital environment, and ensuring an operational non-market sphere of personal enjoyment and expression for end-users. In the regulation of non-commercial use, it is further argued that a well-designed ACS is more respectful of the fundamental rights of Internet users—especially privacy in telecommunications and freedom of expression and information online—than strict enforcement measures, such as filtering, blocking and Internet disconnection.

From the perspective of the fundamental freedom to conduct a business, the advantages of a statutory licence ACS over enforcement are apparent for Internet intermediaries otherwise subject to injunctions. However, for ISPs such advantages may not offset the costs resulting from their qualification as intermediary debtors of the broadband levy. Nevertheless, if the system allows recovery of administrative costs and the levy to be passed on to users, it could be worth experimenting with, especially in light of the institutional thrust towards increasing the role of online intermediaries in enforcement measures. (Here, again, further research is required.)

On balance, there is space available for a statutory licence ACS compliant with EU copyright law. However, doubts remain as to whether the system can overcome potential conflicts with the normal exploitation of works, even following a flexible interpretation. Thus, the chapter explores two flexibility mechanisms to overcome these potential conflicts: embargo periods and opt-out rules.

Embargo periods allow exclusivity to remain the default rule for a period of time coinciding with the most intense commercial exploitation of works. After that period, the ACS would regulate non-commercial use. An opt-out rule allows rights holders to restore exclusivity as their preferred model of exploitation of non-commercial online use of works.

The analysis shows that both models are legally feasible but there is insufficient information on their hidden complexities and costs of adoption, which require additional empirical study. The main challenges lie with the difficulty of implementation across different categories of works, and the fact that they reduce the value for users of an all-encompassing legalisation scheme. A combination of an opt-out rule with an embargo period would ensure that all works eventually return to the ACS, a promising long-term solution. Yet, it will come at the high cost of additional complexity for the management of the system in the interim, making it a difficult policy proposition.

In sum, reform of EU Copyright law via a statutory licence ACS is feasible in a limited fashion. However, its adoption rests on a set of binary normative choices for policy makers as to how to regulate non-commercial use: flexible vs. strict interpretation of limitations, remunerated access vs. exclusivity with strict enforcement, and public vs. private ordering. The public interest choice for access, furthermore, requires that we recognise the internal effect of fundamental rights in shaping the scope of copyright protection. Neither choice is wrong per se. Rather, the choices hinge on a normative view of copyright and of where to strike a fair balance of interests.

The second part of the chapter therefore looks deeper into this normative dimension. It asks whether and to what extent a model of access and remuneration—a statutory licence ACS—is consistent with the general aims of copyright and the objectives of EU copyright law. This part begins by examining whether a right of access and remuneration for the non-commercial online use of works can be reconciled with the dominant rationales for copyright protection in the European legal tradition, namely natural rights (including the fairness and personality theories).
and utilitarianism. Both theories, beyond their influence in droit d’auteur and common law countries, are reflected in the objectives of the copyright acquis and provide justification for copyright protection in EU law. Consequently, they play a role in the balancing of competing interests that underlies the determination of the scope of protection, including the imposition of restrictions on the exclusive right.

From the perspective of natural rights, a statutory licence ACS impacts the material interests of authors in the commercial exploitation of copyright. Therefore, it mainly calls into question the fairness justification for copyright protection, developed from the Lockean desert-for-labour argument. Assuming arguendo that Locke’s theory applies to copyright and provides an acceptable rationale for granting a property right over the expressive results of creative labour, the fairness theory does not impose absolute protection for the right, but allows restrictions thereto. Those restrictions result not only from the sufficiency proviso, but more clearly from the consideration of the public interest when transitioning from the state of nature to a civil and political society. In actualising the public interest, the prohibition element (exclusivity) of copyright protection can be curtailed, while retaining its reward element (remuneration), thereby safeguarding the material interests of authors.

A statutory licence ACS can therefore be accommodated by the fairness theory, insofar as it ensures remuneration for the use of works (arguably on more favourable terms than an exclusive right) and is justified not only by market failure but also by the public interest in both the protection of fundamental rights and freedoms of users, and the promotion of creation and dissemination of works.

The utilitarian theory justifies copyright protection on the basis of the prospective incentives it provides for the creation and dissemination of works. It views copyright as a positive right granted to further the public interest, and the exclusive right as a device to solve a public goods problem in the production and dissemination of works. According to this theory, the recognition of a property-like enforceable right to prohibit use without authorisation or remuneration would address the free-rider problems arising from the non-excludable character of copyright goods, allowing a functioning market for their production and supply. The exclusive right would enable copyright owners to charge prices sufficiently high to recoup their costs of creation, inducing as a result future creative activities and maximising the production of works.

The artificial imposition of exclusivity is justified if its benefits outweigh its costs. With regard to an ACS, the question is whether regulating non-commercial online use of works through an exclusive right imposes costs that validate restrictions to that right. The analysis suggests that certain costs of exclusivity—chilling effects on follow-on creativity, transaction costs, and administration and enforcement costs—may justify the adoption of a liability rule in the form of a limitation-based statutory licence.

Hence, imposing a restriction on the exclusive right through a right of access and remuneration for non-commercial online use is in principle consistent with the utilitarian rationale of copyright. In practice, whether this switch from a property to a liability rule is desirable rests on empirical research on the costs and benefits of the new system as compared to the status quo. On this point, there are indicators that such a switch would increase social welfare.

Building on these theories, the chapter then examines the human and fundamental rights characterisation of copyright in different legal instruments (UDHR, ICESCR, ECHR, and the Charter), including its qualification as a property right. It follows from this examination that
copyright protection is not absolute and has at its core access and remuneration dimensions, characterised by the availability of works and cultural participation, and respect for the material interests of rights holders (especially creators). The possibility of restricting the prohibition element of copyright and modulating the options for its exercise is illustrated throughout this dissertation in mechanisms that include voluntary and mandatory models of collective rights management, and statutory licences.

This conceptual turn towards an access and remuneration right is justified by the social function of copyright. The argument here is that the scope of protection is not absolute. Rather, it should be drawn in light of the public interest. One method for introducing this social function into the determination of the scope of copyright is by incorporating the public interest within the three-step test analysis of a limitation, through identifying the legitimate interests of third parties and considering them in the fair balancing exercise. (This method was followed in the first part of the chapter).

Another method is to consider the public interest from an external perspective, as a fundamental (or constitutional) rights foundation for a right of access and remuneration and a limit on absolute copyright protection. From this perspective, it is possible on the one hand to find support for such a right in the universal right to culture and science in the ICESCR and UDHR. On the other hand, the fundamental rights qualification of copyright implies restrictions on its scope based not only on the public interest (see Article 1 Protocol No. 1 ECHR and Article 17 Charter) but also on the application of conflicting fundamental rights and freedoms, sometimes subject to the payment of fair compensation (see, e.g., Luksan).

The result of the application of these normative considerations to the regulation of mass non-commercial online use of works by individuals, is that a limitation-based statutory licence ACS is an admissible alternative to the exclusive right. There are also strong normative arguments to qualify the underlying fair compensation right as unwaivable and potentially mandatory, as well as to afford it some level of protection against disposition by contract or technological measures.

Finally, the last section of the chapter explores the consistency of a statutory licence ACS with the objectives of EU copyright law, as derived from the recitals of the copyright directives (with an emphasis on the InfoSoc Directive) and CJEU jurisprudence. The objectives are: (1) Fair balance between the rights and interests of authors and the rights of users; (2) High level of protection for copyright holders; (3) Adequate compensation or appropriate reward; (4) Circulation of culture; (5) Resolution of legal uncertainty; (6) Technological development (including the promotion of the information society); and (7) Harmonisation of copyright law to achieve a functioning internal market.

On balance, the analysis shows that a properly delimited ACS is consistent with these objectives, in most cases more so than the current regime. This conclusion relies on a nuanced consideration of what should constitute a desirable “high level of protection” for non-commercial online use of works—viewed as an optimal level of protection that ensures adequate compensation for rights holders—and its articulation with the aim of circulation of culture online. The conclusion also emphasises the importance of ACS to resolve legal uncertainty for end-users in their online activities, as well as the potential beneficial effects of a legalisation scheme for technological development in the information society.

To conclude, the narrative arch of this chapter (and indeed the whole dissertation) provides a credible glimpse into the future shape of copyright regulation for non-commercial online use.
The analysis allows us to make an informed choice between private vs. public ordering, strict vs. flexible interpretation, and exclusivity vs. remunerated access. The current regime, which tends towards an online culture of exclusivity, embodies the first set of choices. A statutory licence ACS, which emphasises access and remuneration for non-commercial use, represents the second set of choices. This chapter develops a normative argument for why a “public choice” approach is consistent with the rationales and objectives of the acquis. On balance, the analysis suggests that EU copyright law can and should be adapted to include a right of access and remuneration for this type of online use by individuals. In light of these findings, the following and concluding chapter summarises the findings of this dissertation and provides a blueprint for reform through a statutory licence ACS.