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### Copyright in the age of online access

*Alternative compensation systems in EU copyright law*

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## **6 Summary and Conclusions: Towards Access and Remuneration**

This dissertation explores the flexibility of EU copyright law for the regulation of mass online use of copyright works in light of the public interest. Its main research questions are as follows: Are Alternative Compensation Systems for non-commercial online use of works by individuals admissible under EU copyright law and consistent with its objectives and, if so, to what extent? How can and should EU copyright law incorporate an ACS?

These questions have been for the most part answered in the previous chapters. The first part of this concluding chapter summarises that analysis and its findings (6.1). This summary clarifies whether and to what extent an ACS is admissible in the legal framework of the copyright *acquis*, and consistent with its objectives. The analysis shows that the most promising model to solve the problem identified in this dissertation is a limitation-based statutory licence for non-commercial online use of works by individuals.

Building on these findings, the second part of this chapter proposes a model for such a legalisation scheme, thereby answering the question of how EU copyright law should incorporate an ACS (6.2). The proposed model is presented as a blueprint for copyright reform in the EU. Following the pragmatic approach of the research, such a blueprint is susceptible of adaptation for lower impact reform, for example relying on voluntary types of collective rights management and soft law approaches, like recommendations. The hope is that the outcome of this examination has a realistic chance of adoption, or at least offers a basis for future consideration of models of access and remuneration (rather than exclusivity and strict enforcement) for online use as viable options to modernise EU copyright law.

### **6.1 Summary**

This section summarises the main findings of the previous five chapters. The narrative arch of the study starts with making the case for reform of EU copyright law (6.1.1). It then moves on to extract the lessons of copyright past for compensation systems (6.1.2), before designing a taxonomy of legalisation proposals that assist in the definition of their scope, limits, and effects on the exclusive right (6.1.3). This is followed by an exploration of the space available for an ACS in the *acquis*, which sheds light on the intersection between exclusive rights and limitations for online use of works by individuals (6.1.4). Having concluded that the best legal solution to address the fragmentation challenges of copyright law is a limitation-based statutory licence ACS, an examination is made of whether and to what extent such a licence for non-commercial online use: is admissible under EU copyright law, namely the three-step test; and is consistent with the general aims of copyright and the objectives of EU copyright law (6.1.5).

#### **6.1.1 The Case for Reform of EU Copyright Law**

Technological development allows the exploitation and use of works in different and innovative forms, influencing the social norms that regulate the online conduct of users. This cycle involving copyright, technology, and social norms, has shaped the evolution of the law since its inception.

Copyright law was originally aimed at regulating the commercial use of works between professionals. In that context, the central role of the exclusive right in the legal regime was mostly justified. However, throughout history, the landscape in which copyright operated has

gradually transformed by virtue of technology, social norms, and the market. These forces influenced and shaped the exploitation of copyright and the use of works.

In general, the response of legislators was to extend the subject matter and substantive rights scope of copyright, which currently includes all manner of digital content and different types of online use. This expansion is visible in international and EU copyright law in the multiple revisions to the BC, the adoption of TRIPS, and the WIPO Internet Treaties, which adapted the international framework to the digital network environment. It is likewise clear from the multiple copyright directives, with a particular emphasis on the InfoSoc Directive—which implemented the WIPO treaties into EU law beyond their minimum standards—, and its interpretation by the CJEU.

With the evolution of technology, it became increasingly possible for individuals to access and use works for non-commercial purposes ubiquitously and at a low cost. But the extension of copyright's scope also meant that such use, largely for enjoyment and personal expression, may be restricted. In this way, copyright law shifted from mainly regulating professional relationships to also cover activities of individual users in the private or non-commercial sphere.<sup>1961</sup> The default application of such a legal regime to mass online use of works created a powerful disconnect between the law and technology-influenced social norms.<sup>1962</sup> This mismatch leads to a costly social conflict, which negatively affects the legitimacy of copyright law and pre-empts exploration of alternative legal solutions to remunerate this online use.

Advocates of the current system and stronger protection argue that strict enforcement is an effective deterrent to unauthorised file sharing, which they consider to not only be the main cause of the content industry's losses, but also to jeopardise creative incentives. But there is reason to doubt such arguments.

Most empirical research does not consider file sharing to be a direct substitute for paid sales or services in digital platforms, and some authors even identify positive effects from these practices on the demand for content and ancillary products. Also, it is noteworthy that in a content market in transition—from physical to digital, and from ownership to access-based models—global digital rights revenues have steadily increased. The problem, however, is that creators have not seen a corresponding benefit from that increase, especially in the context of emerging streaming channels.

Furthermore, enforcement is of limited effectiveness in deterring file sharing. This much is clear from the experience of copyright litigation since the early 2000s. Despite the strengthening of exclusive rights, the recognition of legal protection of TPMs, the growing array of available enforcement measures, and institutional backing of rights holders, strict enforcement has not resulted in the elimination of file sharing. Legal, technological and social factors all play a part in this outcome.

From the legal perspective, uncertainty arises from the application of a territorial and substantively fragmented copyright regime to the online use of works. In addition, the jurisprudence of national courts and the CJEU has highlighted the significant legal risks of

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<sup>1961</sup> Gervais, 2009, pp. 845–857, 869–870.

<sup>1962</sup> P. Bernt Hugenholtz, 2013b, p. 26.

enforcement. Perhaps the main peril is the potential hindrance to fundamental rights and freedoms, which have emerged as external limits to copyright protection, *de facto* preventing (for the time being) some of the severest enforcement measures, like broad filtering injunctions and graduated response systems.

From the technological and social standpoints, the possibilities afforded by digital technologies shape consumer expectations and habits, and allow users to meet those expectations where the law and market fail to do so. Despite the evolution of legal offerings and its potential to fulfil unmet demand, the level of fragmentation of EU copyright law all but ensures a perennial mismatch between what end-users expect and what the market can provide.

In this light, it is reasonable to conclude that a model of exclusive rights and strict enforcement will remain inadequate to address that mismatch, while imposing significant social cost. In tandem, the current legal regime is incapable of generating remuneration for the mass online use of works, and risks creating conflicts between copyright and other fundamental rights.

To address this problem, the present dissertation examines reform proposals that focus on models of remunerated access to copyright works in the online environment, rather than full exclusivity. These models are defined under the umbrella term “alternative compensation systems” or “ACS”. ACS replace the need for direct authorisation for the online use of works by individuals (e.g. downloading and uploading), resulting from the application of exclusive rights, with a licensing scheme authorising such use and ensuring remuneration to rights holders or at least creators. In other words, an ACS restricts the nature or exercise of copyright to replace the current regime for non-commercial online use of works by individuals with a “permitted-but-paid” model.

Empirical research provides a boon for the study of ACS, as it shows these models to be not only acceptable to end-users but also economically promising for rights holders. On the one hand, there is evidence of public support for such legalisation schemes, especially among users that already consume culture online, including high intensity file-sharers. The support is strongest for schemes that provide holistic access to works, with few use restrictions, and at a reasonable price (e.g. a surcharge on the monthly rate of Internet access, within the price range of existing premium streaming services). On the other hand, despite the limitations of existing research, at least one recent study in the Netherlands suggests that a statutory licence system for online recorded music can be welfare increasing and generate superior rights revenue. If nothing else, that study highlights the potential cost of exclusivity over a model of access and remuneration for copyright-protected works online.

The possible benefits of a welfare increasing ACS are many. Rights holders would not only see increased revenues but also savings in enforcement costs. Creators could benefit too if the system includes a mandatory claim to fair compensation, which would mitigate the problems with fair remuneration they suffer due to contractual imbalances in the digital exploitation of exclusive rights. End-users would face a lower risk of infringement, increased legal certainty for their online activities, and experience better online access to works. In the long term, an ACS could promote the circulation of culture and technological development in the information society. In all, a legalisation model that ensures remuneration for non-commercial use of works promises to strike a fair balance between the interests of rights holders and users. These are all good arguments to explore the legal and normative admissibility of an ACS within EU copyright law.

### 6.1.2 Lessons from the Past

The legal inquiry proper into legalisation systems begins with a trip to the past. If an ACS constitutes a deviation from the principle of exclusivity, it is sensible to investigate instructive precedents in the history of copyright law. Such analysis could assist in identifying legal regimes that ensure remuneration while restricting exclusivity and striking a fair balance between the public interest and the interest of rights holders. It would also allow an understanding of the underlying policy justifications for the adoption of precedents.

Precedents are rules or schemes that address similar problems and share core characteristics to ACS. They are copyright regimes that regulate large-scale use of works through compensated non-voluntary licences. Precedents aim to solve problems relating to the inability of the law to regulate the large-scale use of works made possible by technological developments, manifested in market failures, and in the difficulty or undesirability (practical, legal, or political) of enforcing exclusive rights.

The analysis focuses on two precedents that have inspired multiple legalisation proposals: statutory licences for private copying, and compulsory licences for broadcasting and communication to the public, regimes which are often combined with mandatory collective management.

The origins of private copying can be traced back to the 1950s in Germany. A series of landmark decisions by the BGH extended the right of reproduction to acts of home taping by individuals, simultaneously imposing contributory liability on the providers of copying technology. In response, the German legislator adopted a statutory licence system subjecting such use to a remunerated legal authorisation. The remuneration was paid through a levy imposed on the technology providers, who had a right to pass it on to the final user. This solution provided a workable system for the payment of remuneration (managed by CMOs), ensured a link between the actual use and the payment, respected the privacy of users, and imposed a proportionate burden on intermediaries that benefited indirectly from the legal permission, in exchange for immunity from liability. The technological neutrality of the legal formula ensured the expansion of the levy across a range of tangible media and devices (as levy targets), as well as types of content.

Internationally, references to private copying are found in the preparatory works of different copyright treaties. In the BC's Stockholm revision conference (1967), the German system was pivotal in shaping the three-step test and equitable remuneration as a flexibility tool to accommodate public interest restrictions to the exclusive right. The debates leading to the WIPO Treaties (1996), on the other hand, addressed the possibility of phasing out levies due to developments in TPMs, but recognised the privacy underpinning of the limitation.

Private copying eventually made it to the *acquis* as an optional limitation in Article 5(2)(b) InfoSoc Directive, which extends to digital private use and is combined with a right to fair compensation. The provision remains relevant to this day despite the legal protection of technological measures and the possibility of contractual disposition of limitations. This relevance, it is submitted, results not only from its market failure justification, but also—and predominantly—from its fundamental rights pedigree.

The BC compulsory licence exempts broadcasters from authorisation for acts of communication to the public of works, subject to equitable remuneration—a largely undefined concept beyond

its ordinary meaning of a fair and just amount, linked to market value and actual use. The licence was introduced in the Rome Act of 1928 in response to the development of radio broadcasting, and amended in the Brussels Act of 1948, allowing *inter alia* its extension to different modalities of wireless diffusion (television broadcasting, satellite broadcasting, rebroadcasting), and wire transmissions (e.g. Internet retransmissions).

Despite proposals to abolish it, the licence survives to this day, most notably through the Agreed Statement to Article 8 WCT, interpreted by some academics as allowing the application of this regime to the online right of communication to the public. In the *acquis*, such an interpretation appears to be pre-empted by Article 3 InfoSoc Directive, which would subject a compulsory licence to the three-step test.

The BC licence further provided inspiration for similar regimes in the field of related rights (in the RC, TRIPS, and WPPT), which have survived in the *acquis* due to the limited scope of Article 3(2) InfoSoc Directive. Also noteworthy is the presence, in the SatCab Directive, of a special regime of mandatory collective management, functionally similar to compulsory licencing.

The two precedents studied illustrate the tendency of copyright law to expand its scope to novel technologies that allow exploitation and use of works outside the exclusive control of rights holders. Although it was initially unclear whether either use should be subject to protection, the response of courts and legislatures was in both cases to extend the exclusive right to such uses. This was done essentially out of a concern that failure to thus extend copyright protection would harm the economic interest of authors and preclude future avenues of commercial exploitation. For private copying, the main justification for this extension was the author's right to a just pecuniary reward. For broadcasting, the motivation offered was fairness to authors, due to the fact that broadcasting programs were essentially comprised of copyright works.

However, the widening of the exclusive right gave rise to a conflict with the public interest. In private copying, the conflict was prompted by the intrusion of copyright in the private sphere, causing a clash between copyright and consumer rights, the fundamental right of privacy, and the ability of technology providers to carry out their activities. In broadcasting, the conflict resulted from interference with a new means of communication of profound social and democratic value (for the circulation of culture, education, and free speech), and from risks to competition caused by the potential refusal by CMOs to license broadcasters.

Both precedents, therefore, share similar public interest dynamics. On the one hand, the extension of protection is justified by an essential financial consideration: the preservation for authors (and later other rights holders) of benefits arising from the commercial exploitation and use of their works through new technologies. On the other hand, allowing authors to appropriate those exploitation possibilities through the grant of exclusive rights was deemed problematic. First, because it could give rise to market failures; and second, because it conflicted with the public interest in accessing and dissemination of knowledge, protection of privacy, technological development, and competition.

At the intersection of these competing claims, the legal alternative that emerged was to restrict the nature or exercise of the exclusive right, promoting in its stead non-voluntary models of remunerated access and use of works. These models allowed authors to retain the core element of copyright protection—remuneration for the use of works—while preserving and respecting the public interest.

This is the essential lesson from the study of precedents: exclusivity is not totemic, but rather a legal tool for copyright protection, subject to the public interest. Where a conflict emerges between the exclusive right and legitimate manifestations of the public interest, models of remunerated access and use—including those based on copyright limitations—offer a legal solution to reconcile and balance competing interests. From this perspective, remuneration becomes more central to copyright protection than exclusivity.

Another important lesson from the analysis concerns the power of rhetoric in copyright policy. It is nothing short of remarkable how much the copyright discussions of yore resemble today's debates on file sharing and other online activities, especially in relation to the arguments advanced in defence of stronger protection and stricter enforcement. Time has not only revealed these arguments to be inaccurate, but also shown balanced solutions, such as that devised in Germany for private copying, to be more sensible. This should give pause to reflect on whether the current policy direction at EU level—towards exclusivity, priority of technological measures, and stringent enforcement—is the most adequate, in particular vis-à-vis individual non-commercial online uses that are at their core activities of personal enjoyment and expression.

### **6.1.3 A Taxonomy of Alternative Compensation Systems**

Having examined historical precedents, the dissertation turns to the conceptual understanding and definition of ACS. For that purpose, a taxonomy is developed to systematise a representative sample of legalisation proposals. The taxonomy incorporates different models and attributes, characterises their legal nature and effects on copyright in light of international and EU copyright law, and assists in defining the scope of ACS.

The first level of the taxonomy identifies five rights acquisition schemes for the wholesale legalisation of online use: voluntary collective licensing, ECL, mandatory collective management, legal licences (including statutory and compulsory licences), and State Systems. Excluded from the taxonomy are proposals that rely solely on private ordering, that fail to ensure remuneration, or that favour the abolishment of copyright protection.

Voluntary collective management and ECL with the possibility of opt-out for rights holders only operate restrictions on the exercise of copyright. From the purely legal standpoint, these voluntary models would be the most feasible and least impactful legalisation options for rights holders. However, the analysis raises concern as to their ability to facilitate the broad blanket multi-territorial licence required by an ACS. This is for two reasons.

The first reason concerns the hurdles imposed on a voluntary licensing scheme by the substantive rights and territorial fragmentation of copyright in the EU. For example, for an EU-wide licence to cover online music it would require aggregation of multiple rights in each sound recording (often from different owners) across the twenty-eight Member States of the EU.

The second reason relates to potential problems with securing the initial and continued participation of rights holders in different sectors. For either model to work, rights holders would have to, in the first place, adhere to collective management in large enough numbers to make the system worthwhile for users (in voluntary collective licensing), or to meet a representativeness threshold sufficient to trigger the extension effect (in ECL). The challenge is particularly great in sectors (such as the audio-visual) that do not have an established practice of collective rights management of online rights. However, even if the challenge is met, the possibility of opting out is a constant threat to the viability of either system. This is especially true as the value of a

legalisation system to end-users is linked to the breadth of the repertoire and consequent licence, especially regarding the most popular works. If major rights holders decide to withhold or hoard these works, an ACS offers little value to its users.

For these reasons, legalisation schemes based on non-voluntary licences yield greater promise. In this dissertation, the term refers to models such as legal licences, mandatory collective management and so-called “compulsory” ECL (i.e. not allowing rights holders to opt out). Such regimes solve the problems of participation and fragmentation, while ensuring fair remuneration. Furthermore, at least in the music sector, they could leverage the infrastructure and know-how of the existing CMO system in the EU. Of course, State Systems could also, theoretically, address some of the problems identified. However, for pragmatic reasons, proposals of this type imply replacing copyright protection for non-commercial use of works with a public funded system *external* to copyright. This would require a major overhaul of EU copyright law, to an extent that is not politically realistic or legally feasible. Therefore, State Systems are discarded as a valid policy option for an ACS.

The meaning of “non-voluntary licence” is ambiguous in copyright scholarship. Here, the term is used broadly to mean legal regimes that impose on the rights holder a certain model for exercising copyright, but do not necessarily entail a change to the exclusive nature of the right. In other words, the effect of a non-voluntary licence is not necessarily to transform an exclusive right into a right of remuneration or compensation. Of course, this is a fine and controversial line to walk in legal scholarship, and carries significant consequences for the legal qualification of legalisation proposals of this type. While it is clear that the application of a statutory licence to an exclusive right leads to its conversion into a remuneration right for the licensed use, it is less obvious whether that is so for mandatory collective management (and compulsory ECL), despite the functional similarities between the models.

After analysing the legal arguments for both sides of the debate, this dissertation takes the view that, from the conceptual and legal-technical standpoints, mandatory collective management affects the options for exercise of copyright, not its nature or existence. Thus, it should not be considered a copyright limitation. The upshot is that mandatory collective management of exclusive rights for non-commercial online use of works (e.g. for the licences mentioned in Article 5(3) CRM Directive) could be explored as a model for ACS, subject to the rigorous requirements of this type of collective management, but not the three-step test.

Nevertheless, the contentious nature of this interpretation raises obstacles to its adoption as a policy option. Hence, from the pragmatic and legitimacy standpoints, it is advisable to inquire whether such a model would comply with the three-step test. That same test would apply to a legalisation proposal based on statutory licensing, as the same would require the adoption of a copyright limitation to the exclusive rights affected by the licence.

In addition to characterising different rights acquisition schemes, their key attributes are examined: subject matter scope, substantive rights scope, compensation type, management system, compensation target, and burden of compensation. These attributes help delimit the scope and contours of an ACS, providing a roadmap to design a legalisation scheme consistent with EU copyright law (see *infra* 6.2).

In sum, this detailed conceptual analysis provides an in depth understanding of the nature, scope and effects of an ACS, as well as the major legal and practical obstacles to its implementation. These are all essential aspects for the study of the admissibility and consistency of such systems



with EU copyright law. The analysis also confirms and adds to the findings of the study of precedents, by demonstrating that legalisation proposals are not radical departures from the status quo. Instead, they are extensions and adaptations of existing copyright regimes. Inspiration is taken predominantly from examples of collective rights management and legal licences, with the objective of enabling a model of access and remuneration in the online environment. This realisation should allow us to view the ACS taxonomy as a toolbox of interoperable models and attributes to explore the flexibility of EU copyright law in search of viable reform options.

#### **6.1.4 The Legal Space for Non-Commercial Online Use of Works in EU Copyright Law**

The following stage of the analysis is to assess *what the law is* in the *acquis* for the regulation of online use of works by individuals. This requires an explanation of how exclusive rights and limitations apply to those uses *de lege lata*, including areas of legal uncertainty. It is only with this knowledge at hand that we can assess the need and scope for legal reform through an ACS.

Individuals' online use can be classified in different categories: browsing, downloading, streaming, stream capture or ripping, uploading, hyperlinking, and digital adaptation. These activities trigger application of the harmonised exclusive rights of reproduction and communication to the public in Articles 2 and 3 InfoSoc Directive. Digital adaptations may also be subject to the right of adaptation, which although not harmonised in EU law, is a minimum right in the BC.

In the EU, territorial and substantive fragmentation of copyright makes the adjudication of online uses challenging. The challenge increases due to the CJEU's complex case law, often a boon for legal uncertainty. In general, the Court interprets exclusive rights broadly, combining technical and economic methods of interpretation to safeguard new modes of exploitation and use of works for rights holders.

The right of reproduction includes most reproductions made over digital networks, applying to browsing, downloading, (down) streaming, stream capture, certain uploads, and the making of digital adaptations. The scope of the online right of communication to the public is less stable in the CJEU's case law, mostly due to the inconsistent application of different criteria, and the fact that such scope may be influenced by the application of contractual and technical restrictions by rights holders (e.g. in the case of hyperlinking). Regardless, it is reasonable to conclude that this right applies broadly to online use of copyright works by individuals, including Internet transmission of streams, certain uploads, and most types of hyperlinking, with the only clear exception being links to "freely accessible" works.

The outcome of the analysis is that harmonised exclusive rights restrict a broad swath of online activities of end-users. The Court's fickle case law and technical definition of rights leave other types of online use in a legal grey area. This is the case for example for hyperlinking to unauthorised sources, the legal qualification of the acts of certain platforms under the right of communication to the public (e.g. The Pirate Bay), and uploading copies of works to a restricted group on a social sharing platform. This uncertainty may have a chilling effect on the online activities of providers and end-users, incentivising them to avoid activities that may turn out to be lawful.

Where an exclusive right restricts a use, a copyright limitation in the InfoSoc Directive may nevertheless permit it. The directive's limitations are mostly optional, do not apply to software and databases, can (in principle) be set aside by contract, and for the most part are superseded by

the application of TPMs. However, a teleological interpretation of limitations sees them as crucial for striking a fair balance between the interest of rights holders in exclusivity and the public interest in circulation of culture and the respect of fundamental rights.

Study of the CJEU's case law highlights the tensions inherent to this balancing exercise. On the one hand, the Court adopts a doctrine of strict interpretation of limitations, using the three-step test as a tool to narrow the scope of limitations. On the other hand, in some of its most well-crafted judgments,<sup>1963</sup> it uses the teleological method to interpret the prototypical wording of some limitations flexibly, in light of their purpose and with respect for the principle of effectiveness. Where a fundamental right provides a motivation for a limitation, the latter's scope is reinforced in the balancing of interests, to the detriment of the exclusive right.

Therefore, fundamental rights assume an *internal* function in the determination of the scope of protection. This function is in addition to their operation as external limits to copyright in situations of conflict between fundamental rights. Through this method, the CJEU mitigates the doctrine of strict interpretation in a way consistent with the InfoSoc Directive's objectives of harmonisation of limitations and fair balance. Arguably, such an approach is also coherent with the goal of achieving a high level of protection, if we take it to mean an "optimal" rather than absolute level of protection.

This approach likewise allows the contemplation of the three-step test as a tool for a flexible and functional interpretation of limitations, a perspective adopted in this study when examining the legal admissibility of a statutory licence ACS (see *infra* 6.1.5). Yet, even recognising the CJEU's emergent jurisprudence on fundamental rights-based limitations, it is undeniable that the scope of existing limitations in the *acquis* is relatively narrow. This is clear from the analysis of the limitations potentially applicable to the types of online use by individuals identified above.

The mandatory limitation for transient and temporary copies in Article 5(1) InfoSoc Directive privileges acts of browsing, but does not clearly exclude from the scope of the reproduction right copies made during (down) streaming of content. The private copying limitation in Article 5(2)(b) InfoSoc Directive could privilege acts of download, (down) streaming, stream capture, and uploading. However, after *ACI Adam*, the limitation does not cover up/downstream copies made from unauthorised sources, raising doubts as to the lawful character of many common online non-commercial reproductions made by end-users. It is likewise unclear whether upload copies made to cloud servers are within the scope of the limitation and, thus, subject to the payment of fair compensation through levies.

Due to a legislative omission in the *acquis*, digital adaptations may be subject to the right of reproduction *and* non-harmonised national rights of adaptation. Where they are covered by an exclusive right, certain adaptations may be exempted by the optional limitations for quotation, incidental inclusions and parody in Article 5(3)(d), (i) and (k) InfoSoc Directive.

The analysis shows that despite some flexibility in this respect, the legal space for unrestricted digital adaptations is limited. First, regulating digital adaptations through a national right of

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<sup>1963</sup> This dissertation is critical of the CJEU's failure to recognise a fundamental rights motivation for the private copying limitation, which may have mitigated the effect of strict interpretation of the Court's case law on Article 5(2)(b) InfoSoc Directive.

adaptation that allows breathing room for non-commercial use would require narrowing the scope of the reproduction right to literal reproductions. This is a difficult proposition in light of the current CJEU interpretation of the reproduction right. Second, the scope of the aforementioned limitations is too narrow to privilege a significant number of digital adaptations, or decisively reduce legal uncertainty in this field. This conclusion holds true even for fundamental rights-based limitations subject to broad purposive interpretation, such as quotation (after *Painer*) and parody (after *Deckmyn*).

The conclusion of the analysis is that a substantial part of individuals' online non-commercial activity is restricted by an exclusive right, or at least tainted by legal uncertainty. Looking forward, the trend is to reinforce the status quo and extend exclusivity to acts that, in the offline world, would be unencumbered by copyright. An example of this trend in the online environment is the legal status of certain types of hyperlinking by Internet users. In no small part, the current state of affairs is due to the priority afforded to contract and technological measures in the determination of the scope of protection.

The priority of "private choice" over "public choice" stems from the legal design of the InfoSoc Directive and is reinforced by some CJEU judgments. Illustrations include the interpretation of concepts like "authorised source" (in hyperlinking and private copying), or whether the content is "freely accessible" or subject to "restrictions" (in defining the "new public" criterion online). In contrast, "public choice" concerns emerge in the purposive reading of limitations and the impossibility of contractual disposition of fair compensation (provided TPMs are not applied).

This tension between public and private choice at the intersection of rights and limitations leads to a normative insight: the current legal framework, as interpreted by the CJEU, is partly inconsistent with the objectives of EU copyright law, as extrapolated from the InfoSoc Directive and the Court's interpretation.<sup>1964</sup> As it applies to non-commercial online use of works by individuals, the *acquis* arguably does not ensure adequate compensation, promote the circulation of culture online, enhance legal certainty, strike a fair balance between the rights and interests of authors and the rights of users, or secure a coherent application of limitations that contributes to their harmonisation. Furthermore, a regime that focuses on strict enforcement online poses barriers to technological development in the information society.

The main objective that might be served by the current system is to secure a "high level of protection for copyright holders". Still, as noted, this phrase should not be interpreted as a synonym for absolute protection, as that may be detrimental to rights holders. Instead, it should refer to an adequate or optimal level of protection, to be assessed in relation to the ability to generate an appropriate reward for rights holders, as well as its coherent application with the remaining objectives of copyright and the public interest.

If the current regulation of non-commercial online use by individuals is inconsistent with the *acquis*, reform through ACS should strive for a better alignment of the legal rules with those objectives. As noted in the development of different ACS proposals (see 6.1.3), the main obstacles to the wholesale legalisation of the mass online use of works relate to the territorial and substantive fragmentation of copyright, and to difficulties in ensuring the participation of rights

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<sup>1964</sup> On the objectives of EU copyright law, see *supra* 1.3, 4.4.1.3, and 5.5.3.

holders in voluntary models of collective rights management, especially in sectors (like the audio-visual) where that practice is uncommon. Furthermore, the analysis of the current legal framework, summarised in this section, highlights the significant uncertainty shrouding the legal status of the online use of works by individuals.

To overcome these obstacles, a future ACS must rely on a legalisation model that ensures aggregation of rights across the EU territory and legal certainty for the types of online use covered. *De lege ferenda*, the best legal solution to achieve these aims is a limitation-based statutory licence applying to non-commercial online acts of reproduction and communication to the public by individuals. The admissibility of such a licence rests on its ability to comply with the three-step test. *A maiore ad minus*, if a statutory licence of this type meets the conditions of the test, so should a legalisation model based on mandatory collective management, as it would arguably impose a lower level of restriction on the affected exclusive rights.

### **6.1.5 The Admissibility of a Limitation-based Statutory Licence for Non-Commercial Online Use Under the Three-step Test and its Consistency with the Objectives of EU Copyright Law**

An ACS based on a compensated limitation and statutory licensing provides the best option for wholesale legalisation of non-commercial online use of works. The admissibility of such a model in EU copyright law depends on it passing the three-step test, viewed as a normative tool to strike a fair balance of interests in copyright.

This dissertation develops a framework to interpret the test in light of international law, namely Article 10 WCT and its Agreed Statement, as required by the InfoSoc Directive. After exploring this framework and the spectrum of possible interpretations of the test, it concludes that a flexible interpretation is more in line with the objectives of copyright law, as it enables the consideration of the public interest in the context of a fair balancing exercise. This flexible reading anchors the subsequent overall assessment of a limitation-based ACS in the system of the test and each of its steps or conditions.

The first step (“certain special cases”) requires that an ACS has a sound policy justification, and its scope is both reasonably foreseeable and not overly broad. An ACS is motivated on economic grounds—market failure of exclusivity and enforcement regarding large-scale online use of works by individuals—and by non-economic factors, including the promotion of creativity, circulation of culture, and the protection of fundamental rights and freedoms of end-users (freedom of expression and information, privacy, personal data) and intermediaries (freedom to conduct a business).

From the quantitative perspective, the scope of the ACS is restricted to natural persons and non-commercial online acts of reproduction and communication to the public that are not already exempted by existing limitations to those rights. In relation to the subject matter covered by the licence, it is argued that it should at least exclude software, *sui generis* databases, and videogames. These exclusions would mirror or go beyond some existing limitations in the InfoSoc Directive, such as private copying. Nevertheless, it is open for debate whether the licence ought to exclude additional subject matter to meet the quantitative first condition of the test. A definitive answer to this question would likely require empirical research into the effects of the licence on the normal exploitation of the categories of works affected, which analysis should occur in the second step.

The second step of the test (“no conflict with the normal exploitation of works”) is the main obstacle to a limitation-based ACS. The study finds that the traditional strict interpretation of this step probably prevents the adoption of a legalisation scheme. However, such an interpretation is arguably inconsistent with the objectives of international and EU copyright law, as it removes from the balancing exercise consideration of the public interest and other normative concerns, as well as the remunerative potential of a limitation. This realisation favours a flexible reading of the second step.

Hence, an ACS conflicts with the normal exploitation if it denies creators and exploiters major and foreseeable sources of rights revenue under normal commercial circumstances. In this context, such sources comprise the online commercial channels for exploitation of the exclusive rights affected by the limitation.

On the one hand, a statutory licence ACS is aimed at non-commercial online use of works by individuals. In relation to this type of use, copyright is often not exercised or monetised by rights holders. Moreover, in many circumstances, the use in question only causes minimal harm. The new limitation and accompanying statutory licence will therefore allow the monetisation of this type of use, in what could be qualified *de lege ferenda* as a normal form of exploitation.

Still, a statutory licence ACS with the proposed scope may *indirectly* affect authorised downloading and streaming platforms, for which there is a licensing market. The scale of such negative effects is unknown and is therefore only subject to speculation. The best available proxy to make that calculation comes from empirical research on the effect of unauthorised file sharing. Based on existing research, this study conjectures (but cannot state with certainty) that a properly delimited statutory licence can co-exist with authorised commercial offerings. (On this empirical question, further research is necessary, including experiments.)

For this finding to hold, however, the statutory licence should ensure that exclusive rights are enforceable against unauthorised for-profit websites capable of having a significant negative effect on the normal exploitation of copyright online, e.g. through existing authorised commercial channels. Different legal approaches in the design of the limitation or interpretation of exclusive rights may assist in achieving this objective. One is to clearly define what constitutes a permitted non-commercial use by individuals in the ACS, excluding from that scope (and the benefit of the limitation) online exchanges by unauthorised platform operators for financial consideration. Another option, which more clearly addresses the definition of the exclusive right rather than the limitation, is to include within the scope of the right of communication to the public acts of linking to unauthorised sources and/or the activities of platform operators. The combination of an ACS-limitation with this interpretation of the exclusive right would in effect exclude such unauthorised platforms from the benefit of the licence. This last option, it is noted, may materialise (at least partly) as a result of the CJEU’s interpretation of the right of communication to the public in pending cases on hyperlinking.<sup>1965</sup> These options could be supplemented by self-regulation, endorsed at EU level, aimed at targeting unauthorised for-profit platforms, but not end-users.

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<sup>1965</sup> The pending cases at the time of writing are: CJEU, Reference for Preliminary Ruling, Case C-160/15, *GS Media*; CJEU, Reference for Preliminary Ruling, Case C-527/15, *Filmspeler*; CJEU, Reference for Preliminary Ruling, Case C-610/15, *Stichting Brein v Ziggo*.

Assuming it is possible to delimit the scope of the ACS along these contours, the system will legalise online use by end-users, eliminating primary liability for their actions, and a limited set of online intermediaries, who should no longer be subject to intermediary liability. Among the intermediaries indirectly benefiting from this legalisation effect will be those providers that enable or facilitate permitted acts by individuals under the licence, but whose activities do not qualify as reproduction or communication to the public of works. The ACS should also not affect the current regime of safe-harbours of the E-Commerce Directive, meaning that the activities of “neutral” intermediaries that qualify for those exemptions of liability will not be infringing. Outside the limited scope of those safe-harbours, the legal status of the activities of intermediaries will be assessed on the above terms. As a rule, the delimited scope of the statutory licence will mean that unauthorised online platforms providing access to works on a for-profit basis will not benefit from the legalisation scheme.

As noted before, even on a flexible interpretation of the second step, only by delimiting the scope of the statutory licence in this manner is it possible to argue that it does not conflict with the normal exploitation of works. However, it is legitimate to ask, *de lege ferenda*, whether this limited legalisation effect on online intermediaries is the most satisfactory from a normative perspective.

The third step (“unreasonable prejudice to legitimate interests”) warrants a balancing exercise pursuant to the principle of proportionality. This exercise takes into account the reasonableness of the prejudice imposed by the limitation, together with a consideration of the legitimate interests of rights holders (i.e. the creators and exploiters of exclusive rights identified in the InfoSoc Directive) and the collective and individual manifestations of the public interest. The legitimate interests of rights holders include the concurrent and opposing interests of creators and exploiters; a major tension between creators and exploiters relates to the focus of the former on fair remuneration and the preference of the latter for assignable exclusive rights and stricter enforcement. On the other side of the spectrum, the public interest should include the legitimate interests of users and intermediaries in the protection of their fundamental rights and freedoms, as well as in the promotion of creativity and circulation of works.

A limitation leads to unreasonable prejudice if it causes harm to rights holders in a way that is disproportionate to the benefits it brings to the public interest. The main prejudice caused by an ACS for rights holders relates to the aforementioned indirect effects on the commercialisation of works through authorised online channels.

One method to reduce harm to reasonable levels is through the provision of fair compensation. Existing research suggests that a statutory licence ACS is able to generate sufficient rights revenue to operate such a reduction. In light of this research, it is suggested that fair compensation in an ACS is calculated on the basis of harm, observing the mitigating factors identified in the InfoSoc Directive, but following a method of contingent valuation. This method would maintain the required link between harm and privileged use, while approximating fair compensation to the notion of “appropriate reward” to incentivise creativity, thereby fulfilling a declared objective of EU copyright law.

Still, in light of the limitations of existing research and the volatile nature of business models in digital networks, the study stresses the need to examine the policy motivations of an ACS, extracted from the analysis of different legitimate interests of creators, exploiters, and the users.

A limitation-based statutory licence ACS coupled with an unwaivable fair compensation right would favour the interests of creators in fair remuneration for online use of their works. It would, it is true, run counter to the declared preference of some (perhaps most) exploiters for preserving assignable exclusive rights in the online environment and for stronger enforcement measures. However, the system simultaneously ensures rights holders of the affected exclusive rights a share of the fair compensation collected, which amounts to a new rights revenue stream from previously uncompensated use.

The prejudice caused by the ACS should be considered reasonable if the fair compensation provided to creators and exploiters as a whole offsets the harm caused by the limitation. Because this calculus relies to a significant extent on empirical questions for which there is no definitive answer, the fate of the limitation ought to rest on the balancing of normative considerations. In other words, the public interest should be the final arbiter of whether it is justified and proportionate to adjust the scope of protection of the exclusive rights of online reproduction and communication to the public in EU law to accommodate an ACS-limitation.

On a balance of interests, this dissertation finds that a statutory licence ACS serves the public interest better than the status quo on two important levels, which relate to goals of EU copyright law. First, it is a superior scheme to promote access and dissemination of knowledge, and therefore the circulation of culture over digital networks, as it concerns non-commercial individual online use of works. Second, for the regulation of such types of use, a properly designed statutory licence provides superior protection for the fundamental rights and freedoms of Internet users as compared to strict enforcement measures (e.g. filtering, blocking, and Internet disconnection). This is true for the right of privacy in telecommunications, the protection of personal data, and freedom of information and expression.

Analysis of the fundamental right to conduct a business is inconclusive in this respect. Some intermediaries will benefit from the ACS, as the risk of intermediary liability arising from the online activities of their users will diminish. For ISPs, however, these benefits may be offset by the requirement that they participate in the system as intermediary debtors of a broadband levy. Allowing ISPs to pass on the levy to their non-professional subscribers and to recover administrative costs imposed by the system will reduce most of the burden; this option may even be preferable to a future scenario where these intermediaries are subject to additional liability and responsibilities in the application of enforcement measures.

The net result of the balancing exercise is that it is legally admissible to adopt a limitation-based statutory licence in compliance with EU copyright law. This possibility, however, hinges on careful delimitation of the scope of the limitation and a flexible reading of the concept of “normal exploitation of works”, which turns on complex legal and empirical questions. Whereas this dissertation addresses the legal issues, resolution of the crucial empirical questions is outside its scope.

In this light, the dissertation resorts to the toolbox developed in the ACS taxonomy to explore two flexibility mechanisms that have the potential to assist in overcoming conflicts with the normal exploitation of works: embargo periods and opt-out rules. Although embedding either model in an ACS is legally feasible, it concludes that they add complexity and impose costs that are difficult to quantify. Therefore, their adoption warrants caution. Notably, it appears extremely challenging to implement either mechanism across different categories of works and content sectors. Consequently, managing such a differentiated system could translate into a

costly logistical challenge, detrimental to its consideration as a policy option. Furthermore, adoption of either mechanism would hinder the value of the system to end-users by reducing the subject matter scope of the licence, and significantly decreasing legal certainty for Internet users. The balance of arguments suggests that, absent compelling evidence to that effect, the coupling of an embargo period or opt-out rule to a statutory licence ACS would not be decisive in overcoming a conflict with the normal exploitation of works.

The analysis concludes for the tentative admissibility under EU copyright law of an ACS for mass non-commercial online use of works by individuals based on a statutory licence and compensated limitation to the exclusive rights of reproduction and communication to the public. That admissibility, however, rests on fundamental normative choices for policy makers on the regulation of non-commercial use of works. A choice for such a legalisation model is a choice for flexible over strict interpretation, for access and remuneration over exclusivity and enforcement, for public over private ordering. Furthermore, a public ordering approach requires recognition of the *internal* effect of fundamental rights in determining the scope of copyright protection. As noted before, both choices are possible and have their merits and drawbacks. Whether we favour one over the other will in essence turn on our normative view of EU copyright law and where its fair balance should be struck in the regulation of this type of use.

In that light, the remainder of the analysis assesses whether a public ordering choice for a model of access and remuneration for non-commercial online use through a statutory licence ACS is consistent with the rationale for copyright, various normative considerations, and the objectives of EU copyright law.

In the first instance, an examination is made as to whether the dominant theories of copyright in the European legal tradition—natural rights (encompassing the fairness and personality theories) and utilitarianism—can accommodate a right of access and remuneration. Manifestations of these theories, it is noted, serve both as justifications for the grant of protection and objectives of EU copyright law. Therefore, they play a role in determining the scope of protection, including in justifying restrictions on exclusivity.

From the perspective of the natural rights theory, a statutory licence ACS impacts the material interests of authors in the online exploitation of their works. Therefore, the main challenge it poses is to Locke's fairness theory. The application of the theory and its desert-for-labour argument to copyright is not undisputed. However, assuming that its application provides a sound rationale for copyright protection through a property right in creative works, the fairness theory does not mandate the absolute nature of that right. Instead, it allows restrictions thereto. For the present purposes, the most relevant restrictions result from the operation of the sufficiency proviso and, even more prominently, from the public interest. In particular, Locke's theory envisages that the transition from the state of nature to a civil and political society can be accompanied by restrictions on rights based on public interest considerations. Among the acceptable restrictions is the contraction of the prohibition element of copyright (exclusivity), provided its reward element (remuneration) is secured. In this way, the material interests of authors, central to copyright protection, are safeguarded.

The result of the analysis is that there is space in the fairness theory to accommodate an ACS for non-commercial use, subject to certain conditions. First, that it ensures remuneration for the permitted use. Second, that it is justified on the public interest, arguably beyond market failure.



For the reasons detailed above in the examination of the three-step test analysis, it is submitted that both conditions are met by statutory licence ACS.

From the viewpoint of the utilitarian theory, copyright protection is justified in the public interest, with the aim of incentivising the creation and dissemination of works. Copyright works share some of the characteristics of public goods, meaning that they are non-rivalrous and non-excludable. Consequently, they also share some of its problems, namely that third parties can freely access and use works without payment to the creator or rights holder, preventing private market actors from charging prices that allow a return on investment and ultimately endangering the provision of such goods. The exclusive right (a property rule) is viewed as an efficient solution to the problem of non-excludability, as it allows copyright owners to recover their costs of creation in a market setting, fostering the production and supply of works.

In the context of the utilitarian theory, the grant of exclusive rights is justified if the benefits it creates offset the costs it imposes. Conversely, if the costs outweigh the benefits, it is justifiable to impose restrictions on the exclusive nature of the right. For the regulation of non-commercial online use by individuals, the application of the exclusive right imposes different types of cost: chilling effects on follow-on creativity, transaction costs, and administration and enforcement costs. It is argued that these costs could justify regulating this type of use through a liability rule, such as a limitation-based statutory licence ACS. Therefore, and in theory, such a legalisation model is consistent with the utilitarian theory. Still, whether its adoption is desirable ultimately depends on empirical research on the associated costs and benefits, as compared to the current regime. In this respect, although further evidence is required, existing research cited throughout the dissertation suggests that a properly designed ACS could be welfare increasing.

After establishing that it is possible to accommodate a model of access and remuneration in the natural rights and utilitarian theories, the analysis focuses on whether such a model is coherent with the human and fundamental rights characterisation of copyright, including its property right status in certain legal instruments, such as the ECHR (Article 1 Protocol No. 1) and the Charter (Article 17). It is clear from this study that copyright protection is not absolute, and by extension neither is the exclusive dimension of the right. Rather, copyright protection has at its core dimensions of access (the availability of works and cultural participation), and remuneration (securing the material interests of authors).

It is suggested that restrictions to the scope of copyright protection are a result of its social function, which requires an adequate balance of interests in the definition of that scope. Hence, the contours of the right, including the objectives and conditions of its exercise, should consider not only the position of rights holders, but be drawn in light of the public interest.

There are different methods to incorporate the social function and public interest in the calibration of the scope of protection. From an *internal* perspective, it is possible to consider individual and collective manifestations of the public interest in the three-step test and its balancing exercise, thereby providing a justification for the introduction of a copyright limitation. (An example of this approach is found in Chapter 5 of this dissertation).

From an *external* perspective, we can envisage two different angles. From one angle, certain fundamental (or constitutional) rights provide a justification for a positive right of access and remuneration. This is the case for the universal right to culture and science in Articles 27(1) UDHR and 15(1) ICESCR. From another angle, the property right protection of copyright allows restrictions on its scope resulting from the public interest in the relevant provisions of the ECHR

and Charter, and imposes limits on protection by virtue of the application of conflicting fundamental rights and freedoms; in some cases, like in *Luksan*, those limits are admissible subject to the payment of fair compensation.

These normative considerations lead to the conclusion that it is admissible to modulate the nature and options for exercise of copyright in light of the public interest. This is evidenced throughout this dissertation in mechanisms that include voluntary and mandatory models of collective rights management, as well as statutory and compulsory licences. Translating these considerations into the regulation of mass non-commercial online use of works by individuals, there are strong normative arguments to accept the replacement of the exclusive right with a limitation-based statutory licence ACS. In addition, the analysis supports the qualification of the underlying fair compensation right as unwaivable, and denotes a preference for its mandatory imposition, together with some level of protection against disposition by contract or technological measures.

The last stage of the normative analysis explores whether and to what extent the proposed legalisation model is consistent with objectives of EU copyright law. These objectives are taken from the recitals of the copyright directives—especially the InfoSoc Directive—and the vast jurisprudence of the CJEU on copyright. The seven objectives identified are: fair balance between the rights and interests of authors and the rights of users; high level of protection for copyright holders; adequate compensation or appropriate reward; circulation of culture; resolution of legal uncertainty; technological development, including the promotion of the information society; and harmonisation of copyright law to achieve a functioning internal market.

The analysis concludes that a statutory licence ACS for non-commercial online use by individuals, subject to the delimitations arising out of the three-step test analysis, is more consistent with these objectives than the current regime. A touchstone of this analysis, derived from the previous normative considerations, is the view that a “high level of protection” does not mean an “absolute” level of protection. Rather, it means an optimal level of protection to ensure adequate compensation for copyright owners, with an emphasis on creators. Furthermore, this level of protection is not determined in a normative vacuum. It must be articulated with the remaining objectives. That is to say, the level of copyright protection—and with it the scope of the right—can and should be modulated in order to achieve the remaining objectives of the law, such as the circulation of culture, the improvement of legal certainty for users in the online environment, and the removal of obstacles to technological development in the information society.

Ultimately, where there once was a wall, this dissertation hopes to open a policy window for lawmakers in the copyright field regarding the regulation of non-commercial online use. The view from that window shows a possible alternative to a legal regime that favours private ordering, strict interpretation, exclusive rights, and technological measures. It shows a system based on public ordering, a flexible and technology neutral reading of copyright law, and an online culture of access and fair remuneration. That system, as demonstrated here, can be reconciled with the justificatory theories of copyright and the particular objectives of EU copyright law, arguably better than the current regime. As a result, it is concluded that the *acquis* can and should be reformed to include a limitation-based statutory licence ACS. The following section draws the contours of such a system, offering a blueprint for copyright reform.

## 6.2 A Blueprint for Reform: A Limitation-based Statutory Licence for Non-Commercial Online Use of Works by Individuals

Until this point, the present dissertation has developed a normative argument for reform of EU copyright law to accommodate a right of access and remuneration for non-commercial online use of works by individuals. This section concludes the analysis and provides the last piece to answer the dissertation's research questions by setting out a workable structure for such a right. In other words, this section provides a legal blueprint for a limitation-based statutory licence ACS that is consistent with a flexible view of EU copyright law. The objective is to supply policy-makers with a modest proposal to inspire legal reform. The following paragraphs set forth the scope and essential elements of that ACS.

### 6.2.1 Beneficiaries (and Intermediaries)

The ACS authorises acts by Internet users that are natural persons. Legal persons and institutions are not direct beneficiaries of the system. Nevertheless, a limited number of online intermediaries may benefit indirectly from the statutory licence, to the extent they were subject to intermediary liability for acts of their users that are now exempt from authorisation. As noted above, this legalisation effect will benefit providers that enable or facilitate permitted acts of individuals under the licence, but whose activities do not qualify as acts of reproduction or communication to the public of works. It is difficult to make an exact determination of the number and type of intermediaries exempted due to the legal uncertainty arising from CJEU case law on the right of communication to the public, and the fact that intermediary liability is not harmonised in EU law beyond the safe-harbours in the E-Commerce Directive. However, as previously argued, a properly scoped licence should exclude unauthorised online platforms that provide access to works on a for-profit basis, whose activities will continue to be infringing.

Furthermore, as with other compensated limitations in the *acquis*, pragmatic considerations should make it possible to identify an intermediary as the primary debtor of fair compensation, with a right to pass on the levy to end-users.<sup>1966</sup> For efficiency reasons, ISPs are the preferred levy targets. However, as discussed below at 6.2.6, other intermediaries may be targeted, namely online service providers that indirectly benefit from the limitation. While that is a possibility, the analysis in this dissertation and existing empirical research suggest that it is sufficient to levy solely ISPs and household connections.<sup>1967</sup> Therefore, the extension of the levy base to other goods or services should be justified by evidence, as it may needlessly interfere with the affected intermediaries' freedom to conduct a business.

### 6.2.2 Subject Matter Scope

In theory, the ACS can apply to all types of work capable of digital expression and online sharing. This is one of the advantages of the system: that it presumptively includes all works

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<sup>1966</sup> See, in the context of private copying, CJEU, *Padawan*, ¶¶46, 48; CJEU, *Reprobel*, ¶70.

<sup>1967</sup> See *supra* 5.3.3.6.3. See also Handke et al., 2015.

made available online, both domestic and foreign to an EU Member State.<sup>1968</sup> An ACS in this form would amount to a “global” as opposed to sector-specific legalisation scheme.

However, a global licence extending to all conceivable categories of work and subject matter may not be compliant with the three-step test for failing to be a certain special case.<sup>1969</sup> Thus, in line with other legalisation proposals, it is important to consider subject matter exclusions to the licence.<sup>1970</sup>

If the ACS-limitation applies to the exclusive rights regulated in the InfoSoc Directive, logic dictates the exclusion from its scope of software and databases.<sup>1971</sup> These types of work or subject matter have idiosyncratic justifications and legal regimes, set out in the “vertical” Software and Database Directives, which are difficult to articulate in a single system with other types of work. Moreover, the software and database sectors do not suffer to the same extent from the problem of mass-scale infringement, and operate according to specific logics.<sup>1972</sup>

Similar arguments apply to videogames. These complex works of authorship include and combine different types of copyright subject matter that may be individually protected (e.g. film, music, text, databases, photographs, and maps) and involve an element of human interaction “while executing the game with a computer program on specific hardware.”<sup>1973</sup> The majority of video games contain as core elements an audio-visual component and the software on which they run, there being significant controversy as to their legal qualification as multimedia works, audio-visual works, or software.<sup>1974</sup> The CJEU seems to embrace a multi-layered protection approach in *Nintendo*, when it states that videogames

constitute complex matter comprising not only a computer program but also graphic and sound elements, which, although encrypted in computer language, have a unique creative value which cannot be reduced to that encryption. In so far as the parts of a videogame, in this case, the graphic and sound elements, are part of its originality, they are protected, together with the entire work, by copyright in the context of the system established by Directive 2001/29.<sup>1975</sup>

The complex legal nature of videogames, their proximity to software, the specificities and norms of the sector, and the absence of infringement and enforcement issues that justify an ACS, all argue for their exclusion from the system.<sup>1976</sup>

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<sup>1968</sup> N.B. solutions based on collective rights management can only include foreign works if mandated by law or based on representation agreements with foreign CMOs.

<sup>1969</sup> See *supra* 5.3.1, 5.3.4, and 6.1.5.

<sup>1970</sup> See *supra* 3.4.1.

<sup>1971</sup> See *supra* 4.4.1, on the legal framework of limitations in the InfoSoc Directive.

<sup>1972</sup> See, regarding software, Kantar Media, 2015.

<sup>1973</sup> Ramos, López, Rodríguez, Meng, & Abrams, 2013, pp. 7–9. See also Grosheide, Roerdink, & Thomas, 2013.

<sup>1974</sup> Grosheide et al., 2013, pp. 9–11; Ramos et al., 2013, pp. 7, 10–11. In distinguishing videogames from audiovisual works, the element of control/interaction in the former seems to be crucial. Cf. Grosheide et al., 2013, p. 11: “So it may be said that control is the defining keyword that discerns video games from movies. Stated differently: when a film runs, it performs the same work every time, whereas when an interactive game is played it follows the instructions by its user.”

<sup>1975</sup> CJEU, *Nintendo*, ¶23.

<sup>1976</sup> See e.g.: Katzenbach, Herweg, & Roessel, 2016, finding imitation is accepted as a common practice in at least a sector of the videogame industry, despite copyright law; Ramos et al., 2013, pp. 7–11, 93–96, on the legal

It may also be sensible to exclude categories of work linked to particular purposes and sectors which are alien to the rationale of an ACS. One possibility is to exclude scientific publications which are used primarily for research purposes, rather than self-expression or personal enjoyment. Currently, online access to these works in the EU results from a combination of paid subscription and open access models, with much debate on the best model going forward. The objective of an ACS is not to solve this problem. Furthermore, the InfoSoc Directive already contains a limitation for “teaching or scientific research”, as well as “research or private study”.<sup>1977</sup>

The main policy choice on the table is whether to extend the ACS to all or most types of work covered by the InfoSoc Directive, carving out specific categories where justified, or build the system on a sectorial approach, as occurs in ECL systems.<sup>1978</sup> Sectorial approaches—like a statutory licence for online music, audio-visual works, photos or literary works—may be easier to implement and justify with recourse to empirical research. For example, a licence specifically tailored to the audio-visual sector can better take into consideration the territorial segmentation practices in that area than a “one-size-fits-all” scheme.

A sectorial or category-based approach would also have the practical advantage of building on existing infrastructures of collective rights management. For example, these infrastructures are already in place in the music and literature sectors, but are far less developed or even non-existent in other sectors. This reality should inform policy makers and may steer them towards the more pragmatic approach of considering an ACS for more traditional categories of protected works and related subject matter.<sup>1979</sup>

In addition, from the perspective of evidence-based reform, it is wise to experiment with the system in discrete fields based on research on the inadequacy of the market to fulfil user expectations. A limitation of this fashion is not foreign to EU copyright tradition, and subject matter-specific privileges can be found for example in the InfoSoc Directive.<sup>1980</sup>

The disadvantage is obvious: end-users will have only a limited licence for one type of content. The resulting system may be unattractive to users desiring access to other types of content for non-commercial purposes. For the excluded categories, the issue of large-scale unauthorised use may persist. What is more, the value of an ACS to users resides in the universal nature of the licence. It turns out that the sum of all parts (a global licence) is more valuable than each part in

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qualification of video games, concluding that the “majority of jurisdictions tend to protect these works of authorship as software”, but noting that it is a common practice in the industry to share part of the source code between different developers; and Grosheide et al., 2013, p. 13, noting that “in the EU generally and in the Netherlands particularly, proceedings about infringing intellectual property rights in video games seldom take place”. On the relatively low volume of online infringement of videogames, see, e.g., Kantar Media, 2015.

<sup>1977</sup> Art. 5(3)(a) and (n) InfoSoc Directive. Another example, less relevant for mass online use, is sheet music. Sheet music is already excluded from the scope of the reprography and private copying limitations. See CJEU, *Reprobel*, ¶¶50–56.

<sup>1978</sup> N.B. ECL is typically adopted in a sectorial logic. Cf. Colin, 2011a, p. 115.

<sup>1979</sup> See P. Bernt Hugenholtz & Quintais, 2016 (forthcoming), exemplifying with music, text, visual and video.

<sup>1980</sup> See, e.g., Art. 5(3) (c), (f), (h), and (m) InfoSoc Directive.

isolation (a sector-specific licence). For that reason, research shows that the relative revenue generated by a sectorial licence may be lower than its value *within a global licence*.<sup>1981</sup>

In the end, there is an inextricable link between the subject matter and substantive rights scope of an ACS. If it is possible to delimit the permissible non-commercial online use so as to prevent conflicts with the commercial exploitation of the same category of works, the policy benefits of an ACS point towards its extension to the same subject matter covered by the InfoSoc Directive, with additional discrete exclusions (e.g. videogames and scientific publications). On a balance of arguments, this appears to be the preferable design choice. Still, if this approach proves too challenging, policy-makers could alternatively delimit the scope of the statutory licence to the types of content for which the risk of conflict with major sources of rights revenue is minor, and for which the payment of fair compensation reduces the potential harm to tolerable levels.

Furthermore, the scope of the ACS should only include works or subject matter lawfully published or made available online. That is to say, a work is only available for non-commercial online use after rights holders authorise its first public disclosure offline or over the Internet.<sup>1982</sup> This condition does not require the lawfulness of the source of the copy of a work for its subsequent online use by individuals. As argued before when discussing private copying post-*ACI Adam* and hyperlinking post-*Svensson*, such a requirement would be impractical and detrimental to an ACS-limitation's effectiveness, rendering it devoid of meaning.<sup>1983</sup>

Instead, it makes sense to require the authorisation of rights holders for use of a commercial nature, allowing them to enforce their copyright against unauthorised for-profit websites. This set-up allows the preservation of enforcement avenues against dissemination of works through unauthorised sources that may cause economic harm to copyright owners, without subjecting end-users to liability for infringement or high transaction costs to use works online.<sup>1984</sup>

### 6.2.3 Substantive Rights Scope: Authorised Non-Commercial Online Use of Works

The limitation-based statutory licence ACS applies to non-commercial online acts of reproduction and communication to the public by individuals. For that type of use, the aforementioned exclusive rights in the InfoSoc Directive are recast as rights of fair compensation. Hence, the limitation covers the *online* rights required by end-users to engage in non-commercial exchanges of digital works over the Internet, “including other interconnected wired or wireless networks.”<sup>1985</sup>

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<sup>1981</sup> See the results reported in Vallbé et al., 2015 and the results reported in Handke et al., 2015 (Appendix 2, Table 5, “Subject matter”).

<sup>1982</sup> See ALAI, 2012, on the determination of the country of origin when a work is first publicly disclosed over the Internet.

<sup>1983</sup> See the discussion *supra* at 4.3.2.2, 4.3.2.3, 4.4.3.6, 4.4.3.8, 5.3.2.3, 5.3.4, 5.5, 6.1.4, and 5.5.3. See also the criticism in Poort & Quintais, 2013; Quintais, 2015a, 2015b.

<sup>1984</sup> With respect to the enforcement avenues available to rights holders in the context of an ACS see *supra* 5.3.2.3. See also *Opinion AG in GS Media*, ¶¶80–87, regarding enforcement measures available even where copyright protection does not extend to hyperlinking from unauthorised sources (discussed *supra* at 4.3.2.3).

<sup>1985</sup> P. Bernt Hugenholtz & Quintais, 2016 (forthcoming). The “online” portion of the definition should not be problematic as it mirrors an existing reference in the *acquis*, namely that of “online rights in musical works” in Art. 3(n) CRM Directive.

As a matter of legislative design, the application of the statutory licence ACS to at least two exclusive rights can give rise to one or more copyright limitations. For example, Article 5(2) InfoSoc Directive lists cases allowing for a limitation to the reproduction right, whereas Article 5(3) InfoSoc Directive and the Orphan Works Directive prescribe limitations to the rights of reproduction *and* communication to the public.

The scope of the limitation or limitations does not need to encompass types of use of works already covered in the directive by other limitations, discussed in Chapter 4. These include temporary and transient copying, private copying, quotation, incidental inclusion and caricature, parody and pastiche. However, the possibility of overlap with existing limitations cannot be discounted. This is not problematic *per se*, as overlap of this type already exists in the InfoSoc Directive, for example between the reprography and private copying limitations,<sup>1986</sup> and should not be detrimental to the adoption of an ACS. Rather, this possibility ought to inform the design of the system and the calculation of fair compensation (see *infra* 6.2.4).

A central characteristic of the proposed limitation is that it privileges “non-commercial” use. This dissertation argues that the term should be understood as a legal standard and an autonomous concept of EU law.<sup>1987</sup> In the context of a statutory licence ACS, the concept covers online use of works by individuals that is not in direct commercial competition with parallel use by rights holders. Using the language of the private copying limitation in art 5(2)(b) InfoSoc Directive, the use in question is “for ends that are neither directly or indirectly commercial”.

The main issue lies with drawing a precise line between *direct* and *indirect* commercial ends, acts or types of use. In the field of private copying, national legislators and courts struggle with the application of subjective and objective tests to draw this line and define the scope of the limitation.<sup>1988</sup> For an ACS, it is likewise possible to define non-commercial use with recourse to objective or subjective criteria.

A *subjective* criterion focuses on the intention of the user. It suggests knowledge as to the state of mind of the individual in relation to their online use of works. This intent-based approach is followed for example in the creative commons licences, which define non-commercial use as “not primarily intended for or directed towards commercial advantage or monetary compensation.”<sup>1989</sup>

In contrast, an *objective* criterion emphasises the commercial nature or character of the use itself (rather than the intention of the user) and attempts to identify indicators of the same. In the field of private copying, for instance, examples of this objective approach include the number of permissible copies per person or the number of persons included in the private sphere of the

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<sup>1986</sup> For an example of this overlap, see CJEU, *Reprobel*, ¶¶32–43. See also von Lewinski & Walter, 2010, pp. 1027–1028.

<sup>1987</sup> See *supra* 1.2 and 5.1.

<sup>1988</sup> See *supra* 4.4.3.2. See also Karapapa, 2012, pp. 82, 91.

<sup>1989</sup> See CREATIVE COMMONS, *NonCommercial interpretation*, [https://wiki.creativecommons.org/wiki/NonCommercial\\_interpretation](https://wiki.creativecommons.org/wiki/NonCommercial_interpretation) (Accessed 30.04.2016): “The definition is intent-based and intentionally flexible in recognition of the many possible factual situations and business models that may exist now or develop later.” See also Creative Commons, 2009, for an in depth study of the user understanding of the term “non-commercial”.

copier. Another notable use of this criterion is the concept of “commercial scale” in Article 61 TRIPS. This concept has been interpreted to mean “counterfeiting or piracy carried on at the magnitude and extent of typical or usual commercial activity with respect to a given product in a given market”.<sup>1990</sup>

Infringements on a commercial-scale are the focus of efforts by the Commission to modernise enforcement of intellectual property rights with the objective of achieving better access to digital content and a functioning Digital Single Market.<sup>1991</sup> In this respect, it is informative to remember the European Parliament’s criticism of the use of the “commercial-scale” concept in relation to criminalisation of copyright infringement by end-users in the proposed (and rejected) directive on criminal measures. Indeed, the European Parliament requested that commercial scale expressly exclude acts “carried out by private users for personal and not-for-profit purposes”.<sup>1992</sup> This exclusion introduces subjective criteria to delimit an objective concept.

If we consider the non-commercial concept to be a standard, it makes sense to accept a combination of subjective and objective factors to assess the purpose or nature of the use. The concept should focus on online activities carried out by individuals for personal enjoyment of works (not necessarily in the private sphere) and outside the market sphere. Hence, “non-commercial” should exclude online use of works for profit, within a commercial context (e.g. a business activity of an individual), or otherwise directed at commercial advantage or monetary compensation.

In principle, end-users should not derive profit or monetary consideration from the use. An illustration is “the use of the work in combination with ads, publicity actions or any other similar activity intended to generate income for the user or a third party”.<sup>1993</sup> The third parties here are digital platforms, like Google, whose main business model is online advertisement.<sup>1994</sup> As noted, this definition would prevent individual operators of P2P and other platforms that generate advertising or sponsorship or other financial consideration in connection with the exchanged works from being exempt from liability as a result of the adoption of the statutory licence.<sup>1995</sup>

However, this definition should not prevent individual Internet users from benefiting from the ACS where their use is for enjoyment of cultural works online. Hence, it must be clear that the non-commercial scope of the limitation leaves space for acts of end-users that, although not

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<sup>1990</sup> WTO, *China–Intellectual Property Rights*, ¶7.577.

<sup>1991</sup> 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. Both Communications endorse a “follow the money” approach. See also EP Resolution Implementation InfoSoc Directive 2015, p. 15.

<sup>1992</sup> Position of the European Parliament adopted at first reading on 25 April 2007 with a view to the adoption of Directive 2007/.../EC of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights (EP-PE\_TC1-COD(2005)0127), p. 7. On which, see Geiger, 2014c, pp. 118–122.

<sup>1993</sup> The example is provided by Metzger & Heinemann, 2015, p. 13, reporting on a pilot project in the Netherlands developed by the CMO Buma/Stemra, which defined “commercial” as including use made against any “financial compensation”, such as “the use of the work in combination with ads, publicity actions or any other similar activity intended to generate income for the user or a third party”.

<sup>1994</sup> Eijk et al., 2015, pp. 12–13.

<sup>1995</sup> See the discussion *supra* at 5.1 and 5.3.2.3.2, with reference to Metzger & Heinemann, 2015, p. 16. See also *supra* 6.1.5.



carried out with a profit-making intention, nonetheless bear economic significance. To define the concept otherwise—i.e. to exclude from its scope any type of use or works with economic value—would deprive the ACS-limitation of any useful scope and effect, limiting it to *de minimis* use. The example that comes to mind is that of cost savings for users that would be willing to pay for access to the work outside the ACS. The payment of fair compensation is designed to address such potential harm to rights holders (and return it to tolerable levels), provided the permitted use does not conflict with major sources of right revenues of copyright owners.

In the few instances where end-users’ online activities fall in the grey area between commercial and non-commercial use, it will be up to the courts—and ultimately to the CJEU in the interpretation of this autonomous concept—to qualify the use. Regardless, whatever indirect financial consideration end-users receive in grey-area cases, it is unlikely to cause substantial harm to rights holders, and should therefore be susceptible of compensation in the context of a statutory licence ACS.

#### 6.2.4 Fair Compensation

An ACS should provide “fair compensation” to rights holders.<sup>1996</sup> To be consistent with EU law, the limitation for non-commercial use should be aligned with this autonomous concept, as interpreted by the CJEU in a number of judgments on the private copying and reprography limitations.<sup>1997</sup>

The right to fair compensation is unwaivable, and vests solely in the authors and related rights holders that in EU law are granted the exclusive rights affected by a limitation. As a result, the grant of a right of fair compensation ensures, first, that creators receive a share of the amounts collected under the statutory licence system and, second, that they are not forced to transfer that share to exploiters (e.g. publishers).<sup>1998</sup> Therefore, as argued previously, this design contributes to the objective of adequate compensation or appropriate reward to authors, in line with the remuneration aspect of copyright and its philosophical mandate to protect the material interests of authors, which are instrumental to incentivising creation.<sup>1999</sup>

Fair compensation should reflect the harm suffered by creators and other rights holders of the affected exclusive rights.<sup>2000</sup> As suggested in Chapter 5, the potential harm caused by the introduction of an ACS-limitation should be considered in terms of the prejudice suffered by copyright owners due to their inability to exercise their copyright for the non-commercial online use of works. Because there is no market to accurately determine the price for the type of use in question, harm should be calculated on the basis of a different reference point. It could be determined, for instance, by measuring users’ willingness to pay through a method of contingent valuation.<sup>2001</sup> In addition, the calculation of fair compensation ought to account for the

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<sup>1996</sup> See *supra* 5.3.3.3, 5.5.2, 5.5.3, and 6.1.5.

<sup>1997</sup> On private copying, see *supra* 2.3 and 4.4.3. On potential solutions to structure collection and distribution of rights revenue, see *supra* 3.4.4–3.4.6.

<sup>1998</sup> CJEU, *Reprobel*, ¶¶44–49. See also European Copyright Society, 2015.

<sup>1999</sup> Cf. *supra* 5.5.

<sup>2000</sup> CJEU, *Padawan*, ¶¶40–42; CJEU, *Reprobel*, ¶¶36, 48–49.

<sup>2001</sup> See *supra* 5.3.3.3 and 6.1.5.

mitigating factors mentioned in the InfoSoc Directive. These include the *de minimis* nature of use, prior payments for the same use, and the application of TPMs.<sup>2002</sup> Each factor deserves further explanation.

First, following recital 35 InfoSoc Directive, if fair compensation reflects harm, its calculation should exclude use of works causing only minimal prejudice to rights holders. This approach is consistent with a method of contingent valuation, as it is unlikely that individuals place any value on minor online use of works.

Second, calculation of fair compensation and the respective broadband levy should take into account whether rights holders include in the licence fee or purchase price of digital content an additional amount to compensate for the types of use privileged by an ACS. If this occurs, the principle of *de minimis* harm and the fair balance aim of the InfoSoc Directive may warrant that “no specific or separate payment” is due.<sup>2003</sup>

However, there are obstacles to reduction of the levy on this account. On the one hand, after *VG Wort*, it seems that use of works allowed by a limitation is permissible regardless of authorisation by copyright owners. If the same rationale is valid for the non-commercial use permitted by an ACS, any authorisation by rights holders for that use is devoid of legal effect. Consequently, such authorisation should not influence the calculation of harm.<sup>2004</sup>

On the other hand, it is challenging for rights holders to price into their online transactions the utility to end-users of a licence for non-commercial use. Like with private copying from unauthorised sources, rights holders will struggle to indirectly appropriate that utility.<sup>2005</sup> Because the marginal costs of copying and sharing files online are constant and near zero, and the size of the user group is not fixed, rights holders are not able to price discriminate to an extent that makes indirect appropriability feasible.<sup>2006</sup> Hence, reducing the levy on this account may be unjustified.

In addition, calculation of the broadband levy should avoid overlap between the ACS-limitation and other compensated limitations, namely private copying. Users should not pay two levies for the same use. If private copying does not apply to copies from unauthorised sources, as is the case after *ACI Adam*, the ACS could focus on compensating the harm caused by that use in relation to the right of reproduction. In practice, one method to achieve a harmonious system is to select distinct levy targets for each limitation. Thus, the levy in the statutory licence ACS should target household Internet subscriptions but not goods or services covered by the private copying levy.<sup>2007</sup>

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<sup>2002</sup> See *supra* 4.4.1.1, 4.4.3.3–4.4.3.5. Cf. CJEU, *VG Wort*, ¶¶73, 77; CJEU, *Reprobel*, ¶¶37–38 (mentioning recital 32 of the directive).

<sup>2003</sup> Recital 35 InfoSoc Directive. See also Quintais, 2015a.

<sup>2004</sup> See *supra* 4.4.3.3 and 4.4.3.4.

<sup>2005</sup> Indirect appropriability refers to the “economic mechanism according to which, under certain conditions, the demand for originals will reflect the value that consumers place both on originals and subsequent copies they make.” See Poort & Quintais, 2013, p. 216; Quintais, 2015b, pp. 85–86, on indirect appropriability and private copying.

<sup>2006</sup> Quintais, 2015b, pp. 85–86.

<sup>2007</sup> Bernault & Lebois, 2005, p. 40.

The third mitigating factor that influences the level of fair compensation is the degree of use of TPMs. In the current regime, fair compensation remains applicable irrespective of the availability or application of technological measures.<sup>2008</sup> However, Member States may decide that application of these measures affects the calculation and amount of fair compensation.<sup>2009</sup> Largely, this calibration will depend on how policy-makers choose to regulate the interface between TPMs and the ACS, namely whether and to what extent users have a right to exercise the statutory limitation.

If the level of TPM adoption is high and the means to exercise the limitation ineffective, the scope of the privilege will be constrained. In this scenario, the harm to rights holders is lower, and so should be the amount of fair compensation. In theory, compensation could even be eliminated if TPMs reduce that harm to *de minimis* levels, although that scenario seems unrealistic in light of the relatively low level of adoption of these measures and their reduced effectiveness in preventing many types of unauthorised online use by individuals. If the adoption of TPMs is low and users are able to enjoy the statutory limitation effectively, the level of fair compensation should not be reduced significantly. These considerations suggest that it is possible to adopt an ACS without interfering with the legal protection of TPMs in the current legal framework. This, despite the strong normative arguments in favour of affording individual users some level of protection against technological measures regarding the permitted use in an ACS.<sup>2010</sup>

To conclude, a right of fair compensation modelled along the lines described above ought to provide sufficient recompense to rights holders for the harm suffered by the adoption of an ACS, in line with CJEU interpretation of the concept of fair compensation, and the objectives of EU law.<sup>2011</sup>

### 6.2.5 Agreed Contractual Terms

The general scheme of the InfoSoc Directive opens the door to contractual disposition of limitations. As noted, there are various cases where a prohibition on contractual disposition is justified, spanning from the definition of limitations as imperative in national law, to instances of consumer law protection, or to cases where a limitation is subject to fair compensation (defined as unwaivable by the CJEU). In addition, the Software and Database Directives expressly prohibit contractual disposition of limitations.<sup>2012</sup>

After *VG Wort*, there is increased support for the view that limitations take precedence over freedom of contract in relation to the privileged use, at least with respect to the reproduction right. Accordingly, an authorisation for acts covered by a limitation is not valid and does not

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<sup>2008</sup> See *supra* 4.4.1.2 and 4.4.3.5.

<sup>2009</sup> *Opinion AG in Copydan*, ¶¶69–80; CJEU, *Copydan*, ¶¶68–73. See also CJEU, *VG Wort*, ¶¶52–57; CJEU, *ACI Adam*, ¶¶43–44.

<sup>2010</sup> See *supra* 5.5.2 and 6.1.5.

<sup>2011</sup> See, e.g., CJEU, *Padawan*, ¶¶40–42; CJEU, *Reprobel*, ¶36. On adequate compensation as an objective of EU law, see *supra* 5.5.3.

<sup>2012</sup> See *supra* 4.4.1, 4.4.3.4, 4.5, 6.1.4, and 5.5.2.

affect the right to fair compensation.<sup>2013</sup> However, where TPMs are applied, Article 6(4)(4) InfoSoc Directive excludes priority for limitations regarding works or other subject matter made available to the public on agreed contractual terms.

*De lege ferenda*, two options are available for an ACS to address this issue in EU copyright law. The first option is to favour private ordering and allow contractual disposition of the ACS-limitation, letting the market influence the scope of the limitation. If this option is followed, the priority of contract over the limitation would have to be taken into account in the calculation of fair compensation, as an additional factor susceptible of mitigating the harm caused to rights holders. The second option is to follow a “public policy” approach and prohibit contractual disposition of the limitation.<sup>2014</sup> This can be done in different ways. One method is to distinguish between individual contracts, allowing contractual waiver of a limitation in the exercise of private autonomy, but prohibiting such waiver in standard terms and conditions. Another method is to distinguish the purpose of limitations and prohibit waivers on agreed contractual terms for limitations motivated strongly by the public interest.<sup>2015</sup>

Several arguments support the adoption of a public policy approach through either of the suggested methods in the context of a statutory licence ACS. First, the strong public interest foundation of the ACS-limitation, namely the respect for users’ fundamental rights, and the promotion of creativity and dissemination of works.<sup>2016</sup> Second, the application of the principle of effectiveness to the limitation, which would be hindered if contracts were allowed priority over limitations.<sup>2017</sup> Third, the consideration that this legalisation proposal privileges non-commercial use by individual users, who as a rule require protection from a structural disadvantage in contractual negotiations.<sup>2018</sup>

To preserve a measure of differentiation, the system could allow contractual terms to prevail in individually negotiated agreements. However, outside those cases, the ACS-limitation should have absolute protection against contractual stipulations.

## 6.2.6 Basic Operation

Finally, it is possible to identify some high level features of the basic operation of a statutory licence ACS. Figure 8 provides a simplified representation of these features and a window into how the system could operate at EU and national level.

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<sup>2013</sup> Dreier, 2015, pp. 5–6, referring to *VG Wort* and the following national cases: BGH, 06.12.2007, I ZR 94/05 (“Drucker und Plotter”), and BGH, 21.07.2011, I ZR 28/11 (“Drucker und Plotter II”).

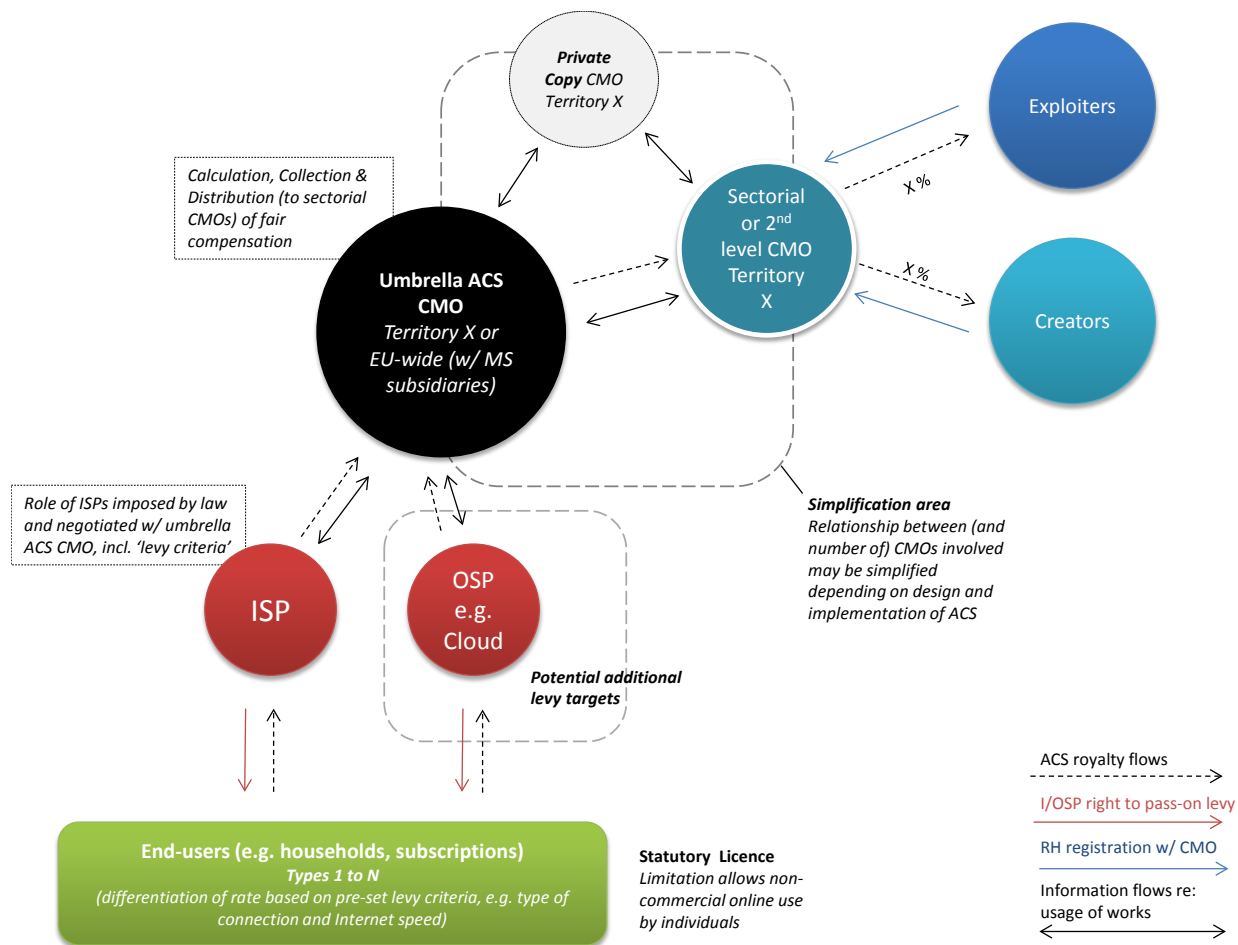
<sup>2014</sup> Dreier, 2015, p. 6.

<sup>2015</sup> Dreier, 2015, p. 6. See also Lucie Guibault, 2002, pp. 302–304.

<sup>2016</sup> See *supra* 5.3.3.5, 5.3.3.6, and 6.1.5.

<sup>2017</sup> In this respect, see EP Resolution Implementation InfoSoc Directive 2015, ¶¶61–62, stressing that effective exercise of limitations “should not be waived by contract or contractual terms” and calling on “distributors to publish all available information concerning the technological measures necessary to ensure interoperability of their content”.

<sup>2018</sup> Dreier, 2015, pp. 6–7.



**Figure 8. Simplified Design for Alternative Compensation System**

First, as regards the determination of the total amount of fair compensation generated by the ACS, the calculation should follow the method outlined above in 6.2.4. The European tradition on collective rights management and statutory licensing highlights different possibilities for how to implement such a method. These include setting the applicable rates by law or regulation, with the intervention of a government agency and/or stakeholder negotiations, subject to judicial or administrative review. It is also possible to allocate this task to an independent authority or an arbitration board. The process should include stakeholder participation, involving rights holders (and their CMOs), intermediary debtors, and representatives of end-users subject to the levy.<sup>2019</sup>

As shown in Figure 8, CMOs play a central role in this system. This makes sense due to the long-standing and well-developed infrastructure of collective rights management in the EU.<sup>2020</sup> In an ACS, CMOs are involved not only in the process of determination of fair compensation, but also in different facets of management of the system, namely the collection and distribution

<sup>2019</sup> See *supra* 3.4.4, on possible variations of an ACS management system.

<sup>2020</sup> See *supra* 3.4.3–3.4.6, on potential solutions to structure collection and distribution of rights revenue.

of rights revenue. All aspects related to the functioning of CMOs in the system are regulated in the CRM Directive.<sup>2021</sup>

The statutory licence ACS will be tied to mandatory collective management of the fair compensation right. In this system, CMOs “play a role in centralizing and monitoring information as well as in granting fair and efficient distribution (not neglecting the defence of creators’ interests against the copyright-based industries)”.<sup>2022</sup> Subject to the rules of the CRM Directive, cross-border articulation of CMOs could rely on a network of representation agreements of national members to manage and enforce the fair compensation right. It is also conceivable that an EU-wide umbrella CMO centralises certain aspects of the system, including data processing, information on uses, and distribution of rights revenue, to the benefit of second-level national CMOs (or subsidiaries) and other stakeholders (see Figure 8).<sup>2023</sup>

A crucial aspect that will affect the management of the system and the number of CMOs involved is the scope of the limitation. Thus, it is necessary to decide whether the ACS is embodied in one limitation covering two exclusive rights (reproduction and communication to the public), or two limitations, each covering one exclusive right. The most efficient design seems the “one limitation” option.

The system must also address issues of overlap between limitations, namely whether it will incorporate existing compensated limitations, most prominently private copying. In this respect, there are strong legal arguments against the merger of limitations, beyond the political challenges inherent to such legislative engineering. They include the difference in substantive rights covered (as private copying only applies to the reproduction right), the distinction between types of use covered regarding acts of reproduction (e.g. copies from unauthorised sources in the case of ACS), and the different levy targets. This does not prevent, from an operational standpoint, the same CMOs that manage the private copying system extending their mandate to manage the ACS, leveraging their expertise and infrastructure to reduce complexity. (See Figure 8 and the reference to a “simplification area”).

Collection of the rights revenue should be carried out by the competent national CMO directly from the intermediary debtor. As regards distribution of fair compensation, the beneficiaries of the compensation are the rights holders of the exclusive rights of reproduction and communication to the public identified in the *acquis*. Furthermore, because the right of fair compensation is unwaivable and non-transferable, creators are entitled to a fair share of the

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<sup>2021</sup> On which, see *supra* 3.3.1–3.3.2.

<sup>2022</sup> R. Hilty & Nérison, 2013, p. 13, discussing the prospective role of CMOs in the digital environment. The authors suggest CMOs “could develop tools to enhance non-commercial uses of protected works thanks to micropayments and blanket licences”, thus enabling “compensation of creative people” and allowing “end-users sufficient access to copyrighted works”. In this respect, they add, “[e]xtending cases in which copyrights were to be statutorily collectively managed would help”.

<sup>2023</sup> See SWD CRM Directive 2012, pp. 46-47, discussing and rejecting the option of a centralised portal for the EU-wide collective administration of online music *on a voluntary basis*. It does not seem that the centralised portal option in the context of an ACS-limitation would give rise to the same competition issues that lead to its rejection by the Commission as a model for multi-territorial licensing of musical works.

distributable rights revenue, with the remaining amount going to exploiters, as shown in Figure 8.<sup>2024</sup>

The specific distribution key for these amounts is determined by law or stakeholder negotiation, as already occurs with existing compensated limitations in the *acquis*. If an objective of EU law is to provide adequate compensation to incentivise creation and safeguard the “independence and dignity of artistic creators and performers” (recital 11 InfoSoc Directive), it is submitted that creators should be apportioned at least half of the rights revenue collected.

The subsequent distribution of revenue among individual rights holders within a category should be dealt with by the second-level CMOs representing each category, following the general rules of the CRM Directive.<sup>2025</sup> This dissertation suggests using contingent valuation methods to ascribe a value to the prejudice suffered by rights holders and, to approximate the notion of harm, using techniques such as the measurement of use through electronic rights management information, sampling, and strictly anonymous monitoring with the assistance of ISPs. The combination of these methods should allow a fair distribution of revenue to rights holders.<sup>2026</sup>

For practical reasons, the preferred compensation target or payment mechanism is a surcharge on the Internet subscription of individual households. The burden of compensation lies primarily with the intermediary debtors, i.e. the ISPs, and ultimately with the end-users benefiting from the limitation. To make this system effective, ISPs are allowed to pass on the levy to end-users in the price of their household (but not professional) subscriptions. As a matter of transparency, this surcharge should be visible to end-users. This set-up is similar to that of private copying systems, and should therefore be familiar to stakeholders.<sup>2027</sup>

As discussed above in 6.2.1, it is possible to extend the pool of levy targets to include online service providers. (For the sake of argument, this possibility is reflected in Figure 8 with a reference to “OSP”.) However, this possibility does not currently seem justified on existing empirical research and, as such, is not recommended. A similar argument can be made in relation to targeting mobile Internet connections, a possibility envisaged by some legalisation proposals, but one which does not seem empirically justified at this time.<sup>2028</sup>

Not all end-users engage in file sharing or consume digital culture online to the same extent. For example, a recent study in the Netherlands shows that 49% of Dutch consumers, including those without Internet access, do not access digital channels to consume music, audio-visual content or books.<sup>2029</sup> Therefore, in a logic similar to the payment of utilities (e.g. gas, electricity and water), it is sensible for the system to differentiate between users and targeted households, while retaining the link between harm and end-user.

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<sup>2024</sup> See *supra* 6.2.4.

<sup>2025</sup> On which, see *supra* 3.3.1 and 3.4.4 (making reference to this topic as part of an ACS attribute).

<sup>2026</sup> See *supra* 5.3.2.3.3 and 5.3.3.3, on the use of contingent valuation to determine the total amount of fair compensation.

<sup>2027</sup> As with certain debtors of the private copying levy, ISPs may choose to compete on price by absorbing the broadband levy. See Roßnagel et al., 2009, p. 22.

<sup>2028</sup> For legalisation proposals mentioning this possibility, see *supra* 3.4.5.

<sup>2029</sup> Vallbé et al., 2015, attributing this result to holdout groups, characterised by older less educated people that predominantly use TV and radio (“non-consumers”), and older educated people who prefer books (“bookworms”). The non-consumers amount to ca. 29%, whereas “bookworms” amount to 20%.

If we use the cited study as an indicator, a statutory licence ACS in the Netherlands could include exemptions or reductions to the broadband levy for categories of households. Candidates would be households whose residents are above a certain age or below a pre-defined income level; it is also rational to reduce the levy for slower types of Internet connection (see Figure 8 and the box referring to “End-users”). Once the system matures, it will be advisable to contemplate further variations, linked to the number of residents per household, and the possibility of users choosing between fixed or metered surcharges (dependent on Internet speed and usage).<sup>2030</sup> This differentiation allows for a more equitable system that better reflects the concepts of fair compensation and harm, whilst leveraging consumers’ willingness to participate in and pay for an ACS.<sup>2031</sup>

### 6.2.7 Scaling Down Reform: Adaptability of the Proposal to Collective Licensing

What is normatively desirable and what is imminently doable are not always the same thing. While the present dissertation shows that copyright reform through a right of access and remuneration for non-commercial online use of works is consistent with EU law, this by no means guarantees its adoption in the short or even medium term.

In a political climate where limitations for worthy purposes such as freedom of panorama or text-and-data mining for research are controversial, the proposal for a limitation-based statutory licence ACS will surely meet with fierce opposition.<sup>2032</sup> Therefore, and following the dissertation’s pragmatic approach advocated in Chapter 1,<sup>2033</sup> this section briefly outlines how the reform blueprint set out above can be scaled down to a more feasible legal solution. In this way, some of the core aspects of an ACS can be actualised in the shorter term.

One approach to scale down reform is to narrow the scope of the statutory licence ACS with regard to subject matter. Section 6.2.2. addresses this possibility, as well as its potential advantages and drawbacks.

Another option is to forego the application of a statutory licence and adapt the ACS blueprint to a model of pure collective rights management. Chapter 3 discusses the basic features of voluntary, extended and mandatory collective management, as well as some of their potential drawbacks, including issues of substantive and territorial fragmentation, and participation.<sup>2034</sup> Whatever the model adopted, CMOs could frame the substantive rights scope of the licence in Article 5(3) CRM Directive, according to which “[r]ightholders shall have the right to grant licences for non-commercial uses of any rights, categories of rights or types of works and other subject-matter that they may choose.”

Voluntary and extended collective licences require that rights holders entrust CMOs with their exclusive online rights of reproduction and communication to the public for the non-commercial

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<sup>2030</sup> This general approach is foreseen by multiple ACS proposals. See *supra* 3.4.4. See, e.g., Colin, 2011a, p. 99.

<sup>2031</sup> Vallbé et al., 2015. See also Handke et al., 2015, regarding recorded music.

<sup>2032</sup> See JULIA REDA, *EU copyright evaluation report – full current text*, <https://juliareda.eu/copyright-evaluation-report/full/> (accessed 30.04.2016), on the drafting history of the recent EP Resolution Implementation InfoSoc Directive 2015.

<sup>2033</sup> See *supra* 1.3.

<sup>2034</sup> These issues are also addressed in the other chapters and inform this study’s preference for a statutory licensing model. See *supra* 4.5, 5.1, 5.5, 6.1.4, and 6.1.5.



online use of works. Assuming for the sake of argument that mandatory collective management only affects the exercise of copyright,<sup>2035</sup> this model would require a legal mandate for CMOs to manage exclusive rights for non-commercial online use. In either scenario, the substantive rights scope of a “collective management ACS” could be identical to that suggested above, as could many of the features of the reform blueprint.

One important difference would of course be the nature of the remuneration, as a collective licence for exclusive rights cannot rely solely on a concept of fair compensation, designed in EU law for limitations. Instead, such a licence would more clearly follow the concept of “appropriate remuneration” in Article 16(3) CRM Directive, pursuant to which tariffs for exclusive or remuneration rights must be

reasonable in relation to, inter alia, the economic value of the use of the rights in trade, taking into account the nature and scope of the use of the work and other subject-matter, as well as in relation to the economic value of the service provided by the collective management organisation.

However, due to the non-commercial nature of the licensed use and the difficulty in defining its economic value in trade, this concept of “appropriate remuneration” offers little guidance beyond a criterion of reasonableness. Thus, it seems that the approach outlined above in 6.2.4 for a right of fair compensation does not contravene the spirit of the law, especially because a contingent valuation method offers a proxy for the market value of the licensed use.

An obvious distinction between the models of collective management mentioned is the level of legislative change to the *acquis* required by each of them. Mandatory collective management, for example, would probably necessitate an intervention at the level of secondary EU law, similar to the special regime for cable retransmission in Articles 9–12 SatCab Directive.<sup>2036</sup>

It is not clear that the same is true for ECL or voluntary collective management. First, because Article 5(3) CRM Directive provides a legal basis for a voluntary licence. Second, because the CRM Directive significantly harmonises the functioning of CMOs in the EU, containing most of the rules needed to establish a voluntary ACS through a network of representation agreements.<sup>2037</sup> Still, at least regarding a legalisation scheme based on ECL, there are good arguments for adopting in the *acquis* a basic framework for the grant of non-commercial licences for the online rights of reproduction and communication to the public. Such a framework could include, for example, a country of origin rule to enable cross-border effect for the national licences, clarify the operation of an opt-out mechanism, and set out other key aspects of the system.<sup>2038</sup>

However, if the necessary rules are already in place in EU law, a more politically feasible short-term solution is to promote a voluntary EU-wide system through a “soft law” instrument that

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<sup>2035</sup> This issue is debated *supra* at 3.3.4 and 4.5. See also *supra* 6.1.3–6.1.5.

<sup>2036</sup> On which, see *supra* 2.4.4 and 3.3.4.1.

<sup>2037</sup> This view is not consensual. Some authors believe the adoption of an ECL at EU level would require commensurate legislative recognition. See the discussion *supra* at 3.3.3.2, where one of the objections levied against legalisation schemes based on ECL is precisely that they would require legal changes to the *acquis*.

<sup>2038</sup> See *supra* 3.3.3.2..

nudges CMOs to grant such non-commercial licences. The obvious candidate in this respect is a recommendation by the Commission under Article 288 TFEU.

Recommendations are non-binding legislative instruments directed primarily at Member States, and possibly also at other economic operators (e.g. CMOs).<sup>2039</sup> In the area of copyright, the Commission has issued recommendations in, for example, the fields of online music, digitisation and digital preservation, as well as access to and preservation of scientific information.<sup>2040</sup>

For the present purposes, it is suggested that a recommendation incorporates and develops the key elements of the ACS blueprint above, and elucidates its articulation with the rules of the InfoSoc and CRM Directives. To increase its effectiveness, the recommendation could be addressed not only at the Member States but also at “all economic operators which are involved in the management of copyright and related rights” in the EU.<sup>2041</sup> This would clarify the application of the instrument to CMOs and “independent management entities” (Article 3(b) CRM Directive), reinforcing its persuasive character despite the lack of binding force.

In relation to the content of the recommendation, this instrument should:

- Recommend a subject matter and substantive rights scope for the licence in line with the proposal above in 6.2.2–6.2.3;
- Provide interpretative guidelines on the concept of “non-commercial uses” in Article 5(3) CRM Directive, in line with the CJEU definition of the autonomous concept, and the principles outlined above at 6.2.3. In particular, said definition should exclude from the scope of the concept any use by unauthorised platforms that derive financial consideration from the online exchange of works;<sup>2042</sup>
- Endorse a methodological approach for the calculation of “appropriate remuneration” that uses the combination of techniques identified in 6.2.4, especially contingent valuation and anonymous measurement of uses;
- Clarify the articulation of the ACS with the private copying limitation and the concept of fair compensation (on which see *supra* 6.2.4 and 6.2.6);
- Provide guidance on the basic operation of the system as regards collection and distribution of amounts, including reserving a fair share of rights revenue to creators (on which see above 6.2.6);
- Support the negotiation of licences between CMOs or independent management entities, on the one hand, and ISPs and online service providers, on the other hand. These intermediaries would then extend the benefit of the licence to their subscribers (natural persons) against payment of an additional fee or bundled in the services provided (see *supra* 6.2.6).

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<sup>2039</sup> For exceptions to this non-binding nature of recommendations in the area of economic and monetary policy, see Bradley, 2014, p. 102.

<sup>2040</sup> Online Music Recommendation 2005; Recommendation on Digitisation, Online Accessibility and Digital Preservation 2006; Recommendation on Access to and Preservation of Scientific Information 2012

<sup>2041</sup> Online Music Recommendation 2005, ¶19.

<sup>2042</sup> See *supra* 5.3.2.3.2.

It is true that recommendations are not always successful, as illustrated by the much-criticised 2005 Online Music Recommendation.<sup>2043</sup> However, in light of the problem of mass unauthorised online use of works and the need to actualise Article 5(3) CRM Directive, a properly designed recommendation could provide a valuable low-cost contribution to improve the regulation of this type of copyright use in the *acquis*. Thus, failing legal reform through statutory licensing or mandatory collective management, this possibility should be explored as a softer version of a system of online access and remuneration in EU copyright law. If the mitigated version proves successful, it will increase the policy space available for a limitation-based statutory licence ACS.

### 6.3 A Way Forward

The contours of copyright protection are shaped by the public interest, and rightly so. It is in the public interest for creators to receive fair remuneration for the online use of their works, thereby rewarding and incentivising creation. It is also in the public interest for end-users to retain a personal sphere of enjoyment and expression in the online environment, for which it is essential they can interact with copyright works without restriction in a non-commercial context, with legal certainty, and without fear of liability.

The current EU copyright regime does not achieve these goals. Rather, it promotes a culture of online exclusivity at the expense of cultural access and fair remuneration. It is therefore necessary to rethink how copyright can and should apply to large-scale individual use of works over the Internet.

This dissertation advances a reform proposal that recasts copyright as a right of access and remuneration for non-commercial online use. This alternative compensation system (or ACS), if properly designed, is consistent with the normative aims of EU copyright law, and would improve the regulation of this type of online use. Where that model is judged too bold, the analysis offers alternative legal solutions to “scale down” reform, so as to increase its political feasibility.

In the end, copyright reform through a model of remunerated access is a matter of normative choice or preference. It is neither a utopian nor, depending on one’s perspective, a dystopian proposition. Rather, it is a legally viable policy option worthy of further exploration and empirical research as to the details and nuances of the system.

The main argument of this dissertation is that we can and should reform EU copyright law to foster a culture of online access that is respectful of the material interests of creators, the fundamental rights of end-users, and the general interests of society. Whether policymakers take on the mantle will depend on their vision of how the copyright law of the future should look, and to what extent it should reflect the public interest.

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<sup>2043</sup> On which, see Lucie Guibault & van Gompel, 2010, pp. 155–158.